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Criminalization and Conceptual Evolution of Sexual Violence Against Women in International Criminal Courts

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ABSTRACT

Violence against women is a widespread phenomenon with global dimensions that affects all societies. This issue violates the fundamental rights and freedoms of victims of violence. Such forms of violence can have devastating effects on the lives of victims, their families, and their communities. Sexual violence against women is more than a public health concern; it constitutes a violation of human rights and an assault on bodily integrity. All forms of such violence, regardless of the reason for their occurrence during armed conflicts, must be regarded as violations of international humanitarian law and be subject to prosecution. Prior to 1990, this issue was the subject of extensive debate. However, since 1990, as a result of increased attention to this violent phenomenon, significant developments have taken place. Despite the efforts made, the international community has never seriously confronted the issue of sexual violence in wars and conflicts, and essential steps at both regional and global levels remain necessary.

Keywords: Sexual violence; international community; international humanitarian law; women; armed conflicts

Introduction

The occurrence of war produces various effects on human societies, and one of its consequences that requires serious attention from the international community is the vulnerability of civilians, including women, whose rights are violated during these conflicts and who bear the greatest share of the resulting harm. Women and men do not undergo similar experiences or psychological trauma in the midst of armed confrontations. While men are more likely to be killed or injured during war, women are more often subjected to sexual violence, and their bodies are deliberately violated. Sexual assault constitutes the most horrific form of sexual violence inflicted upon this vulnerable group. The direct consequences of war—whether internal or international—on the security, health, welfare, comfort, sanitation, and economic life of nations are undeniable. In wars, the victorious side often perpetrates acts of sexual violence as a symbol of triumph.

The purpose of sexual violence in war is to generate hatred among civilian populations and to destroy the stability of social relations. Currently, in thirty regions of the world, internal armed conflicts continue, and their material and



moral consequences target humanity and, in particular, women (1). Considering the widespread commission of sexual violence globally—both in peacetime and wartime—and the insufficient attention paid to such crimes by domestic and international communities, it appears necessary to criminalize these acts within international instruments and decisions of international criminal courts, and to examine their elements and criminal categories with greater precision. Although this violence leaves numerous lethal and long-term impacts on the future and life progression of victims, the international community has not accorded sufficient importance to addressing this phenomenon in armed conflicts nor to supporting the victims of such conduct. The reason for the continuation of these abuses in contemporary conflicts is the tolerance shown toward their commission and toward perpetrators. Ultimately, changing circumstances led to the recognition of violence against women as a violation of human rights. Consequently, with the signing and ratification of United Nations treaties such as the Convention on the Elimination of All Forms of Discrimination Against Women, states pledged not only to protect women from violence but also to establish mechanisms for the prosecution and punishment of offenders.

In recent years, states' efforts to restrict and eradicate all forms of violent practices against women have increased. Many states have enacted specialized laws addressing violence against women and have accepted the principle that sexual violence against women constitutes a crime that the international community will no longer tolerate. At the international level as well, various legal mechanisms have been established—including declarations, resolutions, and other human-rights instruments—that aim to ensure victims' access to criminal justice systems consistent with international humanitarian law, human rights law, and criminal law (2). Efforts to prohibit different forms of sexual violence in international treaties, United Nations documents, and statements of the Secretary-General—particularly through binding international conventions that criminalize sexual violence—attest to the unified approach of states in treating the prohibition of rape as a customary rule of international law. Moreover, rape is prohibited under the domestic laws of all states. However, the adoption and amendment of laws within international instruments alone cannot end sexual violence against women in armed conflicts or prevent its continuation in future conflicts. Other measures, including cultural initiatives and awareness-raising, must complement these laws and instruments.

The development of international criminal law regarding the criminalization of sexual offenses was significantly advanced by the jurisprudence of the International Criminal Tribunal for Rwanda, which followed and expanded upon the jurisprudence of the International Criminal Tribunal for the former Yugoslavia. The Akayesu judgment, in particular, played a major role in this development. Additionally, women's awareness of legal protections has significantly contributed to the prevention of the commission and repetition of sexual violence against women.

Although the international community has adopted a set of humanitarian rules constituting the customary law of war, the implementation of these rules and the enforcement mechanisms attached to them provide the primary means of protecting victims of war—and this can only be achieved through international cooperation. Media institutions also play a critical role in institutionalizing legal norms, social rules, and behavioural standards. Therefore, in the context of reducing sexual violence, media can assume an important responsibility: educating societies on the norms accepted by the international community, encouraging states to uphold ethical standards toward civilians—particularly women—and raising awareness of the gravity of sexual violence through films, documentaries, and other media tools that can awaken the dormant conscience of humanity. Media education can also provide women with necessary techniques to confront sexual violence during conflicts and ways to escape dangerous situations.

The broad international consensus recognizing that the interests of the global community lie in the prohibition of rape reflects a fundamental moral and legal value in maintaining international order. Thus, considering this prohibition as a peremptory norm (*jus cogens*) is not an exaggeration. Despite measures undertaken at the international level to confront the commission of sexual violence as a method of warfare, such violence remains a prevalent category of international crimes in practice. A comprehensive policy by the United Nations and strong support for victims are essential to ending sexual violence.

Although the violation of civilians' rights has long constituted an international crime, the establishment of tribunals such as the International Criminal Court—formed to exercise jurisdiction based on existing international instruments—has strengthened the mechanisms for prosecuting such offenses.

The present author, through an analysis of numerous books and articles, has concluded that the international community has performed inadequately both in terms of legal mechanisms and in preventing the occurrence of sexual violence against women. It is therefore proposed that by criminalizing all forms of sexual violence and providing a comprehensive and precise definition of it, states and international institutions can move forward in providing greater protection for women and victims of such violence.

Definition of Violence (Translated with Original Citation Placement)

There is no single, uniform definition of violence, and each individual, based on cultural, social, and intellectual background, offers a different interpretation. Even in the decisions of international criminal courts—temporary or permanent—various definitions have been provided. What unifies these definitions is international law (3). Violence may be understood as the use of force or as the misuse of power (4). In the *Akayesu* judgment, violence was defined as any act of a sexual nature committed against a person under coercive circumstances. The absence of a proper definition of violence, combined with underreporting to authorities and a lack of awareness among women regarding their legal rights, aggravates the problems associated with sexual violence and its commission against women. Any form of harm inflicted on another person—whether psychological or physical—may be labeled as violence. Violence represents an extreme form of aggression.

Sexual violence is defined as attempts to obtain a sexual act or any other act directed against a person's sexuality through the use of force. The use of force, when resulting in physical injury, constitutes violence.

Before the adoption of the Additional Protocols to the 1949 Geneva Conventions, the United Nations General Assembly in 1974 adopted the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, which, despite its non-binding nature, represented a positive step in supporting and recognizing women and children as victims of inhumane conduct and in increasing attention toward vulnerable individuals during internal conflicts (5).

Although sexual violence has not been criminalized as a war crime in any international instrument other than the Rome Statute of the International Criminal Court (Article 8), references to sexual assault in the statutes of the following international tribunals have treated such acts as war crimes:

Statute of the International Criminal Court, Article 8(b)(22)

Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 2(a)

Statute of the International Criminal Tribunal for Rwanda, Article 4(e)

Statute of the Special Court for Sierra Leone, Article 3(e)

Out of the 560 articles included in these conventions, 42 provisions explicitly address women and, in particular, violence against women.

Article 4 of the Statute of the International Criminal Tribunal for Rwanda lists some of the violations of Common Article 3 and its Additional Protocols relating to sexual offenses. Paragraph (a) of the same article provides a strong legal basis for prosecuting perpetrators of sexual violence, since it criminalizes attacks on the life, health, and physical or mental integrity of persons—especially murder, torture, mutilation, or any form of physical harm.

Bringing Japanese politicians and generals to trial for war crimes was one of the primary reasons for the establishment of the Tokyo Tribunal. Their charges included crimes against peace, violations of the laws and customs of war, and crimes against humanity. The Tokyo Tribunal was the first in history to prosecute and punish perpetrators of sexual crimes against women. Article 5(3) of the Tokyo Charter includes the phrase “other inhumane acts,” under which acts of sexual violence were prosecuted, despite not being expressly mentioned in the Charter. Several military and civilian leaders were tried under this provision.

The first generation of international tribunals lacked explicit provisions on the criminalization of sexual violence and only the Tokyo Tribunal prosecuted sexual offenses for the first time.

The second generation referred only to enslavement as a crime against humanity (3).

According to the broad approach of the Rome Statute regarding sexual crimes—applicable in both wartime and peacetime—the acts listed in Articles 7 and 8 were criminalized under crimes against humanity and war crimes. International efforts over previous decades thus reached their most complete form (6).

The 2016 judgment of the International Criminal Court concerning sexual offenses and the conviction of Jean-Pierre Bemba, a militia commander in the Democratic Republic of Congo, sentenced to eighteen years’ imprisonment under the doctrine of “command responsibility,” stands as the Court’s first conviction in the field of sexual crimes.

In the Thomas Lubanga case, which included charges of sexual offenses against female child soldiers, the Prosecutor announced that he could not proceed with prosecution on these charges at that time because witnesses were unwilling to testify to the sexual crimes committed by Lubanga.

All these international instruments suffer from the limitation that they fail to address the specific characteristics of women that can be violated, instead focusing only on crimes more likely to be committed against women than men. This is a fundamental defect (3).

Forms of Sexual Violence

a) Sexual Slavery

The 1926 Slavery Convention and subparagraph (c) of paragraph 2 of Article 7 of the Statute of the International Criminal Court define slavery as the exercise of any or all of the powers attaching to the right of ownership over a person, as well as the exercise of power in the course of the trade in persons, particularly women and children, and recognize it as an independent crime and a crime against humanity. Today, new forms of sexual slavery exist (7).

b) Forced Prostitution

In Articles 7 and 8 of the Rome Statute of the International Criminal Court, this act is classified both as a crime against humanity and as a war crime.

Forced prostitution has considerable conceptual and factual overlap with sexual slavery, as it covers situations in which one person coerces another into sexual acts and exercises control over them. Some scholars have sought a substitute term for “forced prostitution,” arguing that the word “prostitution” implicitly suggests the victim’s consent and gives the impression that the victim agrees to the sexual acts committed against them (3).

c) Forced Pregnancy

(1) Forced pregnancy is primarily used as a method of ethnic and racial cleansing (2). This crime is mentioned in only one international instrument—namely, the Statute of the International Criminal Court—as both a crime against humanity and a war crime. Article 7 of the Rome Statute provides that the “unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law” constitutes forced pregnancy. This definition alleviated the concerns of states that feared abortion policies might be characterized as forced pregnancy, because it does not restrict states’ competence to regulate birth control and abortion (3).

d) Forced Marriage

(1) The forced handing over of women and girls to become the “wives” of soldiers in exchange for the protection of their families has been a common practice. Under the label of “marriage,” the true criminal nature of the act is concealed—for example, the coercion exerted by the Taliban on Afghan families. Forced marriage is defined in Resolution 1464 of the Parliamentary Assembly of the Council of Europe as “a marriage in which one of the parties has not given full and free consent” (8).

e) Forced Sterilization

(1) Forced sterilization means eliminating a person’s ability to have children through injection, surgery, electricity, or other medical methods. Repeated rapes can also lead to this outcome (6).

Sterilization without the individual’s consent, when carried out with the intent to destroy all or part of a group, constitutes genocide. This act is addressed in Articles 7 and 8 of the Statute of the International Criminal Court as both a crime against humanity and a war crime (9).

f) Female Genital Mutilation

(1) Female genital mutilation is a symbolic practice in which all or part of the organs related to sexual activity are removed, and it is carried out in order to impose absolute obedience of woman to man (10).

Today, this practice is performed in twenty-nine countries, mostly in sub-Saharan Africa, and it leads to the death of many women.

g) Sexual Exploitation of Girls

The most distressing feature of this crime is that it is often committed by those who, in the context of armed conflict, are formally responsible for protecting vulnerable persons, such as peacekeepers and government officials—for example, crimes committed by peacekeeping forces in the Democratic Republic of Congo (11).

The drafting of laws on the crime of sexual violence saw significant progress in the 19th century and the early 20th century. Many treaties and laws, including the 1863 Lieber Code, were based on customary international law, under which the act of rape was recognized as punishable.

Additionally, Article 1 of the Annex to the 1899 Hague Convention II and Article 1 of the 1907 Hague Convention IV prohibited all war crimes, including rape.

A decade after World War I, Article 3 of the 1929 Geneva Convention recognized the prohibition of sexual violence against women during war.

Problems and Obstacles Related to Sexual Violence in Armed Conflicts

Today, feminist theorists, human-rights advocates, and women's rights activists emphasize that, at the level of instruments, international humanitarian law has not succeeded in establishing an effective protective system and that there is a need to revise and update existing rules with a specific focus on violence against women. At the same time, they argue that, under current conditions, we must seek ways to implement what already exists and to operationalize the minimal protections available against sexual violence (11).

The problems and obstacles that hinder the criminalization of sexual violence and the prevention of such acts in armed conflicts fall into three main categories:

1. Women do not have equal access to the criminal justice system.
2. There is no uniform jurisprudence on the recognition of the crime of sexual assault and its elements.
3. There are deficiencies in the categorization of sexual violence and its various forms (2).

Regional Courts and Their Struggle Against Sexual Violence in the Field of Human Rights

International criminal courts, through an evolutionary process, have addressed the concept of sexual crimes and their constituent elements. Although the International Criminal Tribunal for the former Yugoslavia focused primarily on rape and, despite the widespread occurrence of various forms of sexual violence in that context, did not adopt a comprehensive approach to all forms of sexual violence, and although the International Criminal Tribunal for Rwanda began adjudicating sexual crimes with delay, international judicial practice has, in defining sexual violence, proven more precise than existing instruments in the fields of human rights and international humanitarian law (11).

Among the human-rights bodies that adjudicate sexual violence are the Inter-American Commission on Human Rights and the European Court of Human Rights, both of which have jurisdiction over rights protected in their respective human-rights conventions.

For example, the following cases have played a significant role in the development of the criminalization of sexual violence at the international level:

- a) In the case of *Raquel Martín de Mejía v. Peru*, rape was considered one of the constituent elements of torture (Article 5 of the American Convention on Human Rights).
- b) In the *Miguel Castro-Castro Prison v. Peru* case, the forced stripping of women was deemed an act contrary to their dignity and one of the forms of sexual violence against them.
- c) In *X and Y v. the Netherlands*, under Article 8 of the European Convention on Human Rights, rape was characterized as an act that harms the privacy of individuals.
- d) The *Aydın v. Turkey* case.
- e) The *M.C. v. Bulgaria* case.

In all of the above cases, the perpetrators of sexual violence were convicted and punished (2).

In the *Kunarac* (Kadić) case, rape was treated as a violation of fundamental rules of international humanitarian law and international law, and the court characterized the commission of sexual violence as a war crime.

The United Nations Security Council, in Resolution 1820, adopted unanimously, described sexual violence as a tactic of war aimed at humiliating, dominating, instilling fear in, dispersing, or forcibly relocating members of an ethnic group or community. The resolution emphasizes that the commission of sexual violence constitutes a security issue that can impede the establishment of international peace and security, and further stresses that such crimes must be excluded from amnesty arrangements following armed conflict.

In peacetime, and after the outbreak of war, states and belligerent powers may establish safe zones and medical areas within their own territories and, if necessary, in occupied territories, to shield pregnant women and mothers of children under seven from the effects of war. Likewise, belligerent states seek to conclude local agreements with one another to secure the evacuation of women who have recently given birth from besieged areas to safe regions.

Strategies and Recommendations

To protect women during armed conflicts, the following strategies and recommendations can be considered:

1. Establishing specialized police units to assist women who are victims of violence.
2. Creating special courts dedicated to cases of violence against women.
3. Adopting innovative measures for civil or legal compensation for harm suffered by women and for their protection.
4. Providing training for law-enforcement officers and judicial officials.
5. Integrating a gender perspective into the formulation of policies related to women's security.
6. Providing specialized medical, psychological, social, and legal support services for women who face violent situations.
7. Ensuring women's access to services such as shelters, counseling, and legal assistance.
8. Improving evidentiary procedures in court and implementing measures to protect witnesses and victims.
9. Encouraging coordinated, effective, and participatory intervention by courts, prisons, communities, non-governmental organizations, and civil society to protect women from violence.
10. Clarifying applicable standards and states' obligations at the international level with regard to violence against women.
11. Raising awareness about the different forms of sexual violence against women.

Measures to Combat the Commission of Sexual Violence

1. Eradicating poverty during wars and armed conflicts.
2. Controlling access to weapons and the transfer of arms to conflict zones through an international body.
3. Increasing public awareness of the effects of war on women and girls.
4. Establishing international criminal tribunals, similar to those for the former Yugoslavia, Rwanda, and Sierra Leone, to prosecute perpetrators of sexual violence.
5. Ensuring equal attention, by the Security Council, to victims of such violence in all parts of the world and refraining from selective approaches and double standards.
6. Punishing perpetrators of sexual crimes and avoiding their amnesty or impunity by states.

7. Demonstrating greater sensitivity and avoiding concealment, by states and intergovernmental and non-governmental organizations, in cases of sexual exploitation and violence against women committed by multinational forces.
8. Paying special attention to the role of mass media in reducing—or, conversely, promoting—such violence against women.
9. Expanding training and raising the level of awareness among women.
10. Creating a reporting and monitoring network concerning the education and empowerment of women.
11. Separating civilians from combatants and respecting the principle of distinction.
12. Ensuring transparent reporting by international bodies on instances of such violence and on those who order and commit these acts.

Conclusion

Sexual violence arises from gender inequality and patriarchal beliefs that have become institutionalized within the cultures of societies. In patriarchal cultures, alongside the acceptance of gender discrimination, women constantly face the fear of becoming victims of violence and continuously experience fear when resisting unequal situations. Thus, within the framework of male-dominated cultural systems—due to gender inequality, internalized beliefs in inequality, and fear of victimization—violence against women occurs on a large scale. More importantly, violence becomes a tool for controlling women and restricting their participation in social institutions.

In the past, the international community was criticized for its inadequate protection of women against violence and its indifferent attitude toward this issue. In recent years, states' efforts to restrict and eradicate all violent practices against women have increased. Many countries have enacted specific legislation to address violence against women and have acknowledged that sexual violence against women constitutes a crime that the international community will no longer tolerate.

The proportion of civilian casualties in the First and Second World Wars increased dramatically—from 5 percent in earlier conflicts to 90 percent in contemporary wars (5).

The existing differences in ethnicity, social status, religion, and age all mean that women experience acts of violence in different ways. Some women have particular vulnerabilities to violence and therefore require specialized responses and support services.

Although one cannot expect that all crimes and deviations in the international community can be resolved solely through the force of international criminal law—especially criminal sanctions—criminal law can, to some extent through criminalization, respond to such disorders and crimes, since one of the functions of law is to regulate and reduce violence.

Although the efforts of international institutions have had a moderate impact in preventing the commission of this crime.

Feelings of shame and fear of the consequences of reporting sexual assault, the desire for abortion in societies where abortion is prohibited, the lack of access to health centers or counseling services, and other similar factors constitute reasons why women do not report acts of sexual assault and violence. The belief that the public may presume they consented to the act, the stigma associated with it, the threat of being killed by their families, the granting of amnesty to perpetrators of sexual violence, and the absence of organizations to whom women can report such crimes all exacerbate the problem.

Women, under humanitarian law treaties, are civilians and should not be subjected to attack, and because of their vulnerability, they benefit from protection. International humanitarian law is protective in nature, and protection lies at its core.

According to various international treaties, civilians—particularly women—must be shielded from the harmful consequences of hostilities and military operations carried out by belligerent parties.

1. Supporting the role and participation of women in establishing peace and ending conflicts can enhance their social status and promote sustainable development. For centuries, women—through their roles as mediators in many family and social disputes—have demonstrated that they can play an effective and essential role in resolving conflicts, and the international community can benefit from this capability.

Lawyers Without Borders must assist victimized women and bring governments and their soldiers before international courts.

Among the actions that non-governmental organizations can take are: holding international conferences and forums; preparing books and articles to identify women's rights and raise awareness among countries; conducting scientific research showing that sexual violence can have irreversible consequences; and establishing support centers for women who have been victims of sexual violence, thereby contributing to the reduction of wartime sexual violence.

It is necessary to raise awareness regarding the widespread violation of women's rights in armed conflicts so that states may adopt clear positions on this matter.

In conclusion, the present article demonstrates that sexual violence is infused with gender stereotypes and rooted in gender inequality. Efforts to create, maintain, and strengthen gender equality—and to change cultural beliefs, values, and traditions that reinforce gender inequality—lead to the reduction and elimination of sexual aggression and promote a culture of prevention and resistance against sexual violence.

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Authors' Contributions

All authors equally contributed to this study.

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The authors of this article declared no conflict of interest.

Ethical Considerations

All ethical principles were adhered in conducting and writing this article.

Transparency of Data

In accordance with the principles of transparency and open research, we declare that all data and materials used in this study are available upon request.

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