

Sexual Violence as a War Crime: The Binding Force of International Treaties and Their Enforcement

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Abstrak

Kekerasan seksual dalam konflik bersenjata dapat memenuhi unsur kejahatan perang apabila terdapat nexus yang memadai dengan konflik bersenjata dan unsur khusus tindak pidana sebagaimana dirumuskan dalam hukum humaniter internasional. Dalam kategori hukum yang berbeda, kekerasan seksual juga dapat memenuhi unsur kejahatan terhadap kemanusiaan apabila merupakan bagian dari serangan yang meluas atau sistematis terhadap penduduk sipil dan dilakukan dengan pengetahuan mengenai serangan tersebut. Penelitian hukum normatif ini menganalisis kekuatan mengikat perjanjian internasional, hukum kebiasaan internasional, dan mekanisme penegakan yang relevan dengan menelaah Konvensi Jenewa, Protokol Tambahan, Statuta Roma, serta praktik peradilan pidana internasional. Hasil penelitian menunjukkan bahwa klasifikasi tindak pidana harus dipisahkan secara tegas dari dasar yurisdiksi. Ratifikasi perjanjian bukan satu-satunya sumber kewajiban internasional, tetapi yurisdiksi Mahkamah Pidana Internasional juga tidak timbul otomatis terhadap negara non-pihak. Penegakan yang efektif memerlukan kombinasi legislasi domestik, dasar yurisdiksi yang sah, kerja sama internasional, pembuktian unsur kontekstual, dan perlindungan korban.

Kata Kunci: Kejahatan Perang; Kekerasan Seksual; Perjanjian Internasional; Hukum Humaniter Internasional; Penegakan.

Abstract

Sexual violence committed in armed conflict may constitute a war crime when a sufficient nexus to the armed conflict and the specific offense elements are established. In a distinct legal category, sexual violence may constitute a crime against humanity when it forms part of a widespread or systematic attack directed against a civilian population and the perpetrator acts with the required knowledge. This normative legal study examines the binding force of international treaties, customary international law, and relevant enforcement mechanisms through the Geneva Conventions, the Additional Protocols, the Rome Statute, and international criminal jurisprudence. The study finds that offense classification must be clearly separated from jurisdiction. Treaty ratification is not the sole source of international obligation, but ICC jurisdiction does not arise automatically in relation to a non-party state. Effective enforcement therefore requires a combination of domestic implementing law, a valid jurisdictional basis, international cooperation, proof of contextual elements, and meaningful protection for victims.

Keywords: War Crimes; Sexual Violence; International Treaties; International Humanitarian Law; Enforcement.

INTRODUCTION

Sexual violence in armed conflict is not merely a violation of personal dignity; depending on the context and the elements established, it may amount to a serious violation of international humanitarian law and an international crime. International humanitarian law protects civilians and other protected persons against rape, enforced prostitution, and other forms of sexual violence, while contemporary international criminal law recognizes a range of sexual-violence offenses within the categories of war crimes and crimes against humanity.¹ The persistence of conflict-related sexual violence despite this dense normative framework demonstrates that the principal difficulty lies not only in identifying applicable norms, but also in classifying conduct correctly, establishing jurisdiction, proving contextual elements, and ensuring effective enforcement.²

The legal classification of sexual violence requires precision. A war-crime characterization depends upon a sufficient nexus between the conduct and an armed conflict, together with the elements of the specific offense. Crimes against humanity are governed by a different contextual threshold: the conduct must form part of a widespread or systematic attack directed against a civilian population, and the perpetrator must possess the legally required knowledge. The Rome Statute reflects this distinction by placing sexual violence in both Article 7 and Article 8, but under different elements and contextual requirements.³

The binding force of the applicable norms also arises from more than one source. For treaty parties, *pacta sunt servanda* requires treaties in force to be performed in good faith.⁴ At the same time, some prohibitions relevant to sexual violence in armed conflict have developed as customary international humanitarian law and may therefore operate independently of a particular state's ratification of a given treaty.⁵ These different sources of obligation must not be conflated with the separate question of international criminal jurisdiction. In particular, the existence of a substantive prohibition does not by itself establish the jurisdiction of the International Criminal Court (ICC).

This study therefore focuses on two interrelated questions: first, how international treaties and customary international law establish binding obligations concerning sexual violence in armed conflict; and second, how those obligations are enforced through national and international mechanisms. The analysis also addresses the distinction between offense classification and jurisdiction, the role of domestic implementation, the significance of international cooperation, and the legal position of states that are not parties to the Rome Statute.

RESEARCH METHOD

¹Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), August 12, 1949, art. 27.

²United Nations Secretary-General, Report of the Secretary-General on Conflict-Related Sexual Violence, S/2025/342 (2025), 4–5.

³Rome Statute of the International Criminal Court, July 17, 1998, arts. 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi).

⁴Vienna Convention on the Law of Treaties, May 23, 1969, art. 26.

⁵International Committee of the Red Cross, Customary International Humanitarian Law, vol. I: Rules (Cambridge: Cambridge University Press, 2005), rule 93.

This research employs a normative juridical method that examines legal norms, principles, treaty provisions, judicial decisions, and relevant legal scholarship in order to answer the identified legal questions.⁶ The study is prescriptive in orientation because it not only describes the applicable framework but also evaluates the legal conditions under which sexual violence may be classified and enforced as an international crime.

The statutory and treaty approach examines the 1949 Geneva Conventions, the 1977 Additional Protocols, the 1998 Rome Statute, the Vienna Convention on the Law of Treaties, relevant United Nations instruments, and Indonesia's Law Number 24 of 2000 concerning International Treaties. The Geneva Convention framework is relevant to the protection of persons affected by armed conflict,⁷ while Additional Protocol I expressly reinforces protection against rape, forced prostitution, and other indecent assault.⁸

The conceptual approach is used to examine *pacta sunt servanda*, customary international law, war crimes, crimes against humanity, individual criminal responsibility, state responsibility, complementarity, and jurisdiction. The case approach draws particularly upon international criminal jurisprudence concerning sexual violence in armed conflict, including *Prosecutor v. Kunarac, Kovač and Vuković*. The study does not use unrelated domestic sexual-offense cases as substitutes for conflict-related jurisprudence because such cases do not establish the armed-conflict nexus or the international-crime context required by this research.

Primary legal materials consist of treaties, statutes, United Nations instruments, and international judicial decisions. Secondary materials include books, journal articles, institutional publications, and scholarly commentary. The materials are collected through library research and analyzed through legal interpretation and deductive reasoning.⁹ Because this is a doctrinal study, it does not measure the prevalence of conflict-related sexual violence or the empirical effectiveness of prosecutions.

RESULTS AND DISCUSSION

The Binding Force of International Treaties and Customary International Law

The Geneva Convention regime provides an important starting point. Article 27 of the Fourth Geneva Convention requires protected women to be especially protected against attacks on their honor, including rape, enforced prostitution, and indecent assault.¹⁰ Although the language of the 1949 Convention reflects the terminology of its era, later developments in international humanitarian law and international criminal law have moved beyond an "honor" framework toward a

⁶Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2010), 25.

⁷Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), August 12, 1949, art. 27.

⁸Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), June 8, 1977, art. 76(1).

⁹Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat* (Jakarta: RajaGrafindo Persada, 2014), 12–14.

¹⁰Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), August 12, 1949, art. 27.

more direct recognition of sexual violence as violence against bodily integrity, autonomy, and human dignity.

Additional Protocol I strengthened this protection by requiring women to be the object of special respect and to be protected in particular against rape, forced prostitution, and other indecent assault.¹¹ The treaty obligation binds states parties according to the ordinary rules of treaty law. However, treaty ratification is not the only basis for the prohibition. The customary status of the prohibition of rape and other forms of sexual violence is reflected in Rule 93 of the ICRC study on customary international humanitarian law.¹² This distinction is crucial: a state may be bound by a customary rule even where it has not accepted every treaty instrument that contains a comparable prohibition.

The Rome Statute develops the criminal-law dimension of this framework. Article 8 expressly includes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other forms of sexual violence of comparable gravity among war crimes in both international and non-international armed conflicts, subject to the elements and contextual requirements applicable to each category.¹³ International criminal law thereby treats sexual violence not simply as an incidental affront to honor, but as conduct capable of generating individual criminal responsibility when the relevant elements are established.

This development is consistent with contemporary scholarship emphasizing that international humanitarian law, human rights law, and international criminal law reinforce one another in prohibiting and responding to sexual violence.¹⁴ Nevertheless, the legal basis and consequence of each body of law must remain analytically distinct. A human-rights violation, a breach of international humanitarian law, and an international crime may overlap in a particular factual situation, but each classification requires its own legal analysis.

United Nations Security Council Resolution 1820 further recognized that rape and other forms of sexual violence may constitute war crimes, crimes against humanity, or acts relating to genocide, depending upon the facts and legal elements established.¹⁵ The resolution is significant for the international policy and enforcement framework, but it should not be inaccurately characterized as a treaty. Its legal significance must instead be assessed according to the Charter framework, the terms of the resolution, and the broader body of international law.

Pacta sunt servanda remains fundamental for treaty parties because a treaty in force must be performed in good faith.¹⁶ In the Indonesian legal context, Law Number 24 of 2000 provides the domestic framework for the conclusion and

¹¹Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), June 8, 1977, art. 76(1).

¹²International Committee of the Red Cross, Customary International Humanitarian Law, vol. I: Rules (Cambridge: Cambridge University Press, 2005), rule 93.

¹³Rome Statute of the International Criminal Court, July 17, 1998, art. 8(2)(b)(xxii) and art. 8(2)(e)(vi).

¹⁴Gloria Gaggioli, "Sexual Violence in Armed Conflicts: A Violation of International Humanitarian Law and Human Rights Law," *International Review of the Red Cross* 96, no. 894 (2014): 503–538, <https://doi.org/10.1017/S1816383115000211>.

¹⁵United Nations Security Council, Resolution 1820, S/RES/1820 (June 19, 2008), para. 1.

¹⁶Vienna Convention on the Law of Treaties, May 23, 1969, art. 26.

ratification of international treaties.¹⁷ Yet the domestic effect of an international obligation, including questions of criminalization, jurisdiction, procedure, and cooperation, must be determined by the relevant constitutional and statutory framework. It is therefore inaccurate to assume that every international criminal norm becomes directly enforceable in domestic criminal proceedings without an adequate legal basis.

The classification of sexual violence as a war crime requires a legally sufficient relationship between the conduct and an armed conflict. The armed conflict must do more than provide a background setting: the offense must be sufficiently connected to the conflict, and the prosecution must establish the elements of the specific war crime. This nexus requirement distinguishes war crimes from ordinary domestic offenses that may be equally grave but do not arise within the legal context required by international humanitarian law.

By contrast, sexual violence may constitute a crime against humanity where it forms part of a widespread or systematic attack directed against a civilian population and the perpetrator acts with knowledge of the attack. The Rome Statute lists rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other sexual violence of comparable gravity within Article 7, subject to the chapeau requirements of crimes against humanity.¹⁸ The same conduct may, in principle, satisfy more than one international-crime category if the independent elements of each category are proven, but the categories must not be treated as interchangeable.

International jurisprudence has played an important role in clarifying the legal treatment of sexual violence. *Prosecutor v. Kunarac, Kovač and Vuković* is particularly relevant because it addressed rape and sexual enslavement in the context of the conflict in Bosnia and Herzegovina and contributed to the development of international criminal jurisprudence on sexual violence.¹⁹ Its relevance lies in the elements and contextual analysis of the crimes before the ICTY; it should not be used to obscure the institutional and jurisdictional differences between the ICTY and the ICC.

Academic analysis of conflict-related sexual violence similarly demonstrates that weak domestic enforcement can contribute to impunity and increase reliance on international accountability mechanisms.²⁰ The appropriate legal response, however, is not to presume international jurisdiction automatically, but to determine which court has jurisdiction, which substantive law applies, whether admissibility requirements are satisfied, and whether sufficient evidence exists for the relevant offense and contextual elements.

¹⁷Republic of Indonesia, Law Number 24 of 2000 concerning International Treaties, State Gazette of the Republic of Indonesia 2000 No. 185.

¹⁸Rome Statute of the International Criminal Court, July 17, 1998, arts. 7(1)(g), 8(2)(b)(xxii), and 8(2)(e)(vi).

¹⁹*Prosecutor v. Kunarac, Kovač and Vuković*, Case No. IT-96-23 & IT-96-23/1-A, Judgment (ICTY Appeals Chamber, June 12, 2002).

²⁰Indah Ardhita Udit, Novianti, and Rahayu Repindowaty Harahap, "Kekerasan Seksual Sebagai Taktik Perang Kongo: Antara Impunitas Hukum Nasional dan Pemberlakuan Statuta Roma," *Uti Possidetis: Journal of International Law* 2, no. 3 (2021): 305–321, <https://doi.org/10.22437/up.v2i3.13763>.

Jurisdiction and Enforcement Mechanisms

Enforcement takes place through several mechanisms that are complementary rather than identical. National courts remain central because states ordinarily exercise criminal jurisdiction through their domestic legal systems. International or hybrid tribunals may operate where a valid constitutive instrument or other legal basis confers jurisdiction. The ICC, established by the Rome Statute, is a permanent court of last resort operating within the jurisdictional and admissibility framework of the Statute.²¹

ICC jurisdiction must be analyzed separately from the substantive prohibition. The Court generally requires a jurisdictional link under Article 12, an appropriate trigger under Article 13, and compliance with the admissibility and complementarity framework, including Article 17.²² For a state that is not a party to the Rome Statute, ordinary treaty-based jurisdiction does not arise merely because the alleged conduct is serious or prohibited under customary international law. Jurisdiction may nevertheless arise through another Statute-recognized basis, including conduct occurring on the territory of a State Party, nationality links in appropriate circumstances, an Article 12(3) declaration, or a Security Council referral.

The complementarity principle reinforces the importance of domestic legal systems. International criminal justice is not designed to replace functioning national systems in every case. Effective domestic implementation therefore requires a sufficient substantive criminal-law basis, rules of jurisdiction, procedural guarantees, investigative capacity, witness and victim protection, and mechanisms for international cooperation. The ICRC has emphasized the importance of domestic criminal repression and effective investigation of rape and other forms of sexual violence during armed conflict.²³

Universal or extraterritorial jurisdiction must also be treated carefully. Certain grave breaches and international crimes may engage special jurisdictional obligations or permissions, but a court cannot simply assume universal jurisdiction without a legal basis in applicable international and domestic law. The scope of such jurisdiction varies according to the offense, treaty obligations, domestic legislation, and the presence or absence of other connecting factors.

Victim protection and reparation are also integral to meaningful enforcement. The United Nations Basic Principles and Guidelines recognize restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition as forms of reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law.²⁴ Where internationally wrongful conduct is attributable to a state, the law of state responsibility may

²¹William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010).

²²Rome Statute of the International Criminal Court, July 17, 1998, arts. 12, 13, and 17.

²³International Committee of the Red Cross, *Prevention and Criminal Repression of Rape and Other Forms of Sexual Violence during Armed Conflicts* (Geneva: ICRC, 2017), 12–15.

²⁴United Nations General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Resolution 60/147 (December 16, 2005), paras. 15–23.

additionally require cessation and full reparation for the injury caused.²⁵ Individual criminal responsibility and state responsibility are therefore distinct but potentially concurrent forms of legal accountability.

Despite the strength of the normative framework, enforcement continues to face practical and political obstacles. These include evidentiary difficulties, stigma and fear affecting victim participation, limited investigative capacity, security risks, non-cooperation with international institutions, jurisdictional disputes, and the dependence of international courts on states for arrests and evidence. Contemporary commentary on wartime sexual violence continues to describe an uneven trajectory of international prosecution, demonstrating that doctrinal recognition does not automatically produce consistent accountability.²⁶

A legally sound enforcement analysis should proceed in stages. First, the conduct must be classified under the correct substantive law: war crime, crime against humanity, another international crime, or a domestic offense. Second, the competent forum must possess a valid basis of jurisdiction. Third, the prosecution must establish each offense element and the applicable contextual elements with admissible evidence. Fourth, admissibility, complementarity, immunities where relevant, cooperation obligations, and procedural safeguards must be considered. Treating any one of these steps as automatic risks collapsing distinct legal questions into a single conclusion.

For Indonesia, these distinctions are particularly important. Indonesia's international obligations cannot be reduced to the question of Rome Statute membership. Obligations may arise under treaties to which Indonesia is a party, customary international humanitarian law, other applicable rules of international law, and domestic legislation. At the same time, non-ratification of the Rome Statute means that the ordinary State Party route to ICC jurisdiction is not automatically available. Any ICC involvement must therefore rest on a jurisdictional basis recognized by the Statute.

The Kunarac jurisprudence remains relevant primarily for understanding the legal characterization and evidentiary treatment of conflict-related sexual violence. It does not itself create ICC jurisdiction, nor does it remove the need to identify the proper domestic or international forum. Likewise, Security Council resolutions and institutional policy documents can strengthen the normative and policy framework without eliminating the requirement to prove the constituent elements of an international crime.

Accordingly, the principal legal challenge is not a complete absence of international norms. The more persistent problem is the fragmentation between substantive prohibitions, jurisdictional rules, domestic implementation, evidentiary standards, institutional capacity, and cooperation. A coherent enforcement strategy must connect these components while preserving their doctrinal distinctions.

²⁵International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), arts. 2 and 31.

²⁶Beth Van Schaack, "Prosecuting Wartime Sexual Violence: The Uneven Trajectory of International Jurisprudence," Lieber Institute for Law & Land Warfare (2025), 12–15.

CONCLUSION

Sexual violence in armed conflict is prohibited by a dense body of international law and may generate both state responsibility and individual criminal responsibility. As a war crime, it requires a sufficient nexus with an armed conflict and proof of the elements of the relevant offense. As a crime against humanity, it requires a widespread or systematic attack directed against a civilian population and the perpetrator's knowledge of that attack. These categories may overlap in appropriate cases, but they must be analyzed separately.

The binding force of the relevant legal norms derives from several sources. Treaties bind their parties and must be performed in good faith, while customary international humanitarian law may create obligations independently of treaty ratification. These substantive obligations do not, however, automatically establish the jurisdiction of a particular international criminal tribunal. ICC jurisdiction depends upon the jurisdictional and admissibility framework of the Rome Statute, including territorial or nationality links, an Article 12(3) acceptance, or a Security Council referral where applicable.

Effective enforcement therefore requires more than recognition of sexual violence as a serious international crime. It requires adequate domestic criminalization and procedure, a valid basis of jurisdiction, competent investigation and prosecution, international cooperation, careful proof of contextual elements, and meaningful protection and reparation for victims. For states outside the ordinary Rome Statute framework, these requirements become especially important because international accountability must be built through the interaction of domestic law, applicable treaty and customary obligations, and legally available international mechanisms.

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