

Agenda 2063

Voices of African Women Today

By

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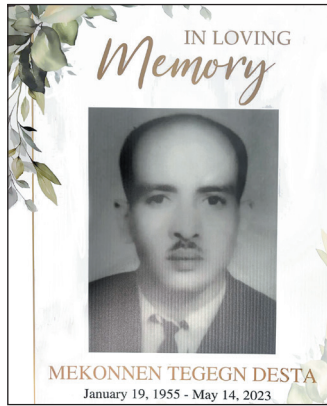
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First and foremost, I thank God the almighty who led and shaped me to be the voice for others. This book is dedicated to my beloved father, **Mekonnen Tegegn Desta** who I unexpectedly lost in May 2023. My father was and continues to be my hero for breaking barriers in his own area of expertise and line of work. As a journalist himself, my father mentored and coached young news anchors and contributed to the work on diplomacy by extending his expertise to African embassies and the UN Economic Commission for Africa. May his soul rest in power.

I want to further extend my gratitude to my mom, my siblings and my husband who have always motivated me to be the best version of myself.

Introduction

Agenda 2063 aspires for a people driven Africa relying on the potential of African people including women. It calls for an inclusive development process where no woman is excluded or left behind. Ensuring gender equality and parity are primary focuses of Agenda 2063. Pressing challenges highlighted under chapters of this book collection created barriers that stand in the way of its full achievement. Eliminating discrimination against women and preventing violence against women remains to be a crucial step to the fulfilment of aspiration 6 of Agenda 2063 that includes empowering women to play their rightful role in all spheres of life, and that they have full gender equality as well. The promises set by Agenda 2063 in terms of increasing the number of women in public life to at least a 50% of elected public offices at all levels in public and private sectors remains unfulfilled. Though there are encouraging developments in few African countries including Rwanda and Liberia, meeting this target is still a challenge for most African countries.

Despite a global decline in the area, Sub Saharan Africa continues to struggle with maternal mortality at a large scale with 70% of preventable maternal death equivalent to 545 maternal deaths per 100,000 live births occurring in the region. Despite a clear recognition of the myriad challenges women face due to harmful traditional practices under agenda 2063, the number of cases of women who are subjected to harmful traditional practices has not abated. Between 2015 and 2024, more than 68 million girls were at risk of undergoing Female Genital Mutilation (FGM) at a global scale. In 2023 only, 144 million African women and girls went through FGM.

Chapter 1

Violence against Women

Introduction

Violence against women affects the lives of many women at a global level. Violence takes various forms including Physical, Psychological and Sexual. Violence against women includes rape, domestic violence, sexual harassment, female genital mutilation, trafficking and others. In most parts of the world, women's inferior position to men contributes to violence against women. In addition, cultural and traditional norms may exacerbate the position of women in the society and contribute to violence against women. In this chapter, the author discusses ongoing societal efforts to control women including through honor killings.

Armed conflicts complicate the work around violence against women as evidenced in most African countries. Conflict-related sexual violence includes rape, sexual slavery, forced prostitution, forced pregnancy, enforced sterilization, forced marriage and other forms of sexual violence of comparable gravity, against women, men, girls or boys directly linked to conflict. It is different from other acts of sexual violence due to the conflict-related environment in which it occurs and the profile of perpetrators and victims. Perpetrators are often affiliated with State or non-State armed groups to the inclusion of terrorist organizations, militias, affiliated forces, government forces, and armed groups. This chapter further discusses the rampant acts of conflict related sexual violence in Africa and ways of addressing it based on a detailed analysis of the conflicts, the root causes for the conflicts and the relevant regional and global actors.

Inclusive national dialogue and accountability for sexual crimes are central to the path out of the current crises in Ethiopia

Due to the conflict in Ethiopia, women and girls continue to bear the brunt of the cruel and inhuman acts committed by all parties involved in the conflict for the last 16 months. Many have lost their lives, suffered sexual violence, displaced, and starved.¹ Women living with disability, older women, and refugee women have been the target of brutal sexual violence. These crimes are horrific in nature as they represent the level of vengeance and humiliation pursued by actors in the conflict. Reports have highlighted the extent of these violations and implicated all sides to the conflict in war crimes and crimes against humanity.²

In the Tigray region of Ethiopia, Ethiopia's National Defense Force, Eritrean Defense Force as well as Amhara Special Force and its allied militia committed widespread sexual abuse against Tigrean women.³ In the initial stages of the conflict, rape cases were reported in Mekele, Ayder, Adigrat, and Wukro hospitals of Tigray. Investigations on human rights in Tigray indicate that Tigrean women were subjected to attempted rape, gang rape, oral and anal rape, and insertion of foreign objects into the vagina; in addition, they were subjected to ethnic slurs and degrading comments.⁴ They were also exposed to unwanted pregnancy and sexually transmitted diseases. Access to humanitarian aid including access to sexual and reproductive health services remains a challenge. Sexual violence was used as a weapon of war and as a deliberate strategy to terrorize, degrade and humiliate the victims.⁵ In the most hideous way, Eritrean women and girls fleeing persecution in Eritrea were raped by members of Eritrean Defense Forces and forces

¹ <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2021/04/report/conflict-related-sexual-violence-report-of-the-united-nations-secretary-general/SG-Report-2020editedsmall.pdf>

² <https://drive.google.com/file/d/1oqIUi-artYwDyAv4Z0l3Ox7C0ipk3RyG/view>

³ <https://news.un.org/en/story/2021/12/1107122>

⁴ <https://www.ohchr.org/Documents/Countries/ET/OHCHR-EHRC-Tigray-Report.pdf>

⁵ <https://news.un.org/en/story/2021/12/1107122>

allied to the Tigray People Liberation Front in the Tigray region of Ethiopia where they sought refuge.⁶ To date, women who were impacted by the conflict continue to be the subject of abduction while on the move.⁷

The number of women who are subjected to sexual violence augmented when the conflict expanded its horizon to the Amhara and Afar regions of Ethiopia.⁸ In these two regions, Tigrean forces committed widespread sexual violence against Amhara and Afari women and girls. In Nifas Mewcha, vicinity of the Amhara region of Ethiopia, women were raped for a nine-day period. Women were subjected to gang rape including in front of their children, physically assaulted, called names and degraded with ethnic slurs, impregnated by their rapists, and suffered mental health problems including anxiety and depression.⁹ They were also robbed and deprived of their source of income. Women were unable to access comprehensive post-rape care, including emergency contraception, post-emergency prophylaxis for HIV and sexually transmitted infections. In these two regions, Tigray Defense Forces used sexual violence to demoralize, dehumanize and punish communities. Sexual violence was used in a more premeditated and organized manner arbitrarily but also selectively for combat purposes.¹⁰ Due to the nature of this crime, the tendency of survivors coming forward with what happened to them in the current context of Ethiopia is limited. There is a likelihood of under-reporting because of the nature of the Ethiopian polity where patriarchy is the dominant view.

⁶ <https://www.hrw.org/news/2021/09/16/ethiopia-eritrean-refugees-targeted-tigray?msclkid=3a1db10bab6411ec92de7dd07bcaffc3>

⁷ <https://www.unhcr.org/news/briefing/2022/2/620f63574/thousands-eritrean-refugees-displaced-clashes-ethiopias-afar-region.html?msclkid=d3f191c9a64611ec93688b21f1f9b42f>

⁸ <https://www.amnesty.org/en/latest/news/2021/11/ethiopia-survivors-of-tplf-attack-in-amhara-describe-gang-rape-looting-and-physical-assaults/>

⁹ <https://www.amnesty.org/en/latest/news/2021/11/ethiopia-survivors-of-tplf-attack-in-amhara-describe-gang-rape-looting-and-physical-assaults/>

¹⁰ <https://ehrc.org/afar-and-amhara-regions-report-on-violations-of-human-rights-and-international-humanitarian-law-in-afar-and-amhara-regions-of-ethiopia-published/?msclkid=2203e107ad3d11ec9f3cf2c4a299c791>

Violations of women's human rights

Conflicts exacerbate deep-rooted inequalities in any country. The gender discrimination women and girls are subjected to in a society amplifies their victimization during the conflict. Outside conflict, women in Ethiopia faced gender-based violence¹¹ including marital rape and other evolving forms of violence such as acid attacks, gang rape, and abduction.¹² In Ethiopia, the male is the acknowledged master of his family. Marriage is viewed as a means of strengthening the link between families and ethnic groups. Thus, the role of women in society is that of cementing family ties through bride-wealth and producing children. The cultural perception of women as the property of men has led to a situation where all actors in the conflict used rape as a weapon. Ethiopia's constitution provides full and equal dignity for women under articles 25 and 35.¹³

Ethiopia's revised criminal code¹⁴ also provides explicit prohibition of violence against women and girls including rape. All members of the African Union including Ethiopia are bound to respect the rights protected under the African Charter on Human and People's Rights. Article 5 of the African Charter prohibits all forms of exploitation and degradation including, slavery, slave trade, torture, cruel, inhuman, or degrading punishment and treatment.¹⁵ Interpretations provided by the African Commission on Human and People's Rights have directly referred to the application of Article 5 not only to physical and psychological harm but also to the protection of women from sexual violence during armed conflict.¹⁶ As a result of the conflict, Ethiopian women and girls were deprived of the protection they are bestowed with. It is important to understand that sexual violence is not and should not be considered as an unavoidable outcome of any conflict. It is a crime that is preventable and punishable

¹¹ <https://www.amnesty.org/en/latest/news/2020/03/ethiopia-parents-fear-for-missing-amhara-students-as-universities-close-over-covid19/>

¹² <https://www.ecoi.net/en/file/local/2005243/N1907214.pdf>

¹³ <https://chilot.me/federal-laws/proc-no-1-1995-constitution-of-the-federal-democratic-repu/>

¹⁴ <https://chilot.me/knowledge-base/the-criminal-code-of-the-federal-democratic-republic-of-ethiopia/?msclkid=353da90fb03811ec8dbe62cd5e476e83>

¹⁵ <https://www.achpr.org/legalinstruments/detail?id=49>

¹⁶ *Id.*

under International Human Rights Law, International Criminal Law, and International Humanitarian Law. Ethiopia is a party to the Convention on the Elimination of Discrimination against Women (CEDAW).

Article 1 of CEDAW defines discrimination against women to include gender-based violence which is violence directed against a woman because she is a woman, or because it affects women excessively. In the context of this definition, rape during conflict is discrimination against women directed at them because of their gender.¹⁷ CEDAW does not allow States to derogate from Convention obligations during periods of conflict or public emergency. State obligations linger during such periods, including due diligence obligations to prevent, investigate, punish and ensure remedy.

Under the convention, state parties are also required to control the activities of domestic non-State actors within their jurisdiction. States also have an obligation to regulate non-State actors under the duty to protect, so they exercise due diligence to prevent, investigate, punish and ensure reparation for the acts of non-state actors. By depriving women of these protections, all actors in the conflict: Ethiopia's Defense Forces, Eritrean Defense Forces, Tigray People Liberation Front, and allied militia, and Amhara Defense Forces and allied militia committed war crimes. In elaborating on article 2 of CEDAW, General Comment 30 clarifies the application of the Convention to situations of armed conflict including complex peace building and post-conflict reconstruction processes. It outlines the content of the obligations assumed by state parties and further highlights the obligations of non-State actors such as the Tigray People Liberation Front and allied militia and that of Amhara Defense Forces and allied militia. Although these actors cannot become parties to women's rights instruments in general, in the context they exist in Ethiopia, they have an identifiable political structure and exercised significant control over territory and population during the conflict. Hence, they are indebted to respect international human rights laws.¹⁸

¹⁷ <https://www.un.org/womenwatch/daw/cedaw/>

¹⁸ <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26797>

On top of the obligations discussed above, as far as article 12 of CEDAW on adequate standard of living is concerned, General Comment 30 of CEDAW states that state parties have an obligation to ensure psychosocial support; family planning services, including emergency contraception; maternal health services, including antenatal care, skilled delivery services, prevention of vertical transmission and emergency obstetric care; safe abortion services; post-abortion care; prevention and treatment of HIV/AIDS and other sexually transmitted infections, post-exposure prophylaxis including care to treat injuries such as fistula. Under the International Covenant on Economic Social and Cultural Rights (ICESCR), which Ethiopia ratified in 1993, pregnant women have the right to health and essential health services that are free when necessary as part of their right to the highest attainable standard of health. The documented limitations on access to essential health care services in conflict-affected regions of Ethiopia are tantamount to violation of both the CEDAW and the ICESCR.¹⁹

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (The Maputo Protocol) which was ratified by Ethiopia on July 18, 2018, elaborates on the right of women to security. The Maputo Protocol protects women from the violation of their human rights both during peacetimes and conflict times. The protocol also calls on states to protect women seeking asylum and refugee status in their territory. In the context of the conflict in Ethiopia, Eritrean refugee women's right was violated when members of Eritrea's Defense Force and Tigray Defense force subjected them to sexual violence. Article 11(2) of the Maputo Protocol further underlines that women in whatever ethnic group they belong to in a conflict should be provided civilian protection.²⁰ In utter disregard of this, women belonging to diverse ethnic groups: Tigray, Amhara, Afar were subjected to sexual violence. Ethiopian National Defense Force, Eritrean National Defense Force, Tigray People Liberation Front, allied militia, and Amhara Defense

¹⁹ <https://healthcluster.who.int/docs/librariesprovider16/meeting-reports/northern-ethiopia-health-cluster-bulletin-october-2021.pdf?msclkid=15717706ad6111ec943405329baf61e>

²⁰ https://www.un.org/en/africa/osaa/pdf/au/protocol_rights_women_africa_2003.pdf

Force and allied militia violated the right of each individual woman to be recognized as a civilian and be provided with such protection.

Impacts of the conflict on women and girls

In addition to the widely reported sexual violence, restricted humanitarian aid, food, access to the internet particularly in Tigray negatively impacted survivors of sexual violence. The lack of medical supplies and trauma kits further characterizes the dire situation in all regions the conflict took place. As investigations indicate, in all places the conflict took place, women who were raped were physically abused and experienced mental health problems. A significant number of girls were also forced to leave their schools early. Access to lifesaving aid including treatment for HIV and STD transmission, contraception, post-exposure prophylaxis as well as psychosocial programs continue to be limited in Tigray. These problems spread widely to the Afar and Amhara regions of Ethiopia after the conflict expanded its reach to these places. Women's livelihood and sources of income were highly impacted due to the conflict as many women were forced to abandon them.²¹

Researches discussing justice for women impacted by conflicts underline that women who survive rape experience trauma and are usually stigmatized by their own communities.²² As a result, many women could be reluctant to report rape. Limited safe spaces for women and girls also added misery to the negative experience women and girls had to go through as a result of the conflict. A significant number of Tigrean women who were subjected to sexual violence fled to Sudan, where the conditions of women particularly in Darfur, the Nuba Mountains, and along the Blue Nile are still impacted by the prolonged civil war and ongoing governance challenges.²³ An increase in the number of

²¹ <https://www.amnesty.org/en/latest/news/2021/11/ethiopia-survivors-of-tplf-attack-in-amhara-describe-gang-rape-looting-and-physical-assaults/>

²² <https://www.un.org/en/chronicle/article/increasing-womens-access-justice-post-conflict-societies>

²³ <https://www.womenpeacesecurity.org/resource/un-security-council-briefing-sudan-hala-al-karib/>

women who migrated to neighboring countries including Sudan was documented after the conflict expanded its reach to Amhara and Afar.²⁴

Calls to actions

As it stands now, Ethiopia's priority should be its people, the majority of whom are women and girls. The plight of women and girls can only be addressed through broader efforts including effective law enforcement, swift corrective and accountability measures, and a sit down with all concerned actors. It is also important that Ethiopia's post-conflict justice priorities for women and girls focus not only on civil and political rights but also on economic, social, and cultural rights.

In the short run, the following critical actions need to be taken:

End the pain and suffering of women, and girls through pledging for unconditional ceasefire, and arms embargo; design effective disarmament, demobilization and reintegration processes and ban arms proliferation in the different regions of Ethiopia;

1. Take appropriate legal and institutional measures to protect women and girls at risk of sexual violence, including internally displaced and refugee women belonging to affected ethnic groups;
2. Take appropriate legal, institutional, and financial measures to ensure the provision of comprehensive services for survivors of sexual violence including but not limited to medical, psychological, and social services necessary for their rehabilitation and reintegration with their community;
3. Establish multipurpose community centers that link immediate assistance to economic and social empowerment and reintegration, and mobile clinics in places where the conflict ensued;
4. Mitigate the costs of the war on women and girls through collaboration with civil society.

²⁴ [https://reliefweb.int/sites/reliefweb.int/files/resources/UNHCR Sudan – Factsheet_ October 2021.pdf?msclkid=53a02f0db04611ec8c03491aca6fe551](https://reliefweb.int/sites/reliefweb.int/files/resources/UNHCR%20Sudan%20Factsheet%20October%202021.pdf?msclkid=53a02f0db04611ec8c03491aca6fe551)

5. Avail women's rights defenders and experts working with survivors of sexual violence with counseling services and on job trainings to help them cope with stress and trauma.

In the long run, the following actions need urgent attention:

1. Collaborate with local and international fact-finding missions to ensure that all perpetrators of sexual and other violence against women during the conflict are properly identified and prosecuted;
2. Build the capacity of the judiciary in Ethiopia including in the context of transitional justice mechanisms, to ensure its independence, impartiality and integrity including through technical cooperation with experts in the area. If and when possible, constitute a separate adhoc commission that can adjudicate cases of sexual violence, and design non-judicial remedies such as truth commissions and reparations;
3. Protect women's rights defenders from State or non-State attacks that undermine their equal and meaningful participation in political and public space;
4. Ensure that legislative, executive, administrative and other regulatory instruments do not restrict women's participation in the prevention, management and resolution of the conflict. Increase the number of women commissioners under the newly established Commission for National Dialogue.²⁵
5. Promote inclusion and transparency under the National Dialogue Commission. Constitute an advisory committee for the newly established Commission for National Dialogue and include survivors of sexual violence in the discussions.²⁶
6. Plan specific interventions to contribute to opportunities for women's economic empowerment including through promoting their right to education.

²⁵ <https://www.fanabc.com/english/house-appoints-commissioners-of-the-national-dialogue-commission/>

²⁶ <https://www.facebook.com/photo/?fbid=982784585993347&set=pcb.982787369326402>

Victimized twice: Promoting accountability and justice for survivors of wartime rape in South Sudan

"I was in Benitu. Ten women were shot through the vagina because they refused to be raped. One was 10 months pregnant."

Interview with a women's group representative, Juba, 25 April 2014
cited in the draft report of the AU Commission of Inquiry for South Sudan

In December 2013, South Sudan plunged into a massive scale of violence because of the outbreak of conflict between the Sudan Liberation Army and the Sudan People Liberation Movement.²⁷ The fight took an ethnic turn as soldiers from the country's largest groups, the Dinka, and Nuer, divided their loyalties to either President Kiir or Mr. Machar respectively. While some civilians were caught in the cross fire, others were deliberately targeted along ethnic lines. Women are the immediate victims of this conflict because of rampant sexual abuse perpetrated against them.²⁸

The gender discrimination South Sudanese women were subjected to in their society before the conflict contributed to their victimization during the conflict. Women suffered in the areas of educational access, domestic violence, non-recognition of marital rape, and forced marriage. Even though South Sudan's constitution, particularly under Article 16, provides full and equal dignity with men, women survivors of rape are still victims of gender-based discrimination due to the prevailing weak justice framework, and thus, victimized twice.

Wartime sexual violence including rape, gang rape, and sexual slavery remains a shocking reality in South Sudan today. Women who survive

²⁷ Recent information indicates that the South Sudan government and its opposition have agreed to share power and establish a Unity Government. Given the previous failed promises, however there is still doubt that this can be sustained. The African Union Commission still believes that the hybrid court will take care of the accountability issues for women rights violations that occurred during the Civil war.

²⁸ African Union Commission of Inquiry on South Sudan, *Draft Report and Contribution to the Africa Union Commission of Inquiry on South Sudan*. <http://www.nyamile.com/2015/03/07/draft-report-of-the-au-commission-of-inquiry-on-South-Sudan>.

rape face threats and experience trauma including a desire to kill themselves and Post Trauma Stress Disorder (PTSD). They also experience stigma. As a result, many women are very reluctant to report rape. Old women from the enemy's ethnic group are raped in order to make it clear to the enemy that they are incapable of protecting their mothers. The goal is to make the enemy feel emasculated, but women suffer the direct consequence. Women who refuse to be raped are shot through their private parts, and even those who are pregnant are forced into sexual intercourse. Some women become pregnant by their rapist. Afterwards they suffer from limited support systems including only a few counseling centers and temporary placements that can only serve a small percentage of the survivors. These centers have also been targets of warfare.²⁹

In the current context of South Sudan, the infrastructure for justice and accountability is weak and fragile to support the rule of law. So far, reports indicate that South Sudan's government has not provided accountability for wartime rape committed by its forces, not demonstrated the will to hold them accountable. The opposition has not investigated or punished any abusive forces. Though a presidential committee was formed in January 2015 to investigate killings and abuses³⁰ it has made no public update on its findings including on wartime rape. Women are reluctant to provide information to this particular committee because of its lack of independence, and because there are no clear mechanisms for survivors of rape and witness protection.³¹ This lack of mechanisms is exacerbated by the acute shortage of legal personnel in the judiciary whose decisions are influenced by one party, the South Sudan People Liberation Movement (SPLM).³² There is a lack of due process of law. As it exists now, the justice system only tilted to certain groups particularly that of the ruling party's. This, combined with the application of customary justice that

²⁹ African union commission of inquiry on South Sudan, final report of the African union commission of inquiry on South Sudan ¶33 (2014).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

is not favorable to women in South Sudan, placed addressing wartime rape at the center of the justice and accountability process.³³

I argue that through the integration of gender responsive standards³⁴ into the investigation and prosecution of wartime rape by the proposed Hybrid Court for South Sudan, perpetrators of wartime rape can be held legally accountable.³⁵ Part I of this section gives an overview of the conflict in South Sudan and the impact of wartime rape on women. Part II discusses the international, regional and national legal and institutional frameworks regarding wartime rape and argues that South Sudan has domestic, regional and international obligations to protect women from wartime rape. Part III discusses promoting accountability through the establishment of the Hybrid Court for South Sudan. It presents gender responsive standards that need to be integrated within the hybrid court to address the needs of victims of wartime rape. Part IV provides the significant structural tools that can be utilized towards promoting accountability and justice for wartime rape in South Sudan.

Overview of the South Sudan Civil War and the use of rape as a tool of warfare

Causes of the Civil War in South Sudan

South Sudan has experienced a number of atrocious conflicts. The main source of these conflicts is disgruntled promises made to southerners by the leaving British and northern elites.³⁶ Southern self-determina-

³³ *Supra* note 32.

³⁴ The writer believes that a gender lens can contribute to dismantling the systematic discrimination against South Sudan's women in the context of the civil war. The gender lens can also contribute to addressing the special interests of women in terms of justice and accountability that could be hidden if a blanket justice and accountability framework is to be developed.

³⁵ For full information on the Hybrid Court for South Sudan, see the Inter-Governmental Authority for Development, *Agreement on the Resolution of the Conflict in the Republic of South Sudan*(August.17,2015,4:00 PM), http://www.sudantribune.com/IMG/pdf/final_proposed_compromise_agreement_for_south_sudan_conflict.pdf.

³⁶ *Supra* note 33.

tion concerns including challenging “Islamisation and Arabisation”³⁷ were basic issues for the civil war between the North and South until the coming into effect of the Comprehensive Peace Agreement (CPA) in 2005.³⁸ This accord granted autonomy to the South under “a federal pact” though the request of the southerners was beyond a federal structure but to an absolute separation.³⁹ Understanding the North-South clash, including the way it was attempted to be resolved under the CPA, is the basis to better comprehend the ongoing South-South conflict and to provide better guidance to how it also needs to be resolved.⁴⁰ For example, there has never been a strong accountability mechanism in place to bring all parties to the table and address what the people of South Sudan want.

The present conflict can relate, in part, to the defects of the CPA in the context of what it tries to achieve. It also relates to the procedures it adopted towards implementing the outcomes it set out. The process voiced the views of few parties such as the National Congress Party (NCP) and the South Sudan People Liberation Movement in Opposition (SPLM/A) and there were those who felt left out from this process. These groups included the South Sudan Defense Forces (SSDF), and parties established in the North as well as civil society. For many South Sudanese, this was discriminatory and hence contributed to the reappearance of similar actions that the South originally fought for in the context of the civil war between the North and South.⁴¹

The environment for peaceful coexistence and unity in South Sudan started to vanish starting from 2009.⁴² There were disagreements within the party that forecast hostility among members of SPLM. An election was planned in South Sudan during this period. Many urged for the unity of vision for South Sudan in the context of the referendum that

³⁷ *Supra* note 36.

³⁸ *Id.*

³⁹ *Supra* note 38.

⁴⁰ *Id.* ¶44.

⁴¹ *Id.* ¶49.

⁴² *Id.* ¶549.

took place in 2010.⁴³ The conflict also connects to the personal relationship between the President and his Vice President. There were disagreements between the two before the election took place. Despite the existence of disagreements between these two high officials, it was deliberately left unrecognized aiming at keeping the harmony within the party from 2005–2011.⁴⁴ The SPLM split in 1991 and the accommodation of the SPLM leadership including receiving Riek Machar on his arrival were in part to blame for the negative relationship that passed to the South Sudan government after the country became independent.⁴⁵

It appears that for some time, there were two equally positioned governments and that the already existing political disparity within SPLM simply accentuated the emerging hostility between the two leaders. This was made worse when the government removed the cabinet in July 2013, which for others was a manifestation of the government's exclusion of some sections of the South Sudanese society from contributing to the country's agenda and further benefiting from the fruits of the country's independence.⁴⁶

During the meeting, SPLM held in December 2013 in South Sudan, many people believed that the tension that existed within the party including at a personal level was growing into one that could jeopardize the security of South Sudanese people.⁴⁷ It was also particularly clear that the Dinka and the Nuer would fight.⁴⁸ The conflict that began as political unrest then turned into more of a personal conflict with an ethnic dimension.⁴⁹ Here, it needs to be clear that the conflict is a response to many of the issues that persisted beginning from the civil war between South Sudan and North Sudan.⁵⁰

⁴³ *Supra* note 41.

⁴⁴ *Id* ¶50.

⁴⁵ *Id*.

⁴⁶ *Id* ¶52.

⁴⁷ *Id* ¶65.

⁴⁸ *Id*.

⁴⁹ *Id*.

⁵⁰ *Id* 49 ¶77.

Consequences of the Civil War in South Sudan

a) Humanitarian implications of the Civil War in South Sudan

The civil war had an overall impact on South Sudan in many aspects. According to recent data's about 2.4 million people are subjected to harsh starvation and 2.3 million South Sudanese were relocated.⁵¹ The humanitarian consequences that have been reported so far also include people "being burnt" in "worship places and hospitals." It also resulted in "mass burials."⁵² Many people who were shot experienced physical abuse including being forced to "jump into a lit fire." Some detained people were forced to "eat human flesh" or "forced to drink human blood."⁵³ The war also resulted in "extrajudicial killings (murder), including slaughter in conditions that are against the right to life."⁵⁴

The war further resulted violations of rights including the right to freedom of expression, and the right to equality as the conflict is of an ethnic type, which discriminated against civilians based on their race and ethnic origin. There was also enforced dislocation/removal of populations, the abduction of children connected with the war and used in "servitude and beaten," raiding, embezzling, and destruction of property. Properties belonging to humanitarian personnel were taken forcefully. The security of their person was violated, and they were prevented from operating peacefully.⁵⁵ Many people were also forcefully taken away from where they were living particularly during the beginning of the war.⁵⁶

b) Economic implication of the Civil War in South Sudan

⁵¹ United States Institute for Peace, *US Special Envoy for South Sudan Donald Booth Testimony before the Senate Committee* (Dec10, 2015), <http://www.usip.org/publications/2015/12/10/independent-south-sudan-failure-of-leadership>.

⁵² *Supra* note 50 ¶380.

⁵³ *Id.*

⁵⁴ *Id.* ¶382.

⁵⁵ *Id.*

⁵⁶ U.N Mission in South Sudan, *Interim Report on Human rights Crisis in South Sudan* (Dec 15, 2013- January 31, 2014), <http://unmiss.unmissions.org/Portals/unmiss/Documents/PR/Reports/HRD%20Interim%20Report%20on%20>.

Internally Displaced Persons (IDPs) in the Protection of Civilian (POC) site of the United Nations' mission in South Sudan in Bor and Juba were incapable of undertaking economic activities and their right to look for opportunities for employment and to contribute to economic activities without restraint was violated because of the war.⁵⁷ The structure of the state in South Sudan also had a paramount significance in terms of safeguarding economic justice as the issue of power sharing that includes delegation of power and decentralization was a fundamental issue of disagreement in the context of the war.⁵⁸ During the course of the war, private property was seized and damaged including homes of targeted Nuer by security forces and some other civilians.⁵⁹ Soldiers and civilians stole most business organizations run by nationals from abroad and international organizations.

c) Political implication of the Civil War in South Sudan

Looking into the political dimension of the war it is important to relate it to what existed among party members after the passing away of John Garang in 2005. This was soon after the endorsement of the Comprehensive Peace Agreement (CPA) and after he was nominated as Sudan's first Vice-President and President of South Sudan. He was replaced by the second in command within the SPLM, Salva Kiir Mayardit, who was not at the time of his election a politician but only a soldier. With regard to Salva Kiir, there were negative thoughts about his capacity to run South Sudan as a president. Garang was the mastermind behind the SPLM's "New Sudan' Platform" which is an expression for a better Sudan.

When Salva Kiir was nominated as president for South Sudan, what John Garang initiated as a dream for new Sudan was somehow left

⁵⁷ U.N Mission in South Sudan, Interim Report on Human rights Crisis in South Sudan (Dec 15, 2013–January 31, 2014), <http://unmiss.unmissions.org/Portals/unmiss/Documents/PR/Reports/HRD%20Interim%20Report%20on%2>.

⁵⁸ *Supra* note 55 ¶382.

⁵⁹ *Supra* note 55 ¶670, Amanda Sperber, South Sudan's Next Civil War is Starting (Jan 25, 2016), <http://foreignpolicy.com/2016/01/22/south-sudan-next-civil-war-is-starting-shilluk-army/>.

out.⁶⁰ The president was considered as discouraging the New Sudan Project when he initially began to replace those individuals close to Garang with his own people.⁶¹ This was made worse when those who replaced the Garang members of the SPLM were replaced in exchange for members belonging to the National Congress Party that is affiliated to Khartoum Sudan. This has contributed to the failure of South Sudan's Comprehensive Peace Agreement from the intended outcome politically. Hence, the political challenges for the government were multifaceted. He was facing challenges from those who supported John Garang and another from his Vice President Rich Machar who was promoting his own agenda.⁶² Many South Sudanese and external friends of South Sudan were calling for the government to go back to what it originally planned to achieve which included democracy, equality and human rights by embarking on a new constitutional regime.⁶³

This was much aggravated when the ruling president indicated his intention to run for president in the 2015 election. What has been the political question for many South Sudanese was the absence of clear political direction by the ruling government, and the absence of any discourse with regard to unity and prosperity for people of South Sudan.⁶⁴ By clearly rejecting the president's intention for the 2015 election, Rich Machar was himself hoping to be elected. This was what finally resulted in the dissolution of the entire cabinet in 2013 including the vice president. The absence of clear guidance by the president recently resulted in labeling ten existing states as "defunct" and replacing them with twenty-eight new ones. This restructuring has been viewed as a move towards systematically decentralizing powerful majorities of the Dinka tribe. It endangers the peace deal his government reached with Machar's opposition and the establishment of the transitional government through the

⁶⁰ Amanda Sperber, *South Sudan's Next Civil War is Starting* (Jan25, 2016), <http://foreignpolicy.com/2016/01/22/south-sudan-next-civil-war-is-starting-shilluk-army/>.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

existing ten states.⁶⁵

There is a belief from the ruling government that they have succeeded in the civil war and that the international community has imposed a peace deal on them. Through the proposition to establish twenty-eight states, the government wanted to validate its own guidance and political influence over how the peace deal ought to be implemented.⁶⁶

Systematic use of rape as a weapon of war in South Sudan

The type of sexual violence differs from one war to another and includes a form of sexual slavery in one conflict.⁶⁷ In some wars, state agents engaged in “sexualized torture” of women who are believed to be supporting insurgents. Again, in some conflicts, combatants use women of particular ethnic groups if there is an ethnic or political sanitization.⁶⁸ There were also wars where soldiers are involved in wartime rape by accident and use the opportunity to entertain themselves though their intention is not to use rape as a tool of warfare. In some settings, wartime rape exacerbates already existing patriarchal beliefs.⁶⁹

During the civil war, rape was used to instigate fear and degrade the public. Through wartime rape, soldiers were able to do whatever they want including burn houses, loot and manifest their control over the other ethnic group. The cultural and predominant view of women as her husband’s property in South Sudan clearly reflects that when a woman is raped during a conflict the act is intended to have an impact on the male counterpart or her community in general and not so much as a direct injury to her.⁷⁰ However, despite this biased view of women

⁶⁵ *Supra* note 64.

⁶⁶ *Id.*

⁶⁷ Elisabeth Jean Wood, *sexual violence during war: towards an understanding of variation*, in *Order Conflict and Violence*, 13 (Ian Shapiro, Stathis Kalyvas & Tarek Masoud eds., 2008).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

subjected to wartime rape, whether it occurs during wartime or peacetime, rape is a violent crime that also affects any women's self-respect and autonomy.

The extent and ruthlessness of sexual violence increased with the outbreak of the current conflict between the Sudan People's Liberation Army (SPLA) and the Sudan People's Liberation Movement/Army in Opposition on 15 December 2013.⁷¹ Frequent use of violence and its counter use have led to acts of vengeance attacks and rapes, often ethnically motivated.⁷² "Armed elements" have also raped women from adjacent countries because of their nationalities and alleged alliances with parties to the conflict.⁷³

According to the United Nations, in South Sudan 167 occurrences of conflict-related sexual violence affecting 236 persons were documented, including seventy-five affecting 116 minors.⁷⁴ Women and girls were under attack in ninety five percent of these cases.⁷⁵ Sexual violence including wartime rape has been reported in ten states to be a part of the military strategy used by both parties, mainly in "Unity, Upper Nile, Lakes, Jonglei, Central, Eastern and Western Equatorial and Western Bahr el Ghazal States."⁷⁶ Reported cases consist of rape including "penetration with objects."⁷⁷

Suspected perpetrators are affiliated to the Sudan People's Liberation Army (SPLA), South Sudan National Police Services (SSNPS) and oppo-

⁷¹ UN Secretary-General, *Report on Conflict-related sexual violence*: Rep. of the Secretary-General, ¶48, U.N.Doc. S/2015/20323 (March 2015).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Supra* note 75.

⁷⁷ *Supra* note 59 ¶¶659.

sition forces.⁷⁸ Civilians of both Nuer and Dinka were made the subject of these incidences.⁷⁹

Definition of wartime rape

The definition of wartime rape mainly depends on cases entertained by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Both of these courts have a distinct way of viewing wartime rape despite their commonality in what constitutes wartime rape. The definition applied by the ICC, which elaborates wartime rape in a document entitled “Rules of Procedure and Evidence” includes a combination of the elements of crime used in ICTY and ICTR cases. These are the *Akayesu*⁸⁰ and *Furundzija* cases.⁸¹ The definition provided by the *Akayesu* case is broader whereas the one presented in *Furundzija* case is a more specific definition of wartime rape. For the purpose of this paper, the researcher choose to use the definition used by ICTR as it has provided the widest definition of rape in international law and could result in better protection for women in the context of armed conflicts due to the nature of the crime. In *Akayesu*, the ICTR defined rape as:

Physical invasion of sexual in nature, committed on a person under circumstances that are coercive, sexual violence, which includes rape, is considered any act of a sexual nature which is committed on a person under circumstances which are coercive. This act must be committed: (a) as part of a widespread or systematic attack; (b) on a civilian population; (c) on certain catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious grounds.⁸²

⁷⁸ UN Secretary-General, *Report on Conflict-related sexual violence*: Rep. of the Secretary-General, ¶50, U.N.Doc. S/2015/20323(March 2015).

⁷⁹ *Supra* note 77 ¶536.

⁸⁰ Prosecutor v. Jean-Paul Akayesu, Case No.ICTR-96-4-T, Judgment,(September 2, 1998).

⁸¹ Prosecutor v. Anto Furundzija, Case No.IT-95-17/1-T, Judgment, (Int’lCrim. Trib.For the Former Yugoslavia December 10,1998).

⁸² Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgment, (September 2, 1998).

Defining victims of wartime rape

Defining victims of wartime rape in the context of South Sudan requires an understanding of two aspects of injury women experienced both ethnic and patriarchal. During and after any civil war, women within selected groups are subjected to injustice and violence including discrimination from public life and denial of access to services because of rape.⁸³ The first step towards understanding victimhood hence should be the recognition of the multilayer impact of rape for women in South Sudan.⁸⁴ There is also a need to understand the linkage between patriarchy and wartime rape.

The fact that discrimination against women with regard to protecting them from sexual violence is socially accepted particularly will have an additional impact for women who are raped in the context of conflicts. Wartime rape leads to greater fear and a sense of subordination. Hence, any justice and accountability mechanism while defining victim hood for women who are subject to wartime rape should encompass both “baseline patriarchy and targeted violence against ethnic groups.”⁸⁵

Elements of rape as a war crime

For wartime rape to happen there needs to be an abuse against the individual that is targeted through a forceful insertion of a sexual organ. It is important to note that wartime time rape can be committed even in the absence of a major incident if there is a minor sexual approach using the perpetrator’s sexual organ or an object. In addition, there are requirements to present evidence including proving the incident happened as

⁸³ David C. Gray and Benjamin A. Levin, *Feminist Perspectives on Extraordinary Justice*, in 13 *Series On Transitional Justice, Feminist Perspectives on Transitional Justice: From International and Criminal to Alternative Forms of Justice* 77-78 (Martha Albertson Fineman & Estelle Zinsstag eds., 2013).

⁸⁴ *Id.*

⁸⁵ *Supra* note 84.

well as the existence of an imminent threat to force including fear of abuse and imprisonment.⁸⁶

Evidence should also show the existence of psychological threats related to the use of one's superior power over others, including situations by which existing circumstances actually facilitate rape as that of protracted violence and conflicts. It also includes abuse using a person's situation such as his/her vulnerability, disability and incapacity hindering his/her free and full consent.⁸⁷

Consequences of wartime rape

a) Physical Consequences of Wartime Rape

Because of wartime rape, an unidentified number of women victims died. Some victims became pregnant and "mutilated."⁸⁸ Wartime rape also resulted in miscarriages caused by the severity of the abuse, as well as illness or death from unauthorized abortions. Women were also subject to sexually transmitted diseases.⁸⁹

b) Psychological Consequences of Wartime Rape

Wartime rape results in significant psychological impact on women. Victims experienced insomnia, depression, post-traumatic stress disorder, and further developed suicidal interests.⁹⁰ All of these symptoms are exacerbated by the absence of appropriate support services including health centers and counseling programs.⁹¹ Women who passed through wartime rape also hesitate to report

⁸⁶ International Criminal Court [ICC], *Elements of Crimes*, Article 8, UN Doc. PCNICC/2000/1/Ass 2(2000)

⁸⁷ *Id.*

⁸⁸ UN Secretary-General, *Report on Conflict-related sexual violence*: Rep. of the Secretary-General, ¶45, U.N. Doc. S/2015/20323 (March 2015).

⁸⁹ Naomi R. Cahn, *Women in Post conflict Reconstruction: Dilemmas and Directions*, 12 Wm. & Mary J. Women & L. 335, 359-360 (2006) (discussing the impacts of wartime rape on women).

⁹⁰ *Supra* note 89.

⁹¹ *Id.*

their rape. They are afraid of exclusion from their homes and communities.⁹²

c) Relational/Communal Consequences of Wartime Rape

During any armed conflict, women's movement is lesser than that of men, since their role is mainly at home taking care of their children and the elderly. This lack of mobility subjects them to greater abuse by soldiers coming to their village.⁹³ Women become unable to escape. In the context of South Sudan's civil war, due to the high number of men dying during the conflict women were obliged to take the roles played by their husbands such as supporting their family economically.⁹⁴

Unfortunately, women who conceived a baby through rape are completely left out by their families with no support for their day-to-day life. This contributed to trauma associated with the crimes and women's exclusion from public-decision making processes.⁹⁵ In addition to this, women who are not married and who actually become pregnant because of wartime rape tend not to be able to get husbands in the future. What is worse is the fact that mothers themselves will reject their children for being a reminder of what happened to them during the civil war.⁹⁶

⁹² *Supra* note 91.

⁹³ *Id.*

⁹⁴ Dunia Tegegn, Results of the Accountability Mechanisms and Women's Role in South Sudan's Peace building Survey (unpublished summary of data collected from the Accountability Mechanisms and Women's Role in South Sudan Survey conducted from Jan 2016-March 2016) (on file with author).

⁹⁵ African Union Commission (AUC), Final Draft Transitional Justice Framework (Feb 5, 2014) (unpublished AU Draft Transitional Justice Framework) (on file with the African Union Commission Department of Political Affairs).

⁹⁶ *Supra* note 89.

Understanding rape in the context of South Sudan's social and political situation

Within Southern Sudanese society the role and status of women is directly related to a culture that puts women as the core of the strength of the family. The male is the acknowledged master of his family. Marriage is on the other hand viewed as a means of strengthening the link between families and ethnic groups.⁹⁷ The role of women in this society is that of "cementing family ties through 'bride-wealth' and of producing children."⁹⁸ For many external audiences who believe in the equality of men and women, the status of women in this region is that of property.⁹⁹ Despite their positive values and their legacies, the cultural practices placed women in a subordinate position and their effects upon the women's dignity and equality is "repugnant and clamor for change."¹⁰⁰

Customary law has been the main source of governance and for the community to live together within the region. Over 90% of criminal disputes, including wartime rape, are executed under customary law.¹⁰¹ In the context of South Sudan, due to women's status as only the property of their husband, even young girls are married at an early age. The number of wives a man can marry in the region can go as high as 100.¹⁰² Moreover, in decision-making, current or previous administrations did not consider women as partners to the New South Sudan. This was clear from the 2005 Comprehensive Peace Agreement and during the appointment of governors for the newly established twenty-eight states

⁹⁷ *Supra* note 96.

⁹⁸ *Id.*

⁹⁹ World Vision International & the South Sudan Secretariat of Legal and Constitutional Affairs, A Study on Customary International Law in Contemporary South Sudan Report 7 (2004).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 54.

¹⁰² DuniaTegegn, Results of the Accountability Mechanisms and Women's Role in South Sudan's Peace building Survey (unpublished summary of data collected from the Accountability Mechanisms and Women's Role in South Sudan Survey conducted from Jan 2016-March 2016) (on file with author).

in 2015.¹⁰³ If women had been given a position in South Sudan, they could have contributed to the situation of other women and children.¹⁰⁴

In understanding the civil war, all groups “followed no rule” and for this reason, the Hybrid Court can be a good solution.¹⁰⁵

International, Regional and National Legal and Institutional Frameworks on Wartime Rape

Convention on the Elimination of Discrimination against Women (CEDAW) and the corresponding committee

The most authoritative gender specific law, the Convention on the Elimination of Discrimination against Women (CEDAW) is ratified by South Sudan in April 2015. CEDAW defines discrimination against women to include gender-based violence, that is, violence directed against a woman because she is a woman, or if an act affects women excessively. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.¹⁰⁶ In the context of the definition provided under Article 1 of CEDAW, wartime rape is a discrimination against women as it adversely affected women in the context it happened in South Sudan.

Article 2 of CEDAW on State Responsibility

While considering accountability in the context of sexual violence or any women’s rights issues, Article 2 of CEDAW is significant. Under Article 2, State parties are required to address all aspects of their legal obligations under the Convention to “respect, protect and fulfill” women’s right to non-discrimination and to the enjoyment of

¹⁰³ *Supra* note 102.

¹⁰⁴ *Supra* note 103.

¹⁰⁵ *Supra* note 104.

¹⁰⁶ Convention on the Elimination of All Forms of Discrimination against Women, art.1, G.A. res.34/180, U.N. GARO Supp. (No. 46) at 193, U.N. Doc A/34/180, entered in to force September 3, 1981, Available at <http://www.un.org/womenwatch/daw/cedaw/> (hereinafter CEDAW).