

PROSECUTING RAPE ATROCITIES IN TIGRAY: SHOULD THE INTERNATIONAL CRIMINAL COURT TAKE OVER THE CASE?

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Abstract

Thousands of women in Tigray have experienced massive atrocities of rape since early November 2020, the beginning of the wage of war between the Tigray People's Liberation Front and the Ethiopian Government. This article examines rape in Tigray as a war crime and analyzes the prospect of holding perpetrators criminally responsible before the International Criminal Court (ICC). This paper is legal research using the statutory, case, fact, and conceptual approaches. The result suggested that there exist war crimes of rape in Tigray. In order to achieve justice for the victims and the sake of a sense of the humanity of people over the world, the case must be tried before an impartial and reliable court, which in this regard, is the ICC. Facts that both Ethiopia and Eritrea are not state parties of the Rome Statute of the ICC do not prevent the case from being prosecuted before the ICC. The most potential means is that international society urges the United Nations Security Council to refer the present case before the ICC to hold the perpetrators criminally responsible.

Keywords: Prosecution; Rape; Tigray; War Crime; International Criminal Court

1. Introduction

Rape, as a nearly inevitable aspect of armed conflicts, has occurred throughout history,¹ forming a strategy in the conflict.² An armed conflict in Ethiopia that began in early November 2020 is a recent example of how rape becomes a black side of a war. A wave of rapes has been experienced by thousands of women in Tigray, a region in the northern territory of Ethiopia bordered by the state of Eritrea.³ One of the parties to the conflict is the Tigray People's Liberation Front (TPLF), which is a former rebel movement that forms 6% of the ethnic portion of Ethiopia and dominated Ethiopian politics for almost three decades before Abiy Ahmed took office as a Prime Minister in April 2018 and moved to centralize power. Moreover, reconfiguring the administering alliance into one party in 2019 has escalated tensions between Abiy's government and the Tigray regional authorities.⁴ The rift between Abiy and TPLF was

¹ Sherrie L. Russell-Brown, "Rape as an Act of Genocide," *Berkeley Journal of International Law* 21, no. 2 (2003): 350, <https://lawcat.berkeley.edu/record/1118668>.

² Michelle Lokot, "Challenging Sensationalism: Narratives on Rape as a Weapon of War in Syria," *International Criminal Law Review* 19 (2019): 2, https://brill.com/view/journals/icla/19/5/article-p844_844.xml.

³ The Editors of Encyclopaedia Britannica, "Tigray," *Britannica*, last modified 2015, accessed September 29, 2021, <https://www.britannica.com/place/Tigray-historical-region-Ethiopia>.

⁴ Human Rights Watch, "Ethiopia: Unlawful Shelling of Tigray Urban Areas," *Human Rights Watch*, last modified 2021, accessed June 14, 2021, <https://www.hrw.org/node/377842/printable/print>.

also deepened by the postponed national elections due to the COVID-19 pandemic, making TPLF held its election in Tigray in September 2020.⁵

On 4th November 2020, based upon the accusation that TPLF had attacked the Northern Command of Ethiopian National Defence Forces (ENDF) in Mekelle, Abiy announced that he had ordered the ENDF to wage war against the TPLF that Amhara Region Special Forces supported.⁶ Once Ethiopian military operations began, communications through phone and internet were quickly cut off in Tigray, making claims and counter-claims of violence hard to confirm.

Hospitals and aid agencies indicated that approximately thousands of women had been raped. However, they could not provide the actual number due to communication difficulties.⁷ Moreover, the conservative estimated number of victims of rape in Tigray is 10,000.⁸ As of 10th June 2021, outrages proceed to be committed, notably by the ENDF, the TPLF, Eritrean Defence Forces, Amhara regional special police and affiliated Fano militias. These include a rise in gender-based violence in the region, in which at least 22,500 survivors of sexual violence are estimated to seek clinical management of rape services.⁹

As confirmed by the United Nations Security Council (UNSC), many individuals reported that they had experienced rape under the threat of impending force, even forcing them to rape members of their families.¹⁰ In other circumstances, military forces also made several women forcibly have sex in exchange for fundamental commodities. In contrast, an increment in the request for emergency contraception and testing for sexually transmitted infections was indicated as the existence of sexual violence in conflict.¹¹ On 23rd March 2020, Abiy acknowledged that

⁵ Associated Press, “‘This Is Genocide’: Ethiopia Attempts to Erase Tigrayan Ethnicity,” *Daily Sabah*, last modified 2021, accessed June 14, 2021, <https://www.dailysabah.com/world/africa/this-is-genocide-ethiopia-attempts-to-erase-tigrayan-ethnicity>.

⁶ Amnesty International, *The Massacre in Axum* (London: Amnesty International, 2021), 5.

⁷ Omna Tigray, *Weaponized Sexual and Gender-Based Violence during the Genocidal War in Tigray*, 2021, 10, <https://omnatigray.org/wp-content/uploads/2021/05/April-2021-SGBV-Report.pdf>.

⁸ Europe External Programme with Africa, *Gender Based Violence in Tigray 08 March 2021 Special Briefing No. 3 Situation Report EEPA HORN*, 2021, 1, <https://www.eepa.be/wp-content/uploads/2020/11/Briefing-Gender-Based-Violence-in-Tigray-8-March-EEPA-Horn-No.-3-08-march-2021FIN.pdf>.

⁹ UNFPA Ethiopia, *Preparedness and Response Plan for the Tigray Crisis*, 2020, 5, https://ethiopia.unfpa.org/sites/default/files/resource-pdf/unfpa_tigray_crisis_preparedness_and_response_plan.pdf.

¹⁰ United Nations Security Council (UNSC), *Conflict-Related Sexual Violence*, 2021, para. 12.

¹¹ Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, “United Nations Special Representative of the Secretary-General on Sexual Violence in Conflict, Ms. Pramila Patten, Urges All Parties to Prohibit the Use of Sexual Violence and Cease Hostilities in the Tigray Region of Ethiopia,” *United Nations*, last modified 2021, accessed June 14, 2021, <https://www.un.org/sexualviolenceinconflict/press-release/united-nations-special-representative-of-the-secretary-general-on-sexual-violence-in-conflict-ms-pramila-patten-urges-all-parties-to-prohibit-the-use-of-sexual-violence-and-cease-hostilities-in-the>.

“atrocities were being committed by raping women” and guaranteed a punishment to the alleged perpetrators. However, neither civilian nor military prosecutors have charged the perpetrators.¹²

Framing through the international criminal law perspective, this article aims to examine whether or not the rapes that occurred in Tigray qualified as a crime under the Rome Statute of the International Criminal Court [Rome Statute]. Rome Statute was adopted by the United Nations Diplomatic Conference of Plenipotentiaries in Rome in 1998 and entered into force on July 1, 2002, after 60 countries ratified it. It established the International Criminal Court (ICC) as a permanent court to prosecute individuals for the most severe crimes of international concern, including genocide, crimes against humanity, war crimes, and the crime of aggression. As a further examination, this article will also analyze the prospect of holding the prosecution against the responsible individuals for the crime of rape committed in Tigray before the ICC.

This article is written by applying a normative legal research method. It conducts a literature study using statutory, fact, case, and conceptual approaches. The statutory approach seeks relevant international legal documents related to the case discussed, including the Rome Statute, Elements of Crimes, and resolutions adopted by the United Nations Security Council. Besides, the fact approach is used in exploring and identifying facts related to the situation in Tigray, as provided in accessible sources. The use of the case approach is aimed at enriching the legal analysis of this article, particularly by reading some case laws of previous court decisions thoroughly. Lastly, a conceptual approach is used to clarify the term, concept, and legal notions, as provided in textbooks, journal articles, and website contents.

2. Discussion

2.1. Rape in Tigray as Part of War Crime under the Rome Statute

Rape can be found in three crimes under the Rome Statute, namely genocide, crimes against humanity, and war crimes. Rape during a genocide might be prosecuted under the genocide provision of causing serious bodily or mental harm to members of a specific group within the meaning of Article 6(3) of the Rome Statute. If rape is committed widely and systematically against any civilian population, it may amount to crimes against humanity as outlined in Article 7(g) of the Rome Statute. However, as rape in Tigray occurred during a non-

¹² Katharine Houreld, “Health Official Alleges ‘Sexual Slavery’ in Tigray,” *Reuters*, last modified 2021, accessed June 14, 2021, <https://www.reuters.com/world/special-report-health-official-alleges-sexual-slavery-tigray-women-blame-2021-04-15/>.

international armed conflict with forces as the perpetrators, the severity and scale of the rape are most likely amounting to war crimes under Article 8(2)(e)(vi)-1 of the Rome Statute.

As the primary legal basis before the ICC,¹³ the Elements of Crimes of the Rome Statute provides the following terms to define the war crime of rape (Article 8(2)(e)(vi)-1): 1) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or the perpetrator with a sexual organ or of the anal or genital opening of the victim with any object or any other part of the body; 2) The invasion was committed by force or by the threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent; 3) The conduct occurred in the context of and was associated with a non-international armed conflict; and, 4) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

As governed in the above provision, the following examination will assess whether or not rape in Tigray constitutes a war crime:

2.1.1. Non-international Armed Conflict Exists in Tigray

Pursuant to the judgment of *Tadić* case,¹⁴ A non-international armed conflict is indicated through protracted armed violence involving governmental authorities and organized armed groups.¹⁵ Accordingly, intense hostilities that constitute protracted armed violence and a sufficient degree of organization that establishes an organized armed group need to be fulfilled.¹⁶ Moreover, as affirmed in *Rutaganda*,¹⁷ and *Orić*,¹⁸ A case-by-case basis is used to answer whether these criteria have been fulfilled. In this regard, the classification of the conflict in Tigray will be identified through the following examination.

¹³ Alessandro Storchi, "Sexual Slavery as a War Crime: A Reform Proposal," *Michigan Journal of International Law* 42, no. 2 (2021): 369–402, <https://repository.law.umich.edu/mjil/vol42/iss2/5/>.

¹⁴ ICTY, *Prosecutor v. Tadić (Case No. IT-94-I-T)*, 562 (1997).

¹⁵ Adil A. Haque, "Whose Armed Conflict? Which Law of Armed Conflict?," *Georgia Journal of International & Comparative Law* 45, no. 3 (2017): 485, <https://digitalcommons.law.uga.edu/gjicl/vol45/iss3/3/>.

¹⁶ Agnieszka Szpak, "Legal Classification of the Armed Conflict in Ukraine in Light of International Humanitarian Law," *Hungarian Journal of Legal Studies* 58, no. 3 (2017): 261–280, <https://akjournals.com/view/journals/2052/58/3/article-p261.xml>; Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford: Oxford University Press, 2012).

¹⁷ International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Rutaganda (ICTR-96-3-T)*, 93 (2010).

¹⁸ ICTR, *Prosecutor v. Orić (IT-03-68-T)*, 254 (2006).

2.1.1.1. The intensity of the Conflict in Tigray

There are various relevant factors used in assessing the intensity of a conflict, including serious attacks with increasing fighting over territory for a period of time; the increase of government forces; the use of formidable weapons and military equipment; a large number of casualties; the number of troops participating in the fighting; the extent of material destruction; and the number of civilians fleeing.¹⁹

Since Abiy launched a military attack against the TPLF on 4th November 2020, intense hostilities in Tigray have been ongoing. The intensity of the hostilities in Tigray may be identified in Table 1. Aside from those hostilities, it is also reported that many refugees in Tigray have been the victim of the conflict. They were forced to return to Eritrea or even were killed shown in Table 1; intense hostilities equipped with heavy weapons have occurred since the outbreak of the conflict. Aside from those hostilities, it is also reported that many refugees in Tigray have been the victims of the conflict. They were forced to return to Eritrea or even were killed.²⁰ As of 9th November 2020, 600 civilians casualties were found in Mai Kadra.²¹ Moreover, as of 22nd December 2020, it was reported that only within six weeks, thousands of refugees had escaped the Tigray region and went to eastern Sudan'.²² Therefore, the conflict in Tigray has met the degree of intensity.

2.1.1.2. TPLF is an Organized Armed Group

Organized armed groups must exercise control over territory, be able to operate their military, as well as to recruit, train, and equip combatants.²³ Moreover, as ruled by the ICTY in *Prlić* case, an organized armed group also requires the existence of a chain of command of a group that may be indicated if the commanding officers at each level of the hierarchy have the authority to supervise, coordinate, and command the units of the armed forces placed under their responsibility.²⁴

¹⁹ Jann K. Kleffner, "The Legal Fog of an Illusion: Three Reflections on 'Organization' and 'Intensity' as Criteria for the Temporal Scope of the Law of Non-International Armed Conflict," *International Law Studies* 95 (2019): 165, <https://digital-commons.usnwc.edu/ils/vol95/iss1/5/>.

²⁰ International Crisis Group, "Crisis Watch," *International Crisis Group*, last modified 2020, accessed June 22, 2021, <https://www.crisisgroup.org/crisiswatch>.

²¹ Ethiopian Human Rights Commission, "Tigray: Maikadra Massacre of Civilians Is a Crime of Atrocity," 2020.

²² UNHCR, "UNHCR and Partners Urgently Seek US\$156 Million to Support Refugees Fleeing Ethiopia's Tigray Crisis," *UNHCR*, last modified 2020, accessed June 22, 2021, <https://www.unhcr.org/news/briefing-notes/unhcr-and-partners-urgently-seek-us156-million-support-refugees-fleeing>.

²³ International Criminal Court (ICC), *Prosecutor v. Lubanga (ICC-01/04-01/06-803-TEN)*, 232 (2007).

²⁴ International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Jadranko Prlić (IT-04-74-T)*, 232 (2013).

The TPLF was established by a small group of individuals in 1975 in Dedebit, northwestern Tigray.²⁵ Since the early 1990s, Ethiopia's political, economic, and military aspects were dominated by the TPLF 1990s until Abiy took office in 2018. Being led by Debretsion Gebremichael, TPLF controls the northern part of the Tigray region, which is described as the "womb" of the nation to fight against Abiy's government.²⁶ Moreover, its huge military and organizational capability are demonstrated through the training of its special military forces since 2018 and the existence of approximately 250,000 troops from a large well-drilled paramilitary force and the local militia.²⁷ With regard to their military operations, several missile attacks and ground operations have been launched against the Ethiopian military and Amhara regional forces and militias.²⁸ The organization's degree of the TPLF is further confirmed by the fact that they exercise a military capacity outside its controlled territory, such as the Eritrean capital.²⁹ Consequently, TPLF is sufficiently organized. For the preceding reasons, the conflict in Tigray is classified as a non-international armed conflict.

2.1.2. The Perpetrator Invaded the Tigrayan Women Through Penetration

Numerous cases in international criminal tribunals such as *Prlić*,³⁰ *Karadžić*,³¹ and *Nyiramasuhuko*³² ruled that rape is constituted by sexual penetration that occurs with a lack of the victims' consent, even if it is partially committed. Moreover, it is ruled that rape is being committed under the circumstances where sexual penetration of the victim's sexual organ is committed by the rapist's penis or any other object or sexual penetration of the victim's mouth by the rapist's penis.³³ Furthermore, it is affirmed in the *Bemba* case that both males and/or females

²⁵ Bamlak Yideg and Peteti Premanandam, "The 1976 TPLF Manifesto and Political Instability in Amhara Region, Ethiopia," *Research Review International Journal of Multidisciplinary* 4, no. 1 (2019): 300.

²⁶ BBC News, "Ethiopia's Tigray Crisis: Debretsion Gebremichael, the Man at the Heart of the Conflict," *BBC News*, last modified 2020, accessed June 22, 2021, <https://www.bbc.com/news/world-africa-54972908>.

²⁷ International Crisis Group, "Clashes over Ethiopia's Tigray Region: Getting to a Ceasefire and National Dialogue," *International Crisis Group*, last modified 2020, accessed June 22, 2021, <https://www.crisisgroup.org/africa/horn-africa/ethiopia/ethiopias-clash-tigray-getting-ceasefire-and-national-dialogue>.

²⁸ Human Rights Watch, "Q&A: Conflict in Ethiopia and International Law," *Human Rights Watch*, last modified 2020, accessed June 14, 2021, <https://www.hrw.org/news/2020/11/25/qa-conflict-ethiopia-and-international-law>.

²⁹ BBC News, "Ethiopia Tigray Crisis: Rockets Hit Outskirts of Eritrea Capital," *BBC News*, last modified 2020, accessed June 22, 2021, <https://www.bbc.com/news/world-africa-54942546>.

³⁰ International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Jadranko Prlić (IT-04-74-T)*, para. 69.

³¹ ICTY, *Prosecutor v. Radovan Karadžić (IT-95-5/18-T)*, 511 (2016).

³² ICTR, *Prosecutor v. Nyiramasuhuko et al (ICTR-98-42-T)*, 6075 (2011).

³³ International Criminal Tribunal for the Former Yugoslavia (ICTY), *Prosecutor v. Jadranko Prlić (IT-04-74-T)*, para. 69.

may be the victims and perpetrators of invasion, which also includes same-sex penetration.³⁴ In Tigray, the evidence of rapes committed towards Tigrayan women during the conflict can be gleaned through Table 2.

As shown in Table 2, rapes were harshly committed against Tigrayan women. However, they are only a few of the thousands of rape victims in Tigray, since many other victims do not make a report due to the lack of healthcare infrastructure and police, as well as the fear of getting punished and further attacked.³⁵ Therefore, it is indisputable to conclude that rapes have occurred in Tigray.

2.1.3. Forces Committed Rape

As ruled by the ICC in the *Bemba* case, in proving the existence of a war crime of rape, it is necessary to assess that the invasion of rape is committed by force, the threat of force, taking advantage of a coercive environment, or committed against any person who is not capable of giving genuine consent.³⁶ Furthermore, as ruled in the *Sesay* case,³⁷ the fact that the invasion of rape is committed by force or the threat of force genuinely constitutes indisputable proof of the lack of consent.

In Tigray, there were reports of family members threatened by forces to rape one another or force family members to witness the rape process directly.³⁸ The reports indicated that the rapes were committed by Eritrean forces, Amhara forces, and ENDF, as further stipulated in Table 3. As shown in Table 3, soldiers raped Tigrean women tragically. Insecurity insight indicates that the perpetrators were usually armed with firearms and raped women at unknown military camps.³⁹ Accordingly, there is no doubt that forces committed rapes.

2.1.4. The perpetrator possessed an awareness of the non-international armed conflict in Tigray

To prove a commission of war crimes, the Prosecutor needs to prove that the perpetrator possesses the awareness (*mens rea*) of the factual circumstances that established the existence of an armed conflict (Elements of Crimes to the Rome Statute of the International Criminal Court, Article 8). As found in the judgment of *Boškoski and Tarčulovski* case, this requirement has been

³⁴ ICC, *Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05 -01/08), 99–101 (2016).

³⁵ Omna Tigray, *Weaponized Sexual and Gender-Based Violence during the Genocidal War in Tigray*, 15.

³⁶ ICC, *Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05 -01/08), 102–109.

³⁷ Special Court For Sierra Leone, *Prosecutor v. Issa Hassan Sesay, Morris Kallon, Augustine Gbao* (Case No. SCSL-04-15-A), 147 (2009).

³⁸ Omna Tigray, *Weaponized Sexual and Gender-Based Violence during the Genocidal War in Tigray*, 12.

³⁹ Insecurity Insight, *Sexual Violence in Ethiopia's Tigray Region* (Geneva, 2021), <https://insecurityinsight.org/wp-content/uploads/2021/03/Sexual-Violence-in-Ethiopia-Tigray-Region-30-March-2021.pdf>.

fulfilled because Boškoski was issuing orders, press releases concerning military activities and was on the ground regularly.⁴⁰

Similarly, Abiy acknowledged that he had ordered the ENDF to wage war against the TPLF and was supported by the Amhara Region Special Forces.⁴¹ Moreover, Ethiopia's military has declared that it has forcibly entered an "unexpected and aimless war" with its Tigray region and has mobilized its troops.⁴² Further stated by Ethiopia's deputy army chief that there had been months of continued provocations and incitement of violence by the TPLF, indicating protracted hostilities.⁴³ Accordingly, there is no doubt to conclude that the *mens rea* requirement is satisfied.

2.2. Prosecuting War Crime of Rape in Tigray before the ICC

In order to prosecute the accused of grave crimes before the ICC, jurisdiction, and admissibility of the case need to be assessed.⁴⁴

2.2.1. The Role of UNSC Referral in the ICC's Jurisdiction

The ICC embraces its jurisdiction against individuals.⁴⁵ Rome Statute holds the ICC jurisdiction as follows: ***firstly***, criminal/material jurisdiction (*ratione materiae*); ***secondly***, temporal jurisdiction (*ratione temporis*); ***thirdly***, territorial jurisdiction (*ratione loci*); and ***lastly***, personal jurisdictions (*ratione personae*).⁴⁶ The subject matter jurisdiction of the ICC comprises the most serious crimes of international concern, as set out in Article 5 of the Rome Statute: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; and (d) The crime of aggression. Temporally, jurisdiction implies that the Court can only obtain its jurisdiction over the crimes committed after the entry into force of the Rome Statute (1 July 2002) in line with the provision under Article 11 of the Rome Statute. Territorially, as governed in Article 12(2) of the

⁴⁰ ICTY, *Prosecutor v. Ljube Boškoski and Johan Tarčulovski (IT-04-82-T)*, 295 (2008).

⁴¹ Amnesty International, *The Massacre in Axum*, 5.

⁴² Andy Gregory, "Ethiopia 'at War' with Leaders of Tigray Region, Military Declares," *Independent*, last modified 2020, accessed June 23, 2021, <https://www.independent.co.uk/news/world/africa/ethiopia-civil-war-tigray-tplf-abiy-latest-b1627418.html>.

⁴³ Mishal Murad, "The Ethiopian Conflict Explained," *Research Society of International Law (RSIL)*, last modified 2021, accessed June 23, 2021, <https://rsilpak.org/2021/the-ethiopian-conflict-explained/>.

⁴⁴ Ayumary M. Fitzgerald, "Crimes Against Humanity in Venezuela: Can the ICC Bring Justice to Venezuelan Victims?," *University of Miami International and Comparative Law Review* 26, no. 1 (2018): 131, <https://repository.law.miami.edu/umiclrvol26/iss1/5/>.

⁴⁵ I Made Pasek Diantha, *Hukum Pidana Internasional Dalam Dinamika Pengadilan Pidana Internasional* (Jakarta: Prenada Media Group, 2014), 151.

⁴⁶ William A. Schabas, *An Introduction to the International Criminal Court* (United Kingdom: Cambridge University Press, 2001), 55.

Rome Statute, the Court's jurisdiction is limited to the territory of a State Party (territorial jurisdiction) or over the nationals of a State Party (personal jurisdiction).

In this case, rape is categorized as a war crime that occurred since 2020, and the material and temporal jurisdictions of the Court have been fulfilled. The Court cannot automatically proceed with the case even if the material and temporal jurisdiction have been met. There are some possibilities for the case to proceed before the ICC. First of all, it requires a referral from a State party (Rome Statute, Article 13(a), (c)). This is not an option because neither Ethiopia nor Eritrea has ratified the Rome Statute (Rome Statute, Article 13(a), (c)). However, suppose the country is not a party to the Rome Statute and cannot prosecute the perpetrator. In that case, the UNSC can issue a resolution referring the case to the ICC, neglecting territorial and personal jurisdiction (Rome Statute, Article 13(b)). Remember that adopting a resolution in the UNSC is a political decision amongst its permanent and non-permanent members. Another option is that the Prosecutor may initiate an investigation on his initiative (*proprio motu*) that serves as insurance for justice for the victims.⁴⁷

The ICC has conducted several proceedings of the cases in the situations referred by the UNSC, including *Al Bashir* case and *Gaddafi* case.⁴⁸ In the case of *Al Bashir*, the ICC authorized its jurisdiction pursuant to UNSC Resolution 1593, which was issued on 31st March 2005, in which this resolution referred the situation in Darfur to the Prosecutor of the ICC.⁴⁹ Furthermore, in the proceeding of *Gaddafi*, the ICC used UNSC Resolution 1970, which referred the situation in Libyan Arab Jamahiriya to the ICC Prosecutor as a basis to take further legal proceedings actions against Gaddafi.⁵⁰ One of the factors of the referral by UNSC to the ICC Prosecutor is that neither Sudan nor Libya is a party to the Rome Statute.⁵¹ Accordingly, to exercise the jurisdiction of the ICC over the war crimes of rape in Tigray requires the UNSC's referral of the case to the ICC Prosecutor.

⁴⁷ Belardo Prasetya Mega Jaya and Ariesta Wibisono Anditya, "Effectiveness Of The International Criminal Court's Jurisdiction In Impunity Prevention," *Justitia et Pax* 36, no. 1 (2020): 1–22, <https://ojs.uaaj.ac.id/index.php/justitiaetpax/article/view/2966>; Madeline Morris, "The Jurisdiction Of The International Criminal Court Over Nationals Of Non-Party States (Conference Remarks)," *ILSA Journal of International & Comparative Law* 6, no. 2 (2000): 363–369, <https://nsuworks.nova.edu/ilsajournal/vol6/iss2/8/>; Daniel Benoliel and Ronen Perry, "Israel, Palestine, and the ICC," *Michigan Journal of International Law* 32, no. 1 (2010): 73–127, <https://repository.law.umich.edu/mjil/vol32/iss1/2/>.

⁴⁸ Teuku Muktasim and Mahfud Mahfud, "Juridical Analysis Of The Implications Of Security Council Referral In Regards To The Obligation Of Non-State Parties To Cooperate With The International Criminal Court," *Jurnal Ilmiah Mahasiswa Bidang Hukum Pidana* 3, no. 1 (2019): 100, <https://jim.usk.ac.id/pidana/article/view/15576>.

⁴⁹ UN Security Council, *Resolution 1593. S/RES/1593 (2005)*, 2005, para. 1.

⁵⁰ UN Security Council, *Resolution 1970. S/RES/1970 (2011)*, 2011, para. 4.

⁵¹ United Nations, *Penal Matters of the Rome Statute of the International Criminal Court* (Treaty Collection, 2021).

2.2.2. The Case in Tigray Is Admissible

The admissibility of a case before the ICC is governed under Article 17 of the Rome Statute, which requires the existence of complementarity and gravity elements. The following examination will identify whether or not the crimes of rape in Tigray fulfill the threshold of admissibility.

2.2.2.1. Complementarity

Rome Statute emphasizes that the ICC shall complement national criminal jurisdiction (Rome Statute, preamble paragraph 10; Article 1). The threshold of complementarity is met when a state has no willingness or ability to prosecute the perpetrators within its jurisdiction.⁵² An assessment of concrete facts is also necessary to prove that a state has no ability or willingness to prosecute the perpetrators.⁵³ Under Article 17 of the Rome Statute, the determination of unwillingness may be indicated if there has been an unjustified delay or inconsistent manner with an intent to bring the person concerned to justice. Moreover, the inability of a State is met when its national judicial system is collapsed or unavailable to carry out the proceedings. Similarly, in *Gaddafi* case the inability of Libya to exercise its judicial powers was found as the national judicial system was “unavailable” within the meaning of Article 17(3) of the Rome Statute.

Presently, even though both Eritrea and Ethiopia have jurisdiction to conduct the prosecution against the perpetrators of the crimes of rape as promised by Abiy,⁵⁴ Eritrea lacks the rule of law, a constitution, and an independent judiciary to deal with grave human rights violations.⁵⁵ Likewise in Ethiopia, the government has failed to use its national criminal justice system to investigate the perpetrators of the alleged crimes.⁵⁶ These indicate that both Eritrean

⁵² Emma Irving, “The Other Side of the Article 21(3) Coin: Human Rights in the Rome Statute and the Limits of Article 21(3),” *Leiden Journal of International Law* 32, no. 4 (2019): 845, <https://www.cambridge.org/core/journals/leiden-journal-of-international-law/article/other-side-of-the-article-213-coin-human-rights-in-the-rome-statute-and-the-limits-of-article-213/B48B305A27B512600E635542C4A4AB61>.

⁵³ ICC, *Prosecutor v. Joseph Kony et Al*, ICC-02/04-01/05-377, 49–52 (2009).

⁵⁴ Houreld, “Health Official Alleges ‘Sexual Slavery’ in Tigray.”

⁵⁵ Office of the United Nations High Commissioner for Human Rights (OHCHR), “Statement of the Special Rapporteur on the Situation of Human Rights Situation in Eritrea, Mr Mohamed Abdelsalam Babiker,” *Office of the United Nations High Commissioner for Human Rights (OHCHR)*, last modified 2021, accessed July 1, 2021, <https://www.ohchr.org/en/statements/2021/02/statement-special-rapporteur-situation-human-rights-situation-eritrea-mr-mohamed?LangID=E&NewsID=26795>.

⁵⁶ Tedros Amanuel, “Pursuant to Article 15 of the Rome Statute of the International Criminal Court, an Open Communication to Office of the Prosecutor (OTP), on Grave Violations of Human Rights in the Tigray Region of Ethiopia, Falling within the Jurisdiction of the Internati,” *Aigaforum*, last modified 2021, accessed July 1, 2021, <http://aigaforum.com/article2021/Open-letter-to-the-Office-of-the-Prosecutor-of-the-ICC.htm>.

and Ethiopian legal authorities remain to have no ability and willingness to conduct prosecution against the perpetrators of the alleged war crimes of rape in the Tigray region.⁵⁷

2.2.2.2. Gravity

The gravity of the case is assessed through quantitative and qualitative considerations:⁵⁸ quantitatively, by the number of victims or damage, and the geographical or temporal spread, and qualitatively, by nature and the manners of the alleged unlawful behavior.

Quantitatively, the gravity of the crimes of rape in Tigray is proven as the number of victims has amounted to more than 10.000 women.⁵⁹ Moreover, the geographical and temporal spread of the crime may be seen through: **First**, Information obtained from the east of the Tigray region indicates more than 136 cases of rape occurred from December 2020 until January 2021.⁶⁰ **Second**, over 174 rape survivors were found in Adigrat, Tigray.⁶¹ **Third**, as of March 2021, five medical facilities in Tigray have reported approximately 516 rape cases.⁶² Qualitatively, the facts that the military camps are surrounded by a macabre party atmosphere, in which the perpetrators poured alcohol over the wounds of the victims and danced standing over them⁶³ and they were joking around and taking pictures of the victims⁶⁴ are sufficient to conclude that rapes in Tigray were committed intentionally with unlawful behavior. Thus, the crimes of rape in Tigray have sufficient gravity to be admissible before the ICC.

⁵⁷ Arie Siswanto, “Pengadilan Hibrida (Hybrid Court) Sebagai Alternatif Penanganan Kejahatan Internasional,” *Refleksi Hukum: Jurnal Ilmu Hukum* 10, no. 1 (2016): 38, 42, <https://ejournal.uksw.edu/refleksihukum/article/view/536>.

⁵⁸ Sascha Dominik Dov Bachmann and Eda Luke Nwibo, “Pull and Push’- Implementing the Complementarity Principle of the Rome Statute of the ICC within the AU: Opportunities and Challenges,” *Brooklyn Journal of International Law* 43, no. 2 (2018): 489, <https://brooklynworks.brooklaw.edu/bjil/vol43/iss2/10/>.

⁵⁹ Europe External Programme with Africa, *Gender Based Violence in Tigray 08 March 2021 Special Briefing No. 3 Situation Report EEPA HORN*, 1.

⁶⁰ Office of the United Nations High Commissioner for Human Rights (OHCHR), “Ethiopia: Persistent, Credible Reports of Grave Violations in Tigray Underscore Urgent Need for Human Rights Access – Bachelet,” *Office of the United Nations High Commissioner for Human Rights (OHCHR)*, last modified 2021, accessed June 21, 2021, <https://www.ohchr.org/en/2021/03/ethiopia-persistent-credible-reports-grave-violations-tigray-underscore-urgent-need-human?LangID=E&NewsID=26838>.

⁶¹ Europe External Programme with Africa, *Gender Based Violence in Tigray 08 March 2021 Special Briefing No. 3 Situation Report EEPA HORN*.

⁶² Michelle Nichols, “Men Forced to Rape Family Members in Ethiopia’s Tigray, U.N. Says,” *Reuters*, last modified 2021, accessed June 14, 2021, <https://www.reuters.com/article/us-ethiopia-conflict-un/men-forced-to-rape-family-members-in-ethiopias-tigray-u-n-says-idUSKBN2BH2ZC>.

⁶³ Lucy Kassa and Anna Pujol-Mazzini, “‘We’re Here to Make You HIV Positive’: Hundreds of Women Rush to Tigray Hospitals as Soldiers Use Rape as Weapon of War,” *The Telegraph*, last modified 2021, accessed June 14, 2021, <https://www.telegraph.co.uk/global-health/women-and-girls/make-hiv-positive-hundreds-women-rush-tigray-hospitals-soldiers/>.

⁶⁴ Omna Tigray, *Weaponized Sexual and Gender-Based Violence during the Genocidal War in Tigray*.

Table 1.
Intense Hostilities in Tigray

Time	Event	Result in death, injury, or damage
November 7, 2020	Shelling along the border of the Amhara and Tigray region	Six (6) people were killed, and over 60 combatants were wounded.
November 9, 2020	Artillery attacks in Humera.	Residential areas in the Kebele 02 neighborhood were damaged, 46 people were killed, and 200 people were wounded.
November 17, 2020	Artillery attacks in Sihre	Ten (10) civilians were killed, businesses and homes were damaged.
November, 28, 2020	Artillery attacks in Mekelle	Twenty-seven (27) civilians were killed and over 100 civilians were injured.

Source: Human Rights Watch, “Ethiopia: Unlawful Shelling of Tigray Urban Areas”, <https://www.hrw.org/news/2021/02/11/ethiopia-unlawful-shelling-tigray-urban-areas>, (February 11, 2021).

Table 2.
Evidence of Rapes in Tigray

Duration	Event	Victim
Eleven days	Rape was committed by forcing cotton, plastic bags, and rocks into the vagina.	A 27-year-old mother
Ten days	Rape was committed in a camp with other female captives.	A 32-year-old mother in Mekelle
Two weeks	Rape was committed by more than ten soldiers located in a field outside a military base.	A 28-year-old house cleaner
Two weeks	Gang-raped	A woman named Mehrawit
Two weeks	Rape in a military camp	A woman named Tirhas from Mekelle
Three days	Gang-raped in the forest	A woman named Selam and 17 other women

Source: OMNA Tigray, *Report Weaponized Sexual and Gender-Based Violence during the Genocidal War in Tigray*, (2021).

Table 3.
Evidence of Rapes Committed by Forces and by the Threat of Force

Event	Victim	Perpetrator
A grandfather was ordered to rape his granddaughter	A grandfather and a daughter in Abiy Addi	Ethiopian soldier
A husband was forced to kneel and watch while soldiers raped his wife	A married couple	Eritrean soldiers
Gang-raped	A woman and five other women	Eritrean soldiers
Gang-raped	A woman named Mehrawit	Eritrean soldiers
Gang-raped by in her home in Humera city	A 13-year-old girl	Amhara forces
Gang-raped in the forest	A woman named Selam and 17 other women	Eritrean soldiers
Rape in a military camp	A woman named Tirhas from Mekelle	Ethiopian soldiers

Source: OMNA Tigray, *Report Weaponized Sexual and Gender-Based Violence during the Genocidal War in Tigray*, (2021); Insecurity Insight, *Sexual Violence in Ethiopia’s Tigray Region*, (March 30, 2021).

3. Conclusion

From the above examination, it can be concluded that the rapes of Tigrayan women are subject to the war crimes of rape, considering the following aspects: First, invasion through sexual penetration towards the victims is proven; Second, the invasion was committed by Eritrean, Ethiopian, and Amhara forces; Third, the rapes were perpetrated during the occurrence

of non-international armed conflict, indicated by the intense hostilities and the degree of organization of the TPLF; and Fourth, the perpetrators possessed the awareness of the existence of the non-international armed conflict.

Regarding prosecuting the perpetrators before the ICC, the ICC may obtain its jurisdiction as the crimes fall within its material jurisdiction and have met the admissibility threshold. This can be examined as follows: First, Eritrean and Ethiopian legal authorities have no ability or willingness to prosecute the perpetrators of the alleged war crime in the Tigray region and thus has led to the fulfillment of the complementarity element; Second, the gravity of the crimes has also been met through quantitative and qualitative assessment; and Third, considering that both Ethiopia and Eritrea are not state parties of the Rome Statute of the ICC, the UNSC may play a vital role to refer the present case before the ICC to hold the perpetrators criminally responsible. Therefore, the crimes of rape in Tigray are subject to the war crime of rape under the Rome Statute and need further investigation by the ICC.

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