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# IBA Interns' Newsletter

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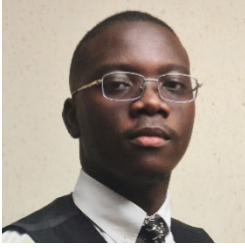


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Adetomiwa  
Fowowe

# Balancing state sovereignty and humanitarian intervention: an analysis of the responsibility to protect principle

## Introduction

The responsibility to protect (R2P) principle has emerged as one of the major areas of interest in international relations following its approaches towards humanitarian intervention in the context of sovereignty. This article will explore the application of R2P through case studies of Libya in 2011, Rwanda in 1994, and Kosovo in 1999. Through these events, the intrinsic nature and ethical issues that may come with the use of R2P will be brought to the surface.

## Concept of R2P principle

The principle that informs the concept of R2P is that sovereignty entails the responsibility of the protection of individuals from genocide, war crimes, ethnic cleansing and crimes against humanity.<sup>1</sup> If this responsibility is not met, the global community has the duty to engage, through dictation, aid and assistance, and finally, force.<sup>2</sup> R2P emerged in the late 1990s after the genocide in Rwanda and the war in the former Yugoslavia and was given full recognition at the UN World Summit in 2005.<sup>3</sup> It is structured around three pillars:<sup>4</sup> the duty of states to safeguard their populations; the duty of international society to help a state fulfil the former duty; and the right of intervention when the country is failing to discharge the duty.

## Case studies

The following case studies shall be used to exemplify the densities of implementing the R2P principle in the further analysis of this discourse.

## *Libya 2011*


Civil conflict in Libya started at the beginning of 2011 with the Arab Spring revolutions when people revolted against the despotism of Muammar Gaddafi.<sup>5</sup> Due to the social unrest that ensued, the government used forceful means and deployed the army which committed genocide against the citizens, resulting into the invocation of R2P by the international community. The United Nations (UN) Security Council allowed military force and involving air strikes meant for the protection of civilians.<sup>6</sup> The intervention led to the eventual downfall of Gaddafi; however, it also left questions regarding the future of Libya and the impacts of outside interference.

## *Rwanda 1994*

The Rwandan genocide is one of the worst stories, which tell about how countries and international communities fail to protect civilians. In 100 days of genocide, approximately 800,000 Tutsis and moderate Hutus were massacred by the Hutu extremists.<sup>7</sup> Even when signs, indicating that violence was imminent where the conflicts were starting, the international community, including the UN, did not act as they should.<sup>8</sup> Failure to act during genocide exposed the weakness of sovereignty and thus the need for future frameworks like R2P.

## *Kosovo 1999*

The Kosovo war arose from the protracted tensions between the Albanian ethnic group and the Serbian authorities who were responsible for gross human rights



violations as well as expulsion of the Albanian population from Kosovo.<sup>9</sup> In reaction to such allegations of ethnically motivated expulsions, NATO undertook military operations, although it did not seek UN sanction with human rights justification.<sup>10</sup> The intervention faced criticism for bypassing UN Security Council authorisation but succeeded in halting the violence and establishing a UN-administered territory on the island.

## Responsibility to protect principle versus state sovereignty: critique

### *Autonomy of state and state consent*

For years, the system of state sovereignty has formed the basis of international law that declares that states are independent and have the right to regulate their internal affairs in any way they like.<sup>11</sup> Nonetheless, what the R2P principle displaces is the dictate that sovereignty means rights without responsibilities. The Libyan intervention, justified under R2P as Gaddafi's regime violently suppressed protests, complicates the argument that sovereignty is inviolable. Such interventions undermine state sovereignty and invite criticisms of neo-imperialism or selective liberalism driven by political bias.<sup>12</sup> The conflict of interest was stark in Rwanda, where the international community's inaction during the genocide prioritised state sovereignty over protecting vulnerable populations.<sup>13</sup> This raises critical questions about when intervention is justified and how to balance state consent with safeguarding those at risk.

### *Responsibility while Protecting*

'Responsibility while Protecting' (RwP) is a concept formulated by Brazil and introduced as an addition to the R2P principle.<sup>14</sup> It shifts attention to how intervention should be done better, specifically in prevention, proportionality, and necessity of intervention.<sup>15</sup> While NATO has been effective in putting a stop to ethnic cleansing of Kosovo, the campaign was conducted outside the framework of the UN Charter, leading to questions of the legal and moral propriety of a return to pre-Charter UN practice. RwP is an attempt to combat the criticisms made by opponents of R2P by ensuring that operations are implemented to the best of precautionary measures

to aggravate existing enmities or inflict additional suffering.<sup>16</sup> RwP aims to reduce the risk of unilateral actions by states and international actors that could undermine both the legitimate fight for human rights and state sovereignty.<sup>17</sup>

## *Conflict of international law and the responsibility to protect principle*

R2P is usually placed in a difficult position with regards to generally recognised principles of international law: notably, the principle of non-intervention. Some of the criticisms levelled at R2P include the possibility that it perpetuates the practice of states engaging in interventionist policies for political or strategic purposes while passing them off as humanitarian.<sup>18</sup> One good example is the Rwandan genocide; the international community failed to act because it did not want to overly interfere with what it saw as a civil matter. Conversely, the situation in Libya, initially described as an impending humanitarian disaster, was also referred to by some experts as a 'test case' for the potential manipulation of the R2P framework.<sup>19</sup>

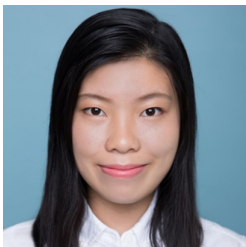
## Conclusion and recommendations

The R2P principle seeks to balance state sovereignty with the need to prevent mass crimes, highlighting the international community's moral obligation to act when governments fail their citizens. However, case studies like Kosovo, Libya and Rwanda underscore both its potential and limitations. To ensure justified and proportionate humanitarian intervention under R2P, transparent criteria should be established. Strengthening early warning mechanisms and preventive diplomacy is vital to address crises before escalation. Furthermore, the RwP principle should be adopted to promote cautious, proportional intervention.

### Notes

- 1 Luke Glanville, 'On the Meaning of "Responsibility" in the "Responsibility to Protect"' (2011) 20(2) *Griffith Law Review* 482–504.
- 2 *Ibid.*
- 3 Noam Chomsky, 'The skeleton in the closet: The responsibility to protect in history' (2011) in *Critical Perspectives on the Responsibility to Protect* (Routledge), pp 11–18.
- 4 Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press, 2011).
- 5 Britannica, 'Libya Revolt of 2011' [www.britannica.com/event/Libya-Revolt-of-2011](http://www.britannica.com/event/Libya-Revolt-of-2011), accessed 5 December 2024.
- 6 *Ibid.*
- 7 Christopher C Taylor, 'A Gendered Genocide: Tutsi

- Women and Hutu Extremists in the 1994 Rwanda Genocide' (1999) 22 PoLAR 42.
- 8 Alan J Kuperman, *The Limits of Humanitarian Intervention: Genocide in Rwanda*, (Rowman & Littlefield, 2004).
  - 9 Mary Walters, 'A Tantalizing Success: The 1999 Kosovo War' (9 July 2021) <https://thestrategybridge.org/the-bridge/2021/7/9/a-tantalizing-success-the-1999-kosovo-war>, accessed 5 December 2024.
  - 10 H Papatiriu, 'The Kosovo War: Kosovar Insurrection, Serbian Retribution and NATO Intervention' (2002) 25(1) *Journal of Strategic Studies* 39–62.
  - 11 Article 2(1) and (7) of the UN Charter.
  - 12 Ian Hurd, 'The Strategic Use of Liberal Internationalism: Libya and the UN Sanctions, 1992–2003' (2005) 59(3) *International Organization* 495–526.
  - 13 Harry Verhoeven, Ricardo Soares de Oliveira & Madhan Mohan Jaganathan, 'To Intervene in Darfur, or Not: Re-examining the R2P Debate and Its Impact' (2016) 30(1) *Global Society* 21–37.
  - 14 Yang R Kassim, 'Rise of the Responsibility While Protecting (RWP)' in *The Geopolitics of Intervention: Asia and the Responsibility to Protect* (SpringerBriefs in Political Science. Springer, 2014), 1–14.
  - 15 *Ibid.*
  - 16 Marcos Tourinho, Oliver Stuenkel & Sarah Brockmeier, "'Responsibility while Protecting": Reforming R2P Implementation' (2016) 30(1) *Global Society* 134–150.
  - 17 *Ibid.*
  - 18 Jennifer Welsh & Maria Banda, 'International Law and the Responsibility to Protect: Clarifying or Expanding States' Responsibilities?' (2010) 2(3) *Global Responsibility to Protect* 213–231.
  - 19 Christopher Hobson, 'Responding to failure: The responsibility to protect after Libya' (2016) 44(3) *Millennium* 433–454.



Holly Leung

# A commentary on the ICJ's Advisory Opinion on Palestine: obligations *erga omnes* (*partes*) in international human rights law

## Introduction

The doctrine of obligations *erga omnes* (*partes*) has received much attention in recent cases at the International Court of Justice (ICJ), such as *Canada and the Netherlands v Syria*, and *South Africa v Israel*. Unsurprisingly, the doctrine has also made its way into the *Advisory Opinion on the Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* ('the AO'). Despite not being the focus of the AO, the ICJ's treatment of obligations *erga omnes* in the AO is worthy of discussion as the ICJ had, for the first time, recognised that international human rights obligations can have an *erga omnes* character.

At paragraph 274 of the AO, the ICJ opined that '[a]mong the obligations *erga omnes* violated by Israel are [...] certain of its obligations under [...] international human rights law'. While paragraph 274 does not specify which obligations under international human rights law are obligations *erga omnes*, the ICJ had identified in preceding paragraphs the international human rights obligations violated by Israel: protection

of the right to family life (paragraph 195); prohibition of discrimination (paragraphs 197, 206 and 213); protection of the right to privacy (paragraph 210 and 220); the right to liberty and security of person, and the freedom of movement (paragraph 242). Reading paragraph 274 in light of the whole AO would seem to suggest that all the aforementioned obligations are obligations *erga omnes* violated by Israel. However, as the ICJ only opined that 'certain' obligations under international human rights law were obligations *erga omnes*, it is possible that not all of the aforementioned obligations possess an *erga omnes* character. The following thus considers *which* human rights give rise to obligations *erga omnes*.

## The test for obligations *erga omnes*

First and foremost, there appears only a general test for whether human rights obligations are obligations *erga omnes*, which is whether '[i]n view of the importance of the rights involved, all states can be held to have a legal interest in their protection' (*Barcelona Traction*, paragraph 33). The ICJ relied on



the same test at paragraph 274 of the AO for finding that certain international human rights obligations violated by Israel were obligations *erga omnes*.

The problem with determining whether there is an obligation *erga omnes* based on the ‘importance of the rights involved’ is that it is difficult to establish the threshold of importance, or in other words, to draw the line as to which rights are sufficiently important and which are not. While *Barcelona Traction* suggests that ‘principles and rules concerning the basic rights of the human person’ (paragraph 34) meet this threshold of importance, hence giving rise to obligations *erga omnes*, the notion of ‘basic rights’ remains vague. For the sake of illustration, the right to freedom of expression is undisputably a basic human right. However, there remains no consensus as to whether the right to internet access is a basic right, which, albeit viewed by scholars such as Reglitz as a necessary right vital for the enjoyment of other rights, is only recognised by a limited number of states.

### **The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)**

Notably, the Human Rights Committee (HRC) appears to regard the civil and political rights enshrined in the ICCPR as basic rights:

‘While article 2 is couched in terms of the obligations of State Parties towards individuals as the right-holders under the Covenant, every State Party has a legal interest in the performance by every other State Party of its obligations. This follows from the fact that the “rules concerning the basic rights of the human person” are *erga omnes* obligation...’ [General Comment No 31, paragraph 2].

By relying on the *erga omnes* nature of ‘basic rights of the human person’ to support its contention that obligations under the ICCPR are owed *erga omnes partes*, the HRC suggests that the rights enshrined in the

ICCPR qualify as basic rights giving rise to obligations *erga omnes*, and *a fortiori*, obligations *erga omnes partes* in respect of the ICCPR. Indeed, the AO seems to support the HRC’s suggestion as all the rights cited in the AO can be found in the ICCPR.

Yet, it is unlikely that the ICCPR contains an exhaustive list of basic rights. In the AO, the ICJ referred to Israel’s violation of rights under the ICESCR in addition to rights under the ICCPR. While the rights referred to by the ICJ are overlapping rights in the ICCPR and the ICESCR (freedom from discrimination under Article 2(2) of the ICESCR and Articles 2(1) and 26 of the ICCPR; right to family life under Article 10 of the ICESCR and Article 17 of the ICCPR), certain rights exclusive to the ICESCR could be comparable to the rights in the ICCPR, and therefore be regarded as basic rights giving rise to obligations *erga omnes*. For example, the right to an adequate standard of living (Article 11 of the ICESCR) may be comparable to the right to life (Article 6 of the ICCPR) in terms of importance as the former may be necessary for securing the latter (see, eg, *Yakye Axa Indigenous Community v Paraguay* (IACHR Series C no 125 (Official Case No) IHRL 1509 (IACHR 2005))). Neither the HRC nor the ICJ has provided clear guidance as to whether and which rights other than those enshrined in the ICCPR would give rise to obligations *erga omnes*.

### **Conclusion**

The ICJ’s finding in the AO is undoubtedly a favourable legal development. Although the AO does not provide much clarity as to which human rights would be sufficiently important so as to give rise to obligations *erga omnes*, the ICJ has at least confirmed the normative value and importance of human rights. States may be encouraged by the AO to invoke other states’ responsibility for alleged violations of *erga omnes* obligations in international human rights law, thus allowing courts the opportunity to give further guidance as to the interaction between international human rights and obligations *erga omnes*.

# Criminal liability of arms corporation officials for war crimes under the Rome Statute<sup>1</sup>

## Introduction

The concept of accountability against impunity has rapidly grown in necessity among the international community, and as such it is a fast-developing branch of international law. The establishment of the International Criminal Court (ICC) by virtue of the Rome Statute is at the pinnacle of this concept.<sup>2</sup> Since its formation, numerous countries have acceded to the jurisdiction of the ICC, evidencing the far-reaching necessity for a judicial body that serves accountability on war crimes, crimes against humanity and crime of aggression.<sup>3</sup> However, an accountability gap is also associated with the said jurisprudence. One such issue is the complicit liability of suppliers of weapons in war crimes. It is to be noted that the Rome Statute does not have jurisdiction over legal persons or corporations whereas it can hold people acting for these corporations accountable. The discussions on the complicity often encounter defences based on state licensing.<sup>4</sup> This ‘profiting from pain’ not only raises moral and ethical concerns but also possesses legal questions: could the persons governing these arms corporations be held liable under the Rome Statute?

## The Rome Statute

The text for complicit liability under the Statute can be found under Article 25(3) (c) which reads: ‘...aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission...’. The Statute, however, does not define the term ‘complicity’. But the discussions regarding complicity can be found in the *travaux préparatoires* of the Statute. The Report of The Inter-sessional Meeting 1998 in Zutphen, the Netherlands, discusses the inclusion of liability of accomplice in the Statute but underlines

the dissenting opinions from different states.<sup>5</sup> *Kai Ambos*<sup>6</sup> analyses the provisions of this Article and opines that the complicit liability under the Rome Statute can be attributed if the aid or assistance provided had a substantial effect in the commission of the crime or has been the causal factor for the offence, irrespective of the *actus reus* element of the crime.<sup>7</sup>

On analysing the mental element required for an offence under the Statute, Article 30(2) (b) provides that: ‘...that person means to cause that consequence or is aware that it will occur in the ordinary course of events’. Thus, to constitute the mental element of the crime of complicity, it is to be proven that the accomplice was aware of the consequences of their act in its normal course.

Therefore, it can be constructed that there is no exclusion in imposing complicit liability on the officials of arms corporations for their lack of due diligence in their supply of arms to states that commissions war crimes, provided they fell within the court’s jurisdiction. This can also be reiterated from the Office of The Prosecutor’s (OTP) statement made in July 2023 to the United Nations Security Council (UNSC) pursuant to the situation in Sudan which reads: ‘...and it applies not only in relation to acts committed in Sudan. Any individual that aids and abets, encourages or directs from outside Sudan, crimes that may be committed in Darfur will also be investigated...’.<sup>8</sup> This statement does not mention arms suppliers but indicates that such an investigation is possible to account for unfettered aids or trading of weapons that fuels the conflict in Sudan.

## The possible case of complicity of arms corporations in the ICC

In December 2019, the European Center for Constitutional and Human Rights

(ECCHR) and Mwatana for Human Rights from Yemen, together with a few other non-governmental organisations (NGOs), communicated with the OTP to the ICC by way of a report evidencing genocide and war crimes in Yemen carried out by Saudi Arabia-United Arab Emirates (UAE) joint forces.<sup>9</sup> The communication – which calls for investigating complicit liability of arms suppliers from France, Germany, Italy, Spain and the United Kingdom, who each fall within the jurisdiction of ICC – is a notable one in the current discussion of complicity. The said report attributes 26 airstrikes carried out by the joint forces of Saudi Arabia and the UAE to war crimes based on the evidence they collected from Yemen and photographic and satellite imageries.<sup>10</sup> This case, if investigated, would become key in the development of complicit liability through arms supply under the Rome Statute.

### The challenge and scope

As discussed, the legal jurisprudence regarding criminalising the act of supplying/selling arms or weapons that aids the commission of war crimes under the Rome Statute is a developing theory. In the case communicated by the ECCHR, the OTP reported in 2020 that a reply will be given to the NGOs by 2021,<sup>11</sup> however, no records have been published at the time of writing. Despite theoretical and academic reviews of the issue of complicity of arms corporation officials, judicial interpretations from the ICC judges are therefore yet to come.

However, the recent developments challenging the arms sales indicate some optimistic approach from international actors. For instance, a panel of UN experts warned states and companies of possible complicity in war crimes and calls to end the supply of weapons to Israel.<sup>12</sup> The resolution of the UN Human Rights Council calls for urgent cessation of jet fuels to Myanmar pointing out the human rights violations it causes in the case of the Rohingyas.<sup>13</sup> Human rights defenders have been calling to stop arms trade to Israel amid the alarming indications of ongoing war crimes in Gaza.<sup>14</sup>

### Conclusion

With the number of countries at war rising over the past years, and the associated risks of grave violation of human rights and humanitarian law, the need for minimising the accountability gap is more necessary than ever. The subjective application of *Agentes et consentientes pari poena plectentur* in the ICC could help minimise this gap substantially.

#### Notes

- 1 Rome Statute 1998.
- 2 Thomas Unger Commissioned by The European Commission, *Independent Study – Observatory in Support of the Global Fight Against Impunity* (2022) Part 1, p 8.
- 3 ‘States Parties – Chronological list’ (*International Criminal Court*) <https://asp.icc-cpi.int/states-parties/states-parties-chronological-list> accessed 3 December 2024.
- 4 Patrick Wilcken – Researcher on Arms Control at Amnesty International, ‘Arms companies are hiding behind governments – it’s time we held them accountable’ (*Amnesty International*, 9 September 2019) [www.amnesty.org/en/latest/news/2019/09/arms-companies-must-be-held-accountable](http://www.amnesty.org/en/latest/news/2019/09/arms-companies-must-be-held-accountable) accessed 3 December 2024.
- 5 Preparatory Committee on The Establishment of an International Criminal Court, *Report of The Inter-Sessional Meeting From 19 To 30 January 1998 in Zutphen, The Netherlands A/AC.249/1998/L.13* (16 March–3 April 1998), p 53.
- 6 Kai Ambos is a Professor of Criminal Law and Criminal Procedure, Comparative Law, International Criminal Law, and Public International Law at the Faculty of Law of Georg-August-University Göttingen (GAU) (Germany), see ‘Kai Ambos’ (*EJIL: Talk!*) [www.ejiltalk.org/author/kambos](http://www.ejiltalk.org/author/kambos) accessed 3 December 2024.
- 7 Kai Ambos, ‘Article 25: Individual Criminal Responsibility’ (14 December 2011). *Commentary On the Rome Statute of The International Criminal Court* (2008) O Triffterer, ed, Munich (2) pp 743-770: available at <https://ssrn.com/abstract=1972186> accessed 3 December 2024.
- 8 ‘Statement of ICC Prosecutor, Karim A A Khan KC, to the United Nations Security Council on the situation in Darfur, pursuant to Resolution 1593 (2005)’ (*International Criminal Court*, 13 July 2023) [www.icc-cpi.int/news/statement-icc-prosecutor-karim-khan-cc-united-nations-security-council-situation-darfur-0](http://www.icc-cpi.int/news/statement-icc-prosecutor-karim-khan-cc-united-nations-security-council-situation-darfur-0) accessed 3 December 2024.
- 9 ‘Made in Europe, bombed in Yemen – ICC must investigate European responsibility in alleged war crimes in Yemen’ (ECCHR) [www.ecchr.eu/en/case/made-in-europe-bombed-in-yemen](http://www.ecchr.eu/en/case/made-in-europe-bombed-in-yemen) accessed 3 December 2024.
- 10 *Ibid.*
- 11 The Office of the Prosecutor, *Report on Preliminary Examination Activities 2020* (14 December 2020), p 11.
- 12 Press Release, ‘States and companies must end arms transfers to Israel immediately or risk responsibility for human rights violations: UN experts’ (United Nations Human Rights Office of the High Commissioner, 20 June 2024) [www.ohchr.org/en/press-releases/2024/06/states-and-companies-must-end-arms-transfers-israel-immediately-or-risk](http://www.ohchr.org/en/press-releases/2024/06/states-and-companies-must-end-arms-transfers-israel-immediately-or-risk) accessed 3 December 2024.
- 13 ‘UN Human Rights Council: Resolution on Myanmar takes crucial stand against deadly jet fuel supply chain’, (*Amnesty International*, 3 December 2024) [www.amnesty.org/en/latest/news/2024/04/un-human-rights-council-resolution-on-myanmar-takes-crucial-stand-against-deadly-jet-fuel-supply-chain](http://www.amnesty.org/en/latest/news/2024/04/un-human-rights-council-resolution-on-myanmar-takes-crucial-stand-against-deadly-jet-fuel-supply-chain) accessed 3 December 2024.

14 'More than 250 humanitarian and human rights organisations call to stop arms transfers to Israel and Palestinian armed groups' (*Amnesty International*, 24 January 2024) [www.amnesty.org/en/latest/news/2024/01/more-than-250-humanitarian-and-human-rights-organisations-call-to-stop-arms-transfers-](https://www.amnesty.org/en/latest/news/2024/01/more-than-250-humanitarian-and-human-rights-organisations-call-to-stop-arms-transfers-)

[to-israel-palestinian-armed-groups](#) accessed 3 December 2024.



Ella Mercurio

# Invisible victims: addressing gender-based persecution in the international refugee framework

## Introduction

Gender-based violence (GBV) is a globally pervasive human rights abuse, often justified under religious traditions that permit physical discipline, patriarchal norms that enforce male dominance, and harmful traditional practices. GBV can escalate into gender-based persecution (GBP) due to an absence of state protection or the violation's severity. In such cases, victims of GBP may seek asylum under international law. However, the international refugee framework omits 'private' violence from the framework's protective scope and has historically adopted a 'gender-blind' approach. Therefore, the legal framework fails to account for the specific challenges faced by women fleeing GBV. This outdated legal dichotomy, which distinguishes 'private' GBV from 'serious' public or political persecution, undermines protections for women fleeing such harms.<sup>1</sup> To remain relevant and effective, attempts to reconcile gender within pre-existing convention grounds must be abandoned, and the international refugee framework must evolve to address the realities of gendered persecution.

## International refugee law framework

The 1951 Refugee Convention obliges signatory states to adhere to the principle of *non-refoulement*, ensuring protection for individuals who qualify as refugees.<sup>2</sup> Under Article 1(A)(2), a 'refugee' is defined as someone with a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular

social group (MPSG), or political opinion'.<sup>3</sup> The Convention was drafted in a post-World War II context, with its primary focus on state-to-state conflicts and public forms of persecution.<sup>4</sup> Consequently, it excluded private violations, the primary domain in which women experience GBP.<sup>5</sup> Female genital mutilation (FGM), for example, is typically perpetrated by non-state actors (NSAs) within the private sphere, rendering it outside the original protective scope of the Convention. Therefore, GBV has historically been afforded a 'different legal significance' to public sphere violence.<sup>6</sup>

Although the 1967 Protocol extended the Convention's jurisdiction, it failed to incorporate gender as a distinct ground for persecution.<sup>7</sup> As a result, women fleeing GBP must navigate a framework that inadequately addresses their lived realities. The absence of gender-specific protections magnifies the vulnerabilities of female refugees and entrenches systemic discrimination within international asylum processes.<sup>8</sup>

## Gender-based persecution

Despite these limitations, international jurisprudence has made strides in recognising GBP, including FGM, as persecution. In 2002, the United Nations High Commissioner for Refugees (UNHCR) explicitly acknowledged FGM as a form of persecution perpetrated by both states and NSAs.<sup>9</sup> Similarly, the Committee on the Elimination of Discrimination Against Women (CEDAW) General Recommendation No 32 urged states to incorporate 'sex and/or gender' as grounds for persecution into



national legislation.<sup>10</sup> Yet, such developments remain non-binding and are inconsistently reflected in domestic asylum practices.<sup>11</sup>

Women fleeing GBP are often forced to subcategorise their claims under existing convention grounds; in particular, MSPG. Subcategorisation, however, presents significant obstacles, as adjudication lacks gender-informed knowledge and applicants must fit their experiences into narrowly interpreted legal categories. For instance, subcategorisation under MSPG frequently results in discordant adjudication, as many states require that gender intersect with another characteristic, like race, for a viable claim.<sup>12</sup> The 2012 European Parliament Report highlights this challenge, noting that ‘gender alone may not be enough for [...] the MSG, [so] international protection is not granted’.<sup>13</sup>

Additionally, the evidentiary burden placed on female asylum seekers often disregards the unique challenges posed by GBP. Establishing a ‘well-founded fear’ is particularly difficult for victims of private violence, who face societal stigma, shame, and fear of reprisal. In cases such as *Amev v UK*,<sup>14</sup> *Bangura v Belgium*<sup>15</sup> and *RW v Sweden*,<sup>16</sup> applicants’ fears of FGM were dismissed due to factors such as delayed asylum applications or perceived inconsistencies in their testimonies. Such deliberations fail to account for the trauma and cultural barriers that often impede victims from presenting their cases in a ‘masculine’ or ‘idealised’ manner.<sup>17</sup>

### Due-diligence

The principle of due diligence, enshrined in instruments like CEDAW General Recommendation No 19 and Article 7.2 of the European Union Qualification Directive (QD), imposes a state obligation to prevent, investigate, and address private violence.<sup>18</sup> Ostensibly, the principle represents a significant step toward protecting women from private harms. However, its practical application often falls short. For instance, in *Collins and Akaziebie v Sweden*, the European Court of Human Rights (ECtHR) rejected an applicant’s asylum claim on the grounds that FGM was outlawed in Nigeria, despite overwhelming evidence that the practice remained culturally entrenched and inadequately addressed by local authorities.<sup>19</sup> Such cases highlight the gap between formal legal protections and the lived realities of women facing GBP.

### Gender-based persecution in Europe

At the regional level, European refugee law has made notable advancements in addressing gender-sensitive asylum claims. The EU QD seeks to standardise criteria for refugee status, explicitly recognising FGM as a form of persecution under the MSPG ground.<sup>20</sup> Furthermore, the EU’s accession to the 2011 Istanbul Convention marks a significant milestone in protecting women from GBV; Article 60 obliges state parties to ensure that GBV is recognised as persecution and mandates gender-sensitive interpretation of asylum claims.<sup>21</sup>

In *C-621/21 (WS)*, the Court of Justice of the European Union affirmed that women exposed to gendered violence could qualify for refugee status under MSPG.<sup>22</sup> Importantly, the Court acknowledged that ‘women, as a whole’ could constitute a particular social group, marking a departure from restrictive interpretations seen in other jurisdictions.<sup>23</sup> However, the ruling also underscores persistent challenges, as subcategorisation under MSPG and the misapplication of due diligence principles continue to hinder comprehensive protection for female refugees.

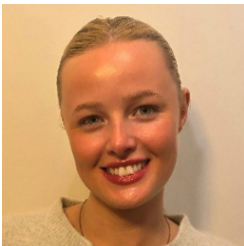
### Reform

While regional instruments like the Istanbul Convention and the QD provide crucial protections, their impact is limited by their complementary and regional nature. To ensure equitable protection for all victims of GBP, the international refugee framework must integrate gender as a distinct ground for persecution within the 1951 Convention. Legal scholar Jared Allen proposes expanding the refugee definition to include individuals with a ‘well-founded fear of gender-motivated harm’.<sup>24</sup> Such a revision would align the framework with contemporary realities and prevent the further invisibilisation of women within the asylum system.

Without substantive reform, women fleeing GBP will continue to face double victimisation: first by their persecutors and second by legal systems that fail to protect them.<sup>25</sup> Recognising gender-motivated harm as a ground for asylum is not merely a legal imperative but a moral one. It is time for the international community to close the gap between rhetoric and reality, ensuring that protection extends to all who need it.

## Notes

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- 3 *Ibid.*
- 4 Malinda Schmiechen, 'Parallel Lives, Uneven Justice: An Analysis of Rights, Protection and Redress for Refugee and Internally Displaced Women in Camps' (2003) 22 SLUPLR 473, 483.
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- 6 Lorene Clark, 'Women and the State: Critical Theory – Oasis or Desert Island?' (1992) 5 CJWL 166, 170.
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- 10 CEDAW, General Recommendation No 32 on the gender-related dimensions of refugee status, asylum, nationality, and statelessness of women (2014) CEDAW/C/GC/32 [13].
- 11 Jane Freedman, *Gendering the International Asylum and Refugee Debate* (Palgrave Macmillan, 2007) 90.
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- 14 *Ameh v UK* (Decision) App no 4539/11 (ECtHR, 2011).
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- 17 European Commission, 'The evaluation of the application of the recast Qualification Directive (2011/95/EU)' (2019) <https://op.europa.eu/en/publication-detail/-/publication/e9528006-1ec1-11e9-8d04-01aa75ed71a1/language-en> accessed 4 December 2024.
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- 21 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (adopted 11 May 2011, entered into force 1 August 2014) CETS No 210 (Istanbul Convention).
- 22 WS C-621/21 (CJEU, 2024) ECLI:EU:C:2024:47.
- 23 *Ibid.*
- 24 Jared Allen, 'Women Qua Women: Using Feminist Theory to Catalyze the Gender Immigration Debate' (2010) 32 GILJ 217, 219.
- 25 Parekh (see n 1 above).



Niamh O'Hara

# Pursuing justice for gender-based crimes in Afghanistan: what the *Al Hassan* case before the ICC could mean for Afghan women and girls


The case of *Prosecutor v Al Hassan ag Abdoul Aziz Ag Mohamed ag Mahmoud* ('*Al Hassan*') represents the first case where the International Criminal Court (ICC) has recognised the charge of gender persecution.<sup>1</sup> Gender persecution under the Rome Statute is a crime against humanity referring to the 'intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of a [gender] group or collectivity'.<sup>2</sup>

Al Hassan was convicted of war crimes and crimes against humanity; however, the criminal liability for gender persecution was unfounded.<sup>3</sup> This has come as a disappointment to those seeking justice in Afghanistan as the Taliban continue to

enforce their regime of oppression and domination upon women and girls.

## The *Al Hassan* case

The Office of the Prosecutor (OTP) investigated the persecution of women and girls in Timbuktu, Mali, during the Ansar Dine and al-Qaeda in the Islamic Maghreb (AQIM) occupation from 2012–13. Al Hassan, head of the Islamic Police, was responsible for enforcing an interpretation of Sharia law. A set of discriminatory rules was introduced for women and girls that controlled every aspect of their lives. They were forced to follow a strict dress code, prohibited to speak with any other man who was not their brother



or husband, restrictions were placed on their freedom of movement, they were forced to marry, subjected to sexual assault and faced arbitrary arrest or excessive force for any violations of these rules.<sup>4</sup>

In a three-judge ICC court, Al Hassan faced the first prosecution for gender persecution.

In June 2024, it was decided by majority that Al Hassan intentionally severely deprived a group of their fundamental rights, contrary to international law. Among them, the right to freedom of thought, conscience and religion; to not be subjected to torture or cruel, inhuman or degrading treatment or punishment; and to bodily integrity. The Trial Chamber found that women and girls were particularly targeted.<sup>5</sup> However, Judge Mindua, despite finding that gender persecution had occurred, acquitted Al Hassan based on duress.<sup>6</sup> Judge Akane found Al Hassan guilty of religious persecution, citing insufficient evidence to prove gender persecution on the basis that the connection requirement for the crime of persecution was left unsatisfied and that gender-based violence could not be linked to the common purpose of the occupation of Timbuktu.<sup>7</sup> It was only Judge Prost who, in her dissenting opinion, found that Al Hassan was guilty of gender persecution. Judge Prost made the important point about the intersections between gender and religion, where any conviction for persecution should reflect the specific targeting of women and girls on the ‘inseparable’ grounds of religion and gender. In her view, a conviction on this basis would acknowledge the suffering of female victims in Timbuktu.<sup>8</sup>

### Application to Afghanistan

*Al Hassan*, despite not resulting in a conviction of gender persecution, is nonetheless important to pursuing justice for Afghan women and girls. It provides important indicators of what the crime of gender persecution entails, alongside a constructive example upon which future prosecutions can be based.

In *Al Hassan*, central to the finding that gender persecution was occurring was the recognition of the targeting of women and girls and depriving them of their fundamental human rights. There were repressive laws aimed at them and harsh, gender-based punishments for non-compliance. Parallels can be drawn with the situation in Afghanistan under Taliban rule

where women and girls are subjected to an education ban; their access to jobs is severely restricted; they are required to have a male chaperone; they must adhere to a strict dress code; and harsh punishments are imposed on those who violate any of the Taliban’s laws.<sup>9</sup> Men and boys do not face the same harsh restrictions. The significance of the ICC acknowledging a gender-specific pattern of oppression cannot be understated.

Also noteworthy is Judge Akane’s dissenting opinion that gender-based violence fell outside of the common purpose of the occupation, distinguishing gender-based crimes such as forced marriage and sexual and gender-based violence from the occupation’s ideology, instead holding they were opportunistic in nature.<sup>10</sup> However, to create an environment where sexual and gender-based violence is admissible, then it is hard to comprehend that this has been done for any other purpose than controlling women and girls into submission. In a Taliban prosecution, a common purpose defence would prove difficult to uphold. The Taliban enforce their gender oppression through decrees and edicts thus writing this oppression into law. They have created a power imbalance where men are not the target of repressive laws. The Taliban are also compelling men to enforce their own state-sanctioned gender oppression for non-compliant female family members.<sup>11</sup> As such, a common purpose is clear.

A conviction for religious persecution may also be indicative for what a future case may look like. Arguments heard in relation to gender issues can stem from the intersections between gender and culture.<sup>12</sup> Rationales for ignoring gender-based international crime can attempt to find their basis within this, where it is argued that discriminatory practices against women and girls simply embody the culture of the offending state.<sup>13</sup> In this case, the religious culture. The situation in 2012–13 Timbuktu is comparable to that of present-day Afghanistan where a repressive and fundamentalist interpretation of Sharia law is imposed in a way that contravenes international law. The Trial Chamber recalls that the measures placed by Ansar Dine/AQIM reflected their interpretation of Sharia which contributed to a situation of religious persecution.<sup>14</sup> While the intersections between religion and gender were not explored to their fullest extent in this case, Judge Prost’s opinion on this shortcoming provides constructive

groundwork that any future prosecution of the Taliban could learn from.

## Conclusion

The similarities between the conduct reflected in Timbuktu and in Afghanistan highlight the need for ICC intervention. From the markers set in the seminal *Al Hassan* case, the Taliban are committing crimes that fall within the jurisdiction of the ICC and, not only could they be prosecuted, but a gender persecution case could result in a resounding victory for the rule of law and human rights.

## Notes

- 1 *Al Hassan*, Confirmation of the Charges, ICC-01/12-01/18 (13 November 2019) [www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd1808354d8.pdf](http://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd1808354d8.pdf), accessed 3 December 2024.
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Grace Kneafsey

# Reproductive violence and international criminal law: addressing the legal lacuna

## Introduction

Throughout history, reproductive violence has long been perpetrated by various actors, in various countries and conflicts around the world, as a means to assert dominance and ownership over the reproductive capacity of certain groups of people.<sup>1</sup> While there is no established definition under international criminal law (ICL), it is used to refer to 'violence which violates reproductive autonomy, and/or is directed at people on account of their actual or potential reproductive capacity, or perceptions thereof'.<sup>2</sup> It often takes place as

part of the commission of genocide, crimes against humanity, and/or war crimes, in the furtherance of a xenophobic ideology of racial or ethnic superiority.<sup>3</sup> For example, the mass atrocities currently being carried out against Yazidi women and girls – including forced birth control, forced pregnancy and violence intended to prevent future procreation – represent one of the most shocking examples of this most horrific form of violence.<sup>4</sup>

Reproductive violence has been successfully prosecuted at the domestic level. Notably, in the case of *Eichmann*, the district court of Jerusalem convicted a



Holocaust perpetrator of genocide, *inter alia*, for measures which he took ‘calculated to prevent births among Jews’.<sup>5</sup> More recently, the Military Tribunal of Uvira in the Democratic Republic of the Congo in 2023 became the first national court to confirm a charge of forced pregnancy as a crime against humanity.<sup>6</sup> However, when one considers reproductive violence in the context of international criminal justice, it remains a relatively elusive concept. Despite its widespread perpetration, there is a lack of attention paid to this specific form of violence, and a failure to recognise it as a distinct category of gender-based crimes under ICL.

### **Reproductive violence and the Rome Statute**

Some acts of reproductive violence are criminalised under the Rome Statute, including: measures intended to prevent births as genocide;<sup>7</sup> forced pregnancy as a crime against humanity and a war crime;<sup>8</sup> and enforced sterilisation as a crime against humanity and a war crime.<sup>9</sup> However, many other acts of reproductive violence are not explicitly enumerated. Additionally, forced pregnancy and enforced sterilisation are only included under the catch-all category of sexual violence.<sup>10</sup>

While these two categories are closely related, it must be stressed that they are not synonymous. As has been noted, reproductive violence targets ‘the victim’s reproductive system, organs, process, or capacity to reproduce’.<sup>11</sup> Certain acts of reproductive violence, such as enforced sterilisation and forced abortion, clearly fall into this category, and yet, they do not necessarily contain a sexual element.<sup>12</sup> Equally, certain acts of sexual violence, such as forced nudity, may constitute sexual violence, but do not always entail reproductive violence.<sup>13</sup> By conflating these two forms of violence, ICL fails to recognise the specificity of reproductive violence, and thus fails to adequately address it.

### **Reproductive violence: shortcomings of international criminal law**

It is suggested that such conflation has led to significant knowledge and accountability gaps with regards to reproductive violence.<sup>14</sup> By mislabelling acts of reproductive violence as sexual violence, and framing them within this context, this places them on the periphery

of other ‘better-known’ crimes of sexual violence.<sup>15</sup> While significant scholarship has (rightly) been devoted to the issue of sexual violence, there remains a dearth of literature relating to reproductive violence in its own right. It is posited that more dedicated research is needed to better understand and address this troubling phenomenon.

Additionally, there has been a severe lack of attention paid to reproductive violence within the investigation and prosecution of international crimes. While there has been some limited discussion in international criminal courts, specific charges have not been brought, even in instances where there is evidence that such violence has occurred. For example, it was not specifically charged at the International Criminal Tribunal for the former Yugoslavia or the International Criminal Tribunal for Rwanda, despite overwhelming reports of acts of reproductive violence.<sup>16</sup> Additionally, the crime of genocide by measures intended to prevent births has not yet been charged at the International Criminal Court (ICC) or any international criminal tribunal. It is suggested that, because such violence is not sufficiently distinguished from sexual violence, it is not considered to warrant specific attention.<sup>17</sup> Thus, it is simply overlooked, and merely treated as ‘subsidiary’ to other crimes.<sup>18</sup> This creates a worrisome impunity gap, whereby international criminal courts fail to hold perpetrators accountable for these most atrocious crimes.

Furthermore, it is argued that the subsummation of reproductive violence into the category of sexual violence does a disservice to its victims, as it fails to accurately recognise the specific harm that they have suffered.<sup>19</sup> While often interrelated, violations of reproductive autonomy are distinct from violations of sexual autonomy and can result in separate reparation needs.<sup>20</sup>

It is therefore argued that ICL, as it currently stands, does not adequately address reproductive violence. This position has been propounded by several individuals and organisations in recent years, who have advocated for the recognition of reproductive violence as a separate category of gender-based crimes, as distinct from sexual violence.<sup>21</sup> In fact, there have already been some positive developments in this direction.

## Positive developments

In 2016, *Ongwen* became the first case in an international criminal court to include a charge of forced pregnancy. In its judgment, the ICC Trial Chamber formally recognised reproductive autonomy, as distinct from sexual autonomy.<sup>22</sup> Subsequently, the ICC-OTP began to revise its position on this issue, culminating in the articulation of a new Policy on Gender-Based Crimes in 2023.<sup>23</sup> While not legally-binding, this marks an important shift in the conceptualisation of reproductive violence; it is defined separately from sexual violence, and recognised as a distinct harm. Additionally, there are also ongoing deliberations regarding a possible Convention on the Prevention and Prosecution of Crimes Against Humanity, in which multiple states have expressed support for the inclusion of specific gender crimes, including reproductive violence.<sup>24</sup>

## Conclusion

However, while these developments represent important milestones, there is undoubtedly more to be done. It is argued that, in order to facilitate greater accountability and reparations, reproductive violence must be clearly defined and explicitly criminalised under ICL, as a distinct and separate category of gender crimes. So long as reproductive violence continues to affect individuals around the world, it is imperative that the international criminal system is equipped to deal with these crimes, and to provide redress to the victims who have suffered from this most heinous form of violence.

### Notes

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- 8 *Ibid* (articles 7(1)(g), 8(2)(b)(xxii) and (e)(vi)) (1998).
- 9 *Ibid*.
- 10 *Ibid*.
- 11 Tanja Altunjan, *Reproductive Violence and International Criminal Law* (1st edn, TMC Asser Press, 2021) 9; Borda (see n 1 above) 99.
- 12 Altunjan (see n 11 above) 7; Borda (see n 1 above) 99.
- 13 Office of the Prosecutor (see n 2 above) 17.
- 14 Borda (see n 4 above); Borda (see n 1 above).
- 15 Borda (see n 4 above).
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- 17 Borda (see n 1 above) 97.
- 18 Altunjan (see n 11 above) 216; Borda (see n 1) 102.
- 19 Ciara Laverty and Dienneke de Vos, 'Reproductive Violence as a Category of Analysis: Disentangling the Relationship between "the Sexual" and "the Reproductive" in Transitional Justice' [2021] 15 *International Journal of Transitional Justice* 616 <https://academic.oup.com/ijtj/article/15/3/616/6320100>, accessed 5 December 2024; Borda (see n 1 above) 97.
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# Transitional justice in Nepal

For a decade, Nepal fought a bloody civil war between the royalist national government and a Maoist insurrection.<sup>1</sup> It was not until 2006 that a comprehensive peace agreement was reached, and 2015 before a constitution was finally agreed and ratified.<sup>2</sup> Under that 2015 constitution, a transitional justice process under a Truth and Reconciliation Commission was promised to ease the pain of the crimes against humanity committed during the civil war.<sup>3</sup> As both sides committed horrific crimes, and both sides were set to take part in the new government, it was essential to the future of the nation that the warring parties found a way to reconcile and coexist.<sup>4</sup> After two failed previous iterations and around 66,000 cases unresolved,<sup>5</sup> the Nepali legislature passed amendments to its transitional justice legislation in an attempt to heal the wounds of the conflict once and for all.<sup>6</sup> While there are promising steps forward, many human rights organisations have issued statements calling it ‘a flawed step forward’.<sup>7</sup>

Historically, political appointments have caused rifts within the Commissions.<sup>8</sup> In a previous attempt at completing the transitional justice process, the chair of the Truth and Reconciliation Commission attended a memorial for a victim of extrajudicial killing by one party of the civil war, but failed to attend a similar memorial for a victim of the opposite side of the civil war.<sup>9</sup> When called out for this behaviour by another commissioner, he refused to attend another Commission meeting unless that commissioner was removed.<sup>10</sup> The resulting deadlock led to no further meetings of the Commission from that point forward until it was eventually dissolved.<sup>11</sup> The current legislation has no guardrails in place to prevent this sort of division.<sup>12</sup>

The key challenges to the current legislation, however, lay in the application of the law. The legislation sets different standards for crimes against humanity and ‘serious’ crimes against humanity.<sup>13</sup> Serious crimes include rape and serious sexual violence, enforced disappearance if the victim is still not located, inhuman or cruel torture, and in all cases, except rape and serious sexual violence, the act must be committed in a targeted and/or planned manner at an unarmed civilian population.<sup>14</sup>

There are obviously many issues with this interpretation. One is that in international law, *all* torture is inhuman and cruel.<sup>15</sup> Hopefully, the special court which will hear these cases will interpret any case of torture as being a ‘serious’ crime against humanity, but that remains to be seen.<sup>16</sup> Another issue is that, in most of these cases, any ‘serious’ crime against humanity committed against a combatant of the opposite side is only a ‘regular’ crime against humanity.<sup>17</sup>

Outside of the suspect definitions, there are massive accountability gaps present in the legislation. For ‘serious’ cases outside of rape and serious sexual violence, the Attorney General may make a binding request to reduce the sentence of a defendant by 75 per cent provided that the truth is disclosed, reparations are paid and an apology is made to the victims or their families.<sup>18</sup> Any other case, if the same circumstances are met, may be entitled to full amnesty.<sup>19</sup>

The law glosses over other important issues as well. There is framework in place to provide compensation to any Maoist soldiers who were not integrated into the Nepali military.<sup>20</sup> The issue is the reason that most of those soldiers were not integrated: due to the fact that the vast majority of those turned away were turned away because they were minors.<sup>21</sup> The vast majority of those who were not integrated were child soldiers fighting for the Maoists, and there is no accountability framework for the commanders who recruited child soldiers, nor anything other than compensation in place for those who were pressed into service as child soldiers.<sup>22</sup> There is nothing set aside for mental health services or counseling for these child soldiers.<sup>23</sup>

The outlook is not without hope, however. The appointments to the recommendation committee were made during a meeting between high-ranking members of all parties, meaning that there is hope that the process will avoid the political pitfalls of previous attempts at transitional justice.<sup>24</sup> The bureaucracy also shows promising signs of productivity.<sup>25</sup> Rather than waiting for the office bearers before laying out the methods, procedures and general important framework for the function of the Commissions, civil servants have already been appointed and are taking action.<sup>26</sup> There are a number of teams



Jonathan Carden

set up within the Truth and Reconciliation Commission specifically set aside for specialty cases, notably those of rape.<sup>27</sup> Historically, due to stigmatisation, victims would not come forward, they would register their claims as torture, or would be laughed at publicly for having been the victim of rape.<sup>28</sup> The bureaucracy has a team in place to offer counseling to victims and register instances of rape with care and sensitivity.<sup>29</sup>

There are certainly reasons to be hopeful as the process progresses. While it is easy to criticise and be pessimistic, this legislation is still a step forward. Nepal is moving towards peace and reconciliation to heal the old wounds left bleeding from its civil war. Various international organisations have offered their support to Nepal<sup>30</sup> during this process in hopes that Nepal may finally help victims and perpetrators find a way to coexist.

#### Notes

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