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# IBA Interns' Newsletter

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# Rape as a weapon of war: systematic mass rape in Ethiopia

‘It’s not just one solitary instance... its systematic, it’s a group of men going to neighbourhoods and raping lots of women. And when you talk to rape victims on both sides, they tell you that the perpetrators tell them that they are doing this to destroy them, to destroy their community. That tells you, it’s not just rape, they are doing it to destroy each other.’

Jamal Osman<sup>1</sup>

## Civil war in Ethiopia

As a result of political dissidence, a non-international armed conflict (NIAC) between the Ethiopian government (Ethiopian National Defence Forces), Eritrean forces (EDF), Amhara Regional Police Special Forces (ASF) and local militias and the Tigray People’s Liberation Front (TPLF) began in November 2020.<sup>2</sup> Having visited the Tigray region, Channel 4 News’ Africa Correspondent Jamal Osman commented that ‘the smell of death lingers in the air; the road is littered with bodies ... and millions have fled’.<sup>3</sup>

## Rape as a war weapon

Rape has always been a grave, systematic and widespread human rights violation during armed conflict. However, in modern warfare, the nature of rape has changed. Its use has transformed to become a tactic: ‘warring groups use rape as a weapon because it destroys communities totally.’<sup>4</sup> This is a key feature of the Ethiopian conflict. In February 2022, Amnesty International reported widespread rape against women committed by Tigrayan combatants in July 2021, when they exercised control over parts of the Amhara region.<sup>5</sup> In August 2021, Amnesty International supplied proof of gang rape and torture perpetrated by Ethiopian and Eritrean forces.<sup>6</sup> The same organisation has documented thousands of rape cases committed by both sides. ‘Sexual

violence, along with other grave human rights violations, has been a defining element of the conflict in Ethiopia’s Tigray region.’<sup>7</sup>

‘The man pointed the gun at his mum and said he would kill them both. She told me that she sacrificed herself and he raped her in front of her son.’

A single mother from Weldiya<sup>8</sup>

‘She told me that they tried to fight the men off ... they kicked her, threatened her with a knife, you can see the scars on her back from where they cut her. She told me that they raped her, hit her badly and then raped her again.’

About a young girl from Weldiya<sup>9</sup>

‘Women and girls subjected to rapes, gang rapes, some of the most horrendous atrocities I’ve come across.’

Donatella Rovera<sup>10</sup>

Ahmed Mohammed, a police officer in Shewa Robit, reported that in November 2021, the rebel forces entered and occupied the town for 11 days.<sup>11</sup> During this time, they broke into the house of a single mother and gang raped her while her son was in the adjacent room. The woman hung herself after the ‘humiliating experience’.

## Post-rape consequences

The woman referred to is not alone in facing post-violence challenges:

- Rape has been used as a war weapon to inflict permanent physical and psychological damage on women and girls;
- Survivors report, bleeding, pain, incontinence, immobility, HIV-positive diagnosis, depression, insomnia and anxiety;
- Amnesty International recounts the experience of Eyerusalem who suffered serious physical harm after Eritrean soldiers gang-raped her and inserted an iron rod and nails in her vagina;<sup>12</sup>
- Human Rights Watch reported that the Ethiopian government’s blocking of aid to



Tigray is preventing sexual violence victims from receiving post-rape care;<sup>13</sup>

- The stigma surrounding these atrocities has led to women feeling isolated. The rape has labelled them ‘unsuitable’ for marriage, so their existence within communities is often denied. Many have fled their homes and others have committed suicide;<sup>14</sup> and
- Women are afraid to come forward making data collection difficult. Each side has attempted to discredit the work of CSOs in collecting such data, exacerbating this problem.

### This is not a ‘one-off’ issue

Despite the reports, investigations, and documentation provided by organisations and despite the brutality of this particular struggle, there is a risk that the Ethiopian civil war will simply join the long list of conflicts in which rape has become a weapon within warfare.

From Bosnia and Herzegovina,<sup>15</sup> Sierra Leone<sup>16</sup> and Sudan<sup>17</sup>, to the mass rape of Yazidi women in Iraq, the actions of Boko Haram in Nigeria and the atrocities committed against the Rohingya in Myanmar, to Aleppo, to the Democratic Republic of Congo, to the Philippines, to Guatemala,<sup>18</sup> a conflict is being fought through women’s bodies with the intent to destroy communities. Clearly this is not a one-off issue, nor is it country/region-specific. This crime occurs in almost every war. RULAC<sup>19</sup>, among others<sup>20</sup>, currently monitor more than 80 armed conflicts involving at least 55 states<sup>21</sup> and more than 70 armed non-state actors. Considering the number of current wars, and ample evidence of mass rape in previous conflicts, we can begin to grasp the magnitude and gravity of the problem.

### Holding those responsible to account

For Ethiopia, it is imperative that the perpetrators are caught and convicted, and authorities held accountable for their failure to protect women. The continuous supply of credible reports that both sides have committed serious human rights violations led to UN Resolution A/HRC/S.33/L.1.<sup>22</sup> This created a three-member panel to ‘establish the facts and circumstances surrounding the alleged violations and abuses, to collect and preserve evidence, and to identify those responsible’.<sup>23</sup> Ethiopia is not party to the Rome Statute<sup>24</sup> which

criminalised rape in both international and NIACs.<sup>25</sup> Therefore, unless the UNSC<sup>26</sup> refers this situation to the Prosecutor,<sup>27</sup> the jurisdiction of the ICC does not extend.<sup>28</sup> However, the ICRC<sup>29</sup> has identified rape as a war crime under customary international law<sup>30,31</sup> and as such, there is scope to properly punish the offenders. Additionally, Ethiopia’s Criminal Code criminalises rape against civilian populations in war.<sup>32</sup>

### Conclusion

Consistent with the global trend, rape has been used as a military tactic in Ethiopia by both parties. The changing nature of rape in war must be confronted with the same determination as other prohibited weapons. The short- and long-term impacts on women are devastating. Therefore, it is essential that their experiences are not disregarded or belittled. The international community must use the mechanisms already at their disposal to prevent impunity and guarantee justice for the women whose bodies have been strategically abused.

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Akshita Tiwary



## The case of Paul Rusesabagina: a blot on the right to free and fair trial in international human rights law

In August 2020, Paul Rusesabagina, the celebrated Rwandan hotelier whose life story constituted the plot of the 2004 Oscar-nominated movie 'Hotel Rwanda', mysteriously disappeared from Dubai and arrived handcuffed in Rwanda where he was sought to be charged on thirteen offences, including terrorism financing, arson and murder.<sup>1</sup> Many of his safeguards under the right to free and fair trial were blatantly

violated during the trial that eventually culminated in his conviction. This article throws light on these violations, and aims to determine plausible solutions to the same.

### Background and conviction

During the 1994 Rwandan genocide, Paul Rusesabagina played a crucial role in sheltering more than 1,200 people in his





hotel in Kigali. In 1996, he left Rwanda and sought asylum in Belgium. Later on, he obtained a Green Card for US, and he and his family have been living in exile in San Antonio since then. His story gained him international repute as a human rights activist, and he received the US Presidential Medal of Freedom in 2005. In recent years, he has been vocal in criticising the autocratic President Paul Kagame's government in Rwanda. During his exile, he became the leader of Rwanda's opposition MRCD group. The armed wing of this group, the FLN, staged deadly attacks in Rwanda in 2018.<sup>2</sup> The inherent controversy here is that Mr. Rusesabagina has previously pledged 'unreserved support to the FLN' and encouraged it to 'bring about change by any means possible'.<sup>3</sup> All this has led his critics to believe that he is equally responsible for the FLN's activities, even if he may not have indicated direct support for the armed attacks.

On the basis of these facts, Paul Rusesabagina was abducted and brought to Rwanda in August 2020, a move that has been termed an 'enforced disappearance' by human rights organisations.<sup>4</sup> His trial commenced in February 2021, with Rwanda's High Court's Special Chamber for International and Cross-border Crimes ('the Court') ruling that it had jurisdiction to try the case, despite Mr Rusesabagina being a citizen of Belgium.<sup>5</sup> Following a flawed trial, the Court convicted him, alongside 20 others, for terrorism-related offences and sentenced him to 25 years in prison in September 2021.<sup>6</sup>

### Contraventions under international human rights law

Paul Rusesabagina's trial contravened his rights under Articles 14(2), 14(3)(b) and 14(3)(d) of the ICCPR, and under Articles 7(1)(2) and 7(1)(3) of the African Charter on Human Rights. Both these instruments have been ratified by Rwanda.<sup>7</sup>

Firstly, Paul Rusesabagina was denied the right to promptly choose his own counsel.<sup>8</sup> During the first week of his detention, Mr Rusesabagina was denied access to a lawyer<sup>9</sup> and he was compelled to select a lawyer from a list provided by the Rwandan Bar Association,<sup>10</sup> who did not defend him properly in court.<sup>11</sup>

Secondly, when Mr Rusesabagina was finally allowed to be represented by a counsel of his choosing, his privileged communications were

intercepted.<sup>12</sup> The defence materials relayed to him were continuously confiscated and reviewed by the prison authorities.<sup>13</sup>

Thirdly, the principle of presumption of innocence was also violated in his case.<sup>14</sup> Statements made by Rwandan President Paul Kagame before and during the trial already deemed Mr Rusesabagina guilty,<sup>15</sup> which formed an important bias in his trial.<sup>16</sup>

Lastly, when Paul Rusesabagina withdrew from the proceedings due to the abovementioned violations, the Court failed to strictly observe his rights of defence in absentia.<sup>17</sup> The witnesses were questioned in a way that seemingly meant to establish Mr Rusesabagina's guilt,<sup>18</sup> and no amicus was appointed to ensure a fair trial despite his absence.<sup>19</sup>

### The way forward: plausible solutions

While this article does not aim to establish Paul Rusesabagina's innocence in any way, it does emphasise the essentiality of observing due procedures in a trial. Justice should not only be done, but should also be *seen* to be done. Mr Rusesabagina's case represents one out of the many instances wherein states have not respected the right to free and fair trial of its citizens/aliens. Such violations become even more prominent in politically motivated trials. In these scenarios, it might be helpful to use the assistance of independent legal bodies in obtaining evidence on behalf of the accused. International organisations could also be allowed to independently monitor the trial, which would ensure that all free trial rights of the accused are safeguarded. Utilising provisions related to appeal would help in assuaging concerns that the trial was conducted fairly, even if the final verdict is pronounced by domestic courts. Moreover, judges should strive to uphold the standards laid down in 'UN Basic Principles on the Independence of the Judiciary', which will guarantee an impartial trial.

Ultimately, it all boils down to whether states would be willing to implement these recommendations. Collective and collaborative efforts among nations are definitely needed, especially where trials of human rights activists based in multiple jurisdictions are concerned. These solutions can go a long way in strengthening the efficacy of the right to fair trial in international human rights law.

## Conclusion

While this article solely focused on the violation of right to fair trial of Paul Rusesabagina, it is imperative to mention that his arrest also contravened other human rights, like the rights against enforced disappearances, arbitrary detention and custodial torture and ill-treatment.<sup>20</sup> However, covering these contraventions in detail is beyond the scope of this article.

The trial of Paul Rusesabagina has been condemned by numerous nations and international bodies including Belgium,<sup>21</sup> the UK,<sup>22</sup> the US,<sup>23</sup> the European Union,<sup>24</sup> American Bar Association,<sup>25</sup> Amnesty International,<sup>26</sup> the IBAHRI and<sup>27</sup> Human Rights Watch.<sup>28</sup> All of them have called for the release of Mr Rusesabagina, especially in light of his deteriorating health conditions in prison.<sup>29</sup> However, the Rwandan authorities' stoic stance has not wavered. It is only hoped that a coordinated international response can create enough pressure on Rwanda to observe its international human rights obligations. Paul Rusesabagina's plight must be alleviated, and states should strive to ensure that another unfair trial like his is prevented in the future.

## Notes

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# Reframing reparations for sexual and gender-based violence survivors and victims

Begüm Tiritöglü



**A**cross the globe, women and girls continue to experience gendered harms from daily practices that are rooted in social taboos and patriarchal norms. Further, they are disproportionately subjected to sexual violence in conflicts and situations of instability, with pre-existing discriminatory patterns heightening the risk that their human rights will be violated.<sup>1</sup> Despite the prevalence of conflict-related sexual violence and its devastating impact on individuals, communities, and societies as a whole, perpetrators are rarely held accountable in proceedings at the national or international level.<sup>2</sup> The fact that sexual and gender-based crimes such as rape, sexual slavery, enforced prostitution and enforced sterilisation are explicitly identified as war crimes and crimes against humanity under the Rome Statute should be noted.<sup>3</sup>

In recent decades, the international community has accorded greater priority to preventing and responding to conflict-related sexual violence, as evidenced by prosecutions at the ICTY and ICTR. Yet, as the UN Secretary-General concluded in 2019, accountability for sexual violence crimes remains elusive at both the national and international levels.<sup>4</sup> This disheartening admission confirms what experts and laypersons alike already knew: the international criminal justice system has made too little progress in securing redress for women and girls who are victims of conflict-related sexual and gender-based violence.<sup>5</sup> What are some concrete steps that might accelerate progress in the coming decade? First, it is essential to conduct a gender-based analysis of states' compliance with human

rights treaties so that they can respond more effectively and be held accountable for their human rights obligations.<sup>6</sup> In 2007, a women's civil society network drafted the Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation to ensure that victims and survivors of conflict-related sexual violence can access their right to reparations generally, and to gender-sensitive reparations in particular.<sup>7</sup>

I argue that the distinctive experiences of women affected by armed conflict cannot be understood and redressed without a holistic approach, one that is sensitive to the local context and culture and that enables survivors to rebuild their lives. Unfortunately, such an approach is rarely employed, and even when it is, such measures are rarely executed fully by states during post-conflict reconstruction.

The Nairobi Declaration sets out two types of reparations: first, gender-sensitive reparations which address the harms suffered, and second, transformative reparations derived from the reparative principle of 'guarantees against non-repetition'.<sup>8</sup> Conflict-based sexual or gender-based violence survivors often experience long-lasting repercussions, including enduring physical harm, psychological trauma, as well as stigma and shame. Many live their lives marginalised and in poverty because they are shunned by their communities. In certain cases, they are disowned by their families and lose all their possessions.<sup>9</sup> Therefore, traditional, non-gender sensitive concepts of restitution may not make women whole, especially when one considers the multifaceted impacts of women and girls being ostracised by their communities. A gender-sensitive approach, for example, would provide alternatives for



relocation or ensure that compensation is accessible and kept by the survivors, depending on the facts specific to each survivor.

The ICC trial of Dominic Ongwen is illustrative of a more progressive approach with the recognition of forced pregnancy as a war crime.<sup>10</sup> There, seven women who were abducted as children and placed in Ongwen's household were asked by the Foundation for Justice and Development Initiatives (FJDI) what types of reparations they needed.<sup>11</sup> Each had unique expectations and needs, such as urgent medical care, monetary compensation for childcare and land ownership.<sup>12</sup> Transformative reparations should aim to dismantle patriarchal structures and transform social structures to address inequalities and strengthen the rule of law to ensure non-repetition of such crimes.<sup>13</sup>

In 2016, grandmothers from Sepur Zarco turned their tragedy into national and international history, reclaiming their voices and truths about the effects the 36-year Guatemalan civil war had on them and their communities. That case involved 22 court hearings and resulted in the conviction of two former military officers for crimes against humanity on counts of rape, murder and slavery. The reparations promised to them included land titling and the creation of committees dedicated to providing basic needs and services, a mobile health center and a new bilingual secondary school that included the case in its curricula and provided scholarships for women, girls and other community members.<sup>14</sup> While the reparations promised by the state haven't been fully met, it is noteworthy that, thus far, a mobile health clinic has been installed, 11 scholarships have been awarded, three schools have been renovated and a documentary on the case has been made.

Domestic reparation schemes, legal and administrative, consisting of both gender-sensitive and transformative reparations, are

essential in ensuring adequate, effective and efficient compensation for survivors and victims of sexual violence. This will not only help survivors take charge of the post-conflict narrative but will also ensure their inclusion and participation in policymaking and reconstruction.

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## Call it by its name: the Armenian genocide

**M**y Armenian great-grandparent writes in his memoir that the years of 1915 and 1916 were the saddest of his life. These

were the years when the forced deportation, organised massacre and cruel suppression of the Armenian population by Ottoman forces came to its culmination. At that time, these



were acts of a crime without a name, but one that was already being asserted as ‘the murder of a nation’<sup>1</sup>.

The problem of not having a word to accurately describe the inhuman situation the Armenians suffered in the beginning of the 20th century went beyond the struggle to find language to convey the depth and the scale of the planned and systematic extermination that befell the Armenians<sup>2</sup>. It was – and still is – a matter of proper qualification and just identification of its people, a question of heritage and memory.

The heinous gravity of the atrocities perpetrated against Armenians in the Ottoman Empire were flaunted in the past. On 24 May 1915, the Allied Governments jointly issued a declaration admonishing the mass killings of Armenians as ‘crimes of Turkey against humanity and civilization’<sup>3</sup>. Established at the end of the First World War, the Report of the 1919 Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties<sup>4</sup> was one of the first of its kind to address issues concerning ‘violations against the laws of humanity’ – in reliance to the Martens Clause contained in the preamble of the 1907 Hague Convention<sup>5</sup> – and concluded that the Ottoman Empire’s cruel treatment of Armenians in its territory contravened the ‘established laws and custom of war and the elementary laws of humanity’. In view of the grave charges, the Commission vainly recommended that all the agents found to be involved in those atrocities would be liable for prosecution and held personally responsible for the crimes.

The Istanbul Trials of 1919-1920<sup>6</sup> – although ultimately ineffectual in adjudging impartially and fairly – produced investigations, interrogations, indictments, telegrams, eye-witness accounts and other testimonies that are considered fundamental evidence to the authorities’ will to destroy and annihilate the Armenians. The martial trials failed in punishing the war criminals accordingly, proving to be a judicial fiasco, but its series of documents were substantial – along with the numerous diplomatic exchanges of various countries<sup>7</sup> – to prove that the acts committed against the Armenians meet the definition of what ought to be called ‘genocide’.

Coined by Raphael Lemkin in 1944, the word ‘genocide’ is a comparatively recent neologism for an old crime. Recognising that genocide is an international crime – the ultimate crime – that entails the national

and international responsibility of individual persons and states, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide<sup>8</sup> further defines it as ‘acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group’. Noteworthy, for the crime of genocide to exist, the prohibited acts enumerated on Article II must have been committed with the *dolus specialis* to destroy the protected groups, denying of its right to exist.

Notwithstanding, the jurisprudence of the International Court of Justice settles that the prohibition of genocide constitutes a peremptory norm of international law (*jus cogens*) and, thus, the obligations to prevent and to punish demanded by the Convention are binding on all states for protecting essential humanitarian values<sup>9</sup>. From the perspective of the legality principle, the ICJ has demonstrated, in the *Croatia v Serbia* judgment<sup>10</sup>, that the criminal adjudication of the conduct of genocide is not admissible retroactively.

The classification of past conducts as genocide has been the theme of disparities and controversies regarding its possible legal effects on international law within the scope of judicial adjudication<sup>11</sup>. Nonetheless, the insurmountable relevant ‘Report on the question of the prevention and punishment of the crime of genocide’ (Whitaker Report)<sup>12</sup> upholds, in a clear statement, that diagnosing past cases can provide a positive assistance to prescribe the optimal remedies to prevent future genocide. In its core, it is by recognising past instances of genocide and analysing their causation that the international community may learn from the history of these events. Remarkably, adopted by a 15 to four majority of the panel of experts in the Sub-Commission, the Whitaker Report mentions the Ottoman massacre of Armenians in 1915-1916 as one of the cases of genocide in the 20th century that meets the definition of genocide enshrined in the Genocide Convention.

In cases of gross violations of human rights and serious violations of international humanitarian law, it is of the utmost importance that the international community endeavours itself to recognise the right of the victims and their relatives to know the truth regarding such violations, to the fullest extent practicable<sup>13</sup>. This undeniable right surpasses the individual figure of the victim and embraces the collective aspect of society to know the truth about past events, the causes,

facts, reasons and circumstances that led to the perpetration of those types of crimes. The full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations<sup>14</sup>. Interrelated with the right to truth is the ‘duty to remember’, or ‘duty of memory’, as the public disclosure of the truth allows for the memorialisation process that reflect and shape the narrative in search for peace, empowerment, reconciliation and community solidarity<sup>15</sup>.

As of 2022, governments and parliaments of 33 countries, the International Centre for Transitional Justice<sup>16</sup>, the International Association of Genocide Scholars<sup>17</sup>, the Elie Wiesel Foundation for Humanity<sup>18</sup>, the European Parliament<sup>19</sup>, European People’s Party<sup>20</sup>, European Movement<sup>21</sup> and the Council of Europe<sup>22</sup> have joined their voices to officially acknowledge the atrocities against the Armenians as genocide as defined in the 1948 Genocide Convention. Most recently, a Parliamentary Bill to require Her Majesty’s Government to formally recognise the Armenian genocide of 1915-16 was proposed in the UK House of Commons<sup>23</sup>.

The symbolic reversal of a longstanding silence of the international community on the brutal and ruthless massacre committed against the Armenians is commendable. Casting away the shadows of denial and keeping alive the memories of the past are paramount for the quest for justice and existence of the Armenians as the recognition of the history of its oppression is now part of its identity and heritage<sup>24</sup>. Most importantly, correctly naming the grotesque horrors that were perpetrated against the Armenians as genocide sheds a light on the generational and transcendental suffering that painstakingly tarnished this group for over a century. Calling it by its name is the only way for the restoration of the dignity and memory of Armenians.

#### Notes

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# Separating fact from fiction: assessing the contemporary relevance of Calvo clauses in modern foreign investment disputes

**Damilare Onaopemipo Disu**



As far as today's economists are concerned, there appears to be a consensus on the monumental role in which a steady inflow of foreign investment can have on the economic development of any country.<sup>1</sup> Yet, subtly embedded within the foreign investment process is the propensity for disputes, which can warrant bickering and economic consequences if not properly handled. As a result, there has been an unabated quest to identify which method is best suited to handle complex foreign investment disputes. One such notorious method in the 19th century was the use of diplomatic protection by great powers to forcibly resolve investment disputes in favour of their nationals.<sup>2</sup> This scenario was especially true of the newly independent Latin American countries wherein countries like England and France militarily intervened at various times for the purpose of giving protection to the investments and properties of her citizens in the country.<sup>3</sup> This approach carried the latent risk of unfairness and triggered the response of Latin American countries.

One of such prominent response was the development of the eponymous Calvo clause, named after its author Carlos Calvo, who in 1863 argued that in the event of a dispute between a foreign investor and the government of a state, diplomatic protection should be excluded, and investors must rely upon available local remedies within the investee-state.<sup>4</sup> Thenceforth, the idea percolated across Latin America and the

world. To be sure, the effect of the Calvo clause in investment contracts is that an investor waives the right to diplomatic protection exercised by its state of nationality and that such an investor must exhaust local legal remedies (for example, rescission and specific performance) in relation to claims arising out of such investment contracts.<sup>5</sup>

Now, this paper aims to answer the following question: is the Calvo clause described above still relevant in the resolution of contemporary investor-state disputes? The answer to this is not as straightforward as we shall soon see.

In the first instance, due to the obvious difficulties of litigating an investment dispute – such as delay in certain jurisdictions, procedural complexities and enforcement challenges – there has been a gravitation towards investor-state arbitration as a means to solve international investment disputes.<sup>6</sup> In this connection, there has been a marked increase in the trend of investors to pre-select the applicable jurisdictional law and venue of arbitration in their investment contracts with investee-states.<sup>7</sup> Even in Latin American states, where the doctrine of Calvo clauses is so devotedly adhered to, this is slowly but steadily becoming the case.<sup>8</sup> As you may imagine, the reference of an investment dispute to international arbitration wherein the applicable law and venue of arbitration are far removed from the jurisdiction within which an investment takes place, is not in line with the purpose of Calvo clauses. Thus, for instance — it is not uncommon for a foreign



investor in Nigeria to enter an investment contract with an investee-state in which the law and venue chosen for dispute resolution is that of a different jurisdiction. While this is understandably due to the need to forestall a situation where the investee-state would wield an influence over the outcome of a dispute resolution process, it has the concomitant effect of diminishing the utility and relevance Calvo clauses in contemporary times.

Additionally, Calvo clauses are laden with several shortcomings, which are steadily pushing them out of fashion. To start with, Calvo clauses stipulate that an investor must seek and exhaust locally available remedies in the investee-state.<sup>9</sup> Yet, it is quite possible for a locally available remedy not to be sufficient in light of complex investment disputes. Thus, there exists several judicial pronouncements wherein the futility, ineffectiveness and insufficiency of locally available remedies has been advanced as a justification for waiver of the requirement for exhaustion of local remedies, and by consequence, the Calvo clause which entrenches this requirement.<sup>10</sup> Specifically, in *Loewen v United States*,<sup>11</sup> it was held that in assessing the sufficiency or otherwise of a local remedy, the investor's financial and economic circumstances must be taken account of. To this challenge of insufficiency of locally available remedy, we may add the following challenges of Calvo clauses — delay in obtaining local remedies due to bureaucratic procedures across diverse jurisdictions, and the high cost of pursuing local remedies over an extended period.<sup>12</sup> These challenges, among others, have diminished the relevance of Calvo clauses and promoted the utility of international arbitration for resolution of investment disputes.

Moreover, the emergence of international treaties such as the New York Convention,<sup>13</sup> has also contributed to the receding relevance of Calvo clauses. As an example, the New York Convention allows arbitral awards rendered in a foreign venue and based on a foreign law (which could have been chosen by the investor and the investee-state) to be recognised and enforced in the jurisdiction where the investment is situated insofar as the jurisdiction is a signatory to the New York Convention.<sup>14</sup>

It is for the foregoing reasons that one writer described the Calvo doctrine as 'dead'.<sup>15</sup> For another writer, the Calvo doctrine is 'less relevant in the current world'.<sup>16</sup> But is this the whole truth about

the Calvo doctrine or clause? Perhaps not so when we understand that the Calvo doctrine could be narrowly taken to simply indicate the ousting of diplomatic protection by the investor as a mechanism of investment dispute resolution. After all, the exclusion of diplomatic protection is one of the two key elements of the Calvo doctrine. Therefore, to merely state the Calvo doctrine has lost its relevance due to the decline in the pursuit of local remedies, does not paint a fair picture of what truly obtains.

Given this circumstance, the extent to which the Calvo doctrine can be said to have lost or retained its contemporary relevance would be dependent on an individual's understanding of the Calvo doctrine. For those who think the Calvo doctrine is simply the fervent pursuit of local remedies, they might as well certify the death of this doctrine. However, for those who perceive the Calvo doctrine as the exclusion of diplomatic protection, then the doctrine is very well alive. Indeed, it was this latter view that *Shan* shared when he wrote of the continued relevance of the Calvo doctrine in the following terms:

*'Calvo is not completely dead [...] More precisely, Calvo is still alive respecting rejection of diplomatic protection.'*<sup>17</sup>

#### Notes

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# Considering the role of the legal profession in combatting illicit financial flows on the African continent

Matilda Nengare



## Introduction

Illicit Financial Flows (IFFs) are theft.<sup>1</sup> While they consist of complicated and evolving concepts, which may be couched in difficult-to-understand language,<sup>2</sup> at their core, IFFs are the pilfering of resources, which has a direct negative effect on the economies of the countries involved.<sup>3</sup> The United Nations Conference on Trade and Development (UNCTAD) reports that the African continent collectively loses USD88.6bn annually due to IFFs,<sup>4</sup> which constitutes nearly 4 per cent of its gross domestic product (GDP).<sup>5</sup>

Between 1980 and 2018, Sub-Saharan Africa received almost USD2tn in development aid and foreign direct investment (FDI).<sup>6</sup> In the same period,<sup>7</sup> an estimated amount of USD1.3tn was removed from the region in the form of IFFs.<sup>8</sup>

Public domestic resources are meant to constitute a central financing component for sustainable development, contributing to the provision of public goods and services, equity and macroeconomic stability.<sup>9</sup> Instead, these resources are being channelled off the continent and converted to private use. IFFs directly and severely undermine development efforts and require urgent attention and resolution.

## What exactly are illicit financial flows?

An illicit flow can be defined as the international cross-border transfer of funds with an illegal origin, destination or manner of transfer.<sup>10</sup> IFFs can consist of several types of distinct activities, including money laundering, bribery and corruption, terrorist financing and tax evasion.<sup>11</sup>

The issue of IFFs raises complex issues that cut across different disciplines<sup>12</sup> and which involve different actors. It has been highlighted that the eradication of IFFs will require interdisciplinary action and coordination.<sup>13</sup>

For the purpose of this article, I reflect on the role of lawyers in stemming IFFs, focusing particularly on cases involving public officials.

Case studies: Angola, Cameroon and Zimbabwe

- In 2013, Forbes profiled Isabel dos Santos, daughter of President Jose Eduardo dos Santos (who ruled Angola for 38 years).<sup>14</sup> With an estimated net worth of USD3.5bn, she was the richest woman in Africa.<sup>15</sup> Many of the funds stemming from the oil-rich country were heavily invested in her personal portfolio abroad, in addition to numerous assets located across Europe.<sup>16</sup>
- President Paul Biya of Cameroon has

presided over the country for 40 years.<sup>17</sup> Despite Cameroon having one of the lowest GDPs in the world, with nearly half the population living below the poverty line,<sup>18</sup> his personal fortune is estimated at over USD200m.<sup>19</sup> Biya has multiple assets located across Europe, where he spends the majority of his time.<sup>20</sup>

- Former President Robert Mugabe, who ruled Zimbabwe for 37 years, accumulated a rumoured fortune of over £1bn.<sup>21</sup> This included properties located across the globe, including in Dubai, Hong Kong, Malaysia, Singapore and South Africa.<sup>22</sup>

These three countries offer a snapshot into the issue of IFFs, which has been perpetuated by a ruling elite in Africa. Angola, Cameroon and Zimbabwe are all mineral-rich countries, with reserves which include gold, diamonds, gas, platinum, lithium and iron.<sup>23</sup> Despite this, they remain some of the poorest and most underdeveloped in the world.

This phenomenon of publicly elected officials (or their relatives) amassing inordinate fortunes while in office is by no means confined to African leaders. Much of the same has been recorded across the world, including in Kazakhstan, Malaysia and the Philippines.<sup>24</sup> It becomes particularly stark when considered within the context of being perpetuated in disproportionately poor countries.

Illicit Financial Flows have a human cost. They impact the poorest and most vulnerable in society, often being linked to mismanagement of public funds, severe human rights abuses, repression and corruption.<sup>25</sup> They also heighten instability, damage public trust and undermine good governance.<sup>26</sup>

### **The relationship between sustainable development and eradication of IFFs**

For African states, achievement of the Sustainable Development Goals (SDGs) and the African Union's Agenda 2063 is inextricably linked to the eradication of IFFs.<sup>27</sup> The OECD has highlighted the urgency of addressing IFFs to ensure development policy coherence.<sup>28</sup>

### **Lawyers and evolving ethical duties and morals**

Due to the nature of their roles, lawyers may find themselves facilitating IFFs, either initiating such transactions or serving as

intermediaries for their clients, wilfully or through negligence.<sup>29</sup> This might be done through measures such as tax structuring, offshore transactions, trade misinvoicing, corruption or outright fraud.<sup>30</sup>

As expert technicians and business leaders and intermediaries, lawyers are in a unique position.<sup>31</sup> This comes with specific duties and ethical responsibilities, not only to clients, but also to the legal profession, courts, governmental authorities and wider society.<sup>32</sup> As the world evolves, these considerations must inevitably evolve.<sup>33</sup>

### **Balancing act? Considering alternative approaches**

The position in which lawyers find themselves in stems from their core duty: to act in the best interests of the client.<sup>34</sup> However, this duty is neither sacrosanct nor unfettered. In carrying out their duties, lawyers may often find themselves faced with competing duties and interests, which they must balance.<sup>35</sup>

At a time where there has been a concerted global effort to coordinate ESG initiatives and achieve the momentous undertakings of the SDGs, legal professionals must reflect on how to balance their traditional duties against contemporary moral and ethical concerns.<sup>36</sup> An argument can be made that, as global citizens, lawyers have duties which include not facilitating economic crime, which may adversely impact sustainable development.

### **Leading from the front**

An example of the evolution of law firms can be found in the new sustainability strategy of international law firm, Clifford Chance.<sup>37</sup> In recognition of 'the increasing urgency of climate change mitigation', Clifford Chance has committed to a sustainability evaluation of all new matters.<sup>38</sup> This will inform whether the firm takes on the new matter.

Considered in a similar vein, the idea of lawyers and law firms conducting enhanced client due diligence for financial misconduct and economic crime, and specifically IFFs is not too farfetched.

### **Conclusion**

In a global context where companies are increasingly focusing on the triple bottom line, the idea of the legal profession evolving to respond to contemporary developments is not ludicrous. Many lawyers and firms



are already undertaking initiatives aimed at ensuring greater sustainability and global justice.<sup>39</sup> It appears intuitive for them to also do so in the context of supporting the fight against IFFs for greater global economic and financial transparency, as well as stability and development in less developed regions.<sup>40</sup>

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Nia Knighton



## How the media covers war: a look at media coverage of conflict in the Global North and the Global South

**M**ainstream media has exploded with content following Russia's announcement of a military operation against Ukraine.

Subsequent around-the-clock news coverage, radio segments, articles, podcast episodes and social media discourse regarding the war in Ukraine have followed, spawning a massive public outcry that has yielded swift international reaction, generated billions in humanitarian aid and even crowdfunded the Ukrainian military.<sup>1</sup> However, global comradery is not always extended to countries in the Global South, who are battling similar modern-day conflicts of war, coup d'états, famine and genocide at unprecedented levels. There has been an outpour of solidarity, collective grief and expressions of empathy for conflict and tragedy in the Global North at large, and at the same time, a scarcity of international reaction and prolonged support for victims of recent conflicts in other nations in the Global South, such as Afghanistan, Ethiopia and Syria, to name a few – all of which have seen larger numbers in death tolls, displacement and infrastructural damage. This is indicative of a hypocritical international community that selectively mourns the loss of life, while blatantly ignoring equally horrendous atrocities in other parts of the world.<sup>2</sup> This stark imbalance of the 'grievability' of life, which has its roots in the racial and colonial legacy of the West,

is not just a question of what makes a worthy news story, but who is worthy of mass coverage and collective empathy.<sup>3</sup>

### Media coverage of conflicts in the Global North versus the Global South

Russian aggression towards Ukraine is undoubtedly unlawful, unjustifiable and should be condemned unequivocally. Nevertheless, double standards exist in the media's coverage of the war in Ukraine when compared to war, resistance and displacement in the Global South, raising concerns of unequal attention to victims of war and unequal 'grievability' of the loss of life. Remarkably, much of the media coverage of the Ukrainian crisis has received little controversy regarding the spate of refugees fleeing to safety in bordering countries or the right of civilians to engage in armed resistance – a grace that has not been similarly extended to asylum seekers or armed resistance movements in the Global South.<sup>4</sup>

Media coverage of the Ukrainian crisis parallels coverage strategies of other calamities in the Global North, like the Paris attacks in 2015, and the 9/11 attacks in the US, which included anecdotes of personal stories, humanising images of loss, nuance and frequent airtime. Comparatively, many people have criticised journalists and news outlets for reporting atrocities in





the Global South in terms of numbers and sensationalised despair.<sup>5</sup> For instance, while mainstream media is hesitant to depict dead bodies of (white) Westerners in the media, dead bodies, and gruesome injuries of those, particularly in Africa, Asia and the Middle East, are frequently shown to the public as part of a long tradition of exploiting the most painful, brutal moments for Western consumption.<sup>6</sup>

So why does mainstream media empathise with the realities of conflict and war in the Global North differently from that of the Global South? Consider recent remarks made by media pundits, journalists and political figures like former Deputy Prosecutor General of Ukraine, David Sakvarelidze, who described his emotional response in seeing ‘European people with blue eyes and blond hair being killed’, or CBS News Senior Correspondent in Kyiv, Charlie D’Agata who said in an on-air interview, ‘This isn’t a place, with all due respect, like Iraq or Afghanistan that has seen conflict raging for decades. This is a relatively civilised, relatively European [...] city’. Remarks such as these explicitly highlight the racialised lens through which European and American correspondents determine human value and shape public discourse.<sup>7</sup>

### **International response to war in Ukraine compared to that of the Global South**

The mass coverage of the war in Ukraine has sparked swift responses from the international community. Within two weeks of the invasion, the Human Rights Council in Geneva voted to establish a Commission on Ukraine, and the Prosecutor of the International Criminal Court (ICC) announced an investigation into possible war crimes or crimes against humanity in Ukraine.<sup>8</sup> Australia, the European Union, Germany, Japan, Switzerland, Taiwan, the United Kingdom and the United States are among those who have imposed immediate sanctions targeting Russian banks, oil refineries, and military exports.<sup>9</sup> Additionally, countries across Eastern Europe like Moldova, Poland and Romania, which have historically taken a hardline stance towards refugees arriving from countries such as Afghanistan and Syria in recent years, have opened their borders to Ukrainian refugees.<sup>10</sup>

The European Union, which just last September, was criticised for politicising the refugee crisis in Afghanistan after the Taliban

takeover, said it would offer three years of protection for Ukrainian refugees with overwhelming support from the public.<sup>11</sup> The Biden administration recently announced temporary protected status to Ukrainians already in the US.<sup>12</sup> This comes less than a year after the US expelled over 12,000 Haitian refugees from its Texas borders with images of Texas border agents on horseback using whips to corral Haitian asylum seekers back across the Mexican border.<sup>13</sup> Responses to conflict and war in the Global South have largely been met with slow and often absent reactions from mainstream media and the West alike.<sup>14</sup> The international community has been relatively slow to pass meaningful resolutions in countries like the Democratic Republic of Congo, Ethiopia, Myanmar, South Sudan, Syria and Yemen to name a few.<sup>15</sup> While timely responses to violations of international law should be the practised norm of the international community, the time lag between responses by the international community and the laissez-faire approach to conflicts in other parts of the world, namely the Global South, give rise to concern.

### **Politics of desirability and determining the value of life**

The consistent imbalance of media coverage and expressions of shock found in international news outlets, statements by world leaders and social media by and large seem to point to notions of desirability and worth, which have inseparable roots in both a racial and colonial context.<sup>16</sup> Ideas of dominance from colonial and imperial legacies persist in the modern state, shaping Western ideas of desirability based on power, access and race. ‘Desire is political — both affected by and simultaneously shaping systems of power and oppression.’<sup>17</sup> The more desirable a person or group of people are – whether it be because of race, class, size, geography, religion, gender or sexual identity, and so on – the more valued their life is. The preconception of ‘value’ of life has its origins in white supremacy and has been recently spotlighted in the #BlackLivesMatter movement as a resistance movement against global anti-Blackness. A life must fit a certain preconception of what one constitutes as life, and as such, determines if one will mourn the destruction of that life. The mainstream responses to the loss of life and livelihood in Ukraine reflect ideas of ‘grievability’, and



ultimately stem from beliefs reiterated by Mr Sakvarelidze, that Europeans with 'blonde hair and blue eyes' are more 'desirable', more valuable and thus more 'grievable' compared to the Black, Brown and Indigenous lives in the Global South.<sup>18</sup>

## Conclusion

Mainstream media and society operating out of the Global North must grapple with their legacies of a racial and colonial past and the ingrained preconceptions for determining the value of someone's life. Every life is precious, and atrocities that occur in the Global South deserve equal attention and collective action as those that occur in the Global North. *Who* is worthy of mass coverage and collective empathy and response? The answer is simple: everyone.

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- 18 Aljazeera, 'Double standards': Western coverage of Ukraine war criticized [www.aljazeera.com/news/2022/2/27/western-media-coverage-ukraine-russia-invasion-criticism](http://www.aljazeera.com/news/2022/2/27/western-media-coverage-ukraine-russia-invasion-criticism)

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# Businesses and human rights in the realm of artificial intelligence

**A**rtificial intelligence is the reality of the present, not the future. The pervasiveness of the use of artificial intelligence in everyday life raises the question of its impact on human rights.

Artificial intelligence can carry such risks for human rights as sensitive data collection, lack of freedom of opinion, expression and information. Artificial Intelligence can affect

the right to privacy in criminal justice risk assessment and healthcare diagnostics. AI-based machines collect, store and analyze the personal data of individuals during criminal justice risk assessment.<sup>1</sup> In the field of diagnostics, a vast amount of sensitive data collection is needed for the artificial intelligence systems.<sup>2</sup> These examples raise privacy concerns. Moreover, freedom of



opinion, expression and information can be attacked. For instance, in the financial sphere when AI sets credit ratings.<sup>3</sup> Similarly, for employment, a person may avoid communicating with certain people and try not to express his opinion in fear that this may affect his profile in recruitment since ‘all data’ could be ‘hiring data’.<sup>4</sup>

Artificial intelligence is provided by business entities, and therefore it is highly important for businesses to carry the responsibility to respect human rights. To evaluate the impact of business activities on human rights and minimise its negative consequences, the UN developed the Guiding Principles on Business and Human Rights. These are devoted to the obligations of the state and private enterprises to protect human rights, as well as to provide remedies in case of the breach of these rights. Although states are obliged to promote human rights in business activities, the obligations of businesses will only be considered in the paper.

Regarding the enforcement of human rights by private enterprises, the most effective tool is due diligence according to Principle 17 of the United Nations Guiding Principles on Business and Human Rights<sup>5</sup> (UNGPs). Human rights due diligence is considered by the UN Office of the United Nations High Commissioner for Human Rights (OHCHR) in the B-tech project<sup>6</sup> as the identification, assessment, response, tracking and communication of risks to people, within relevant business processes and functions, such as human resources, procurement, marketing, operations and community engagement.<sup>7</sup> Despite the fact that business and human rights in technology were covered by the UN in their B-tech project, not enough attention was paid to the impact of artificial intelligence on human rights and its due diligence.

To start with, in the realm of artificial intelligence, human rights due diligence may have its disadvantages. For example, small companies such as startups that develop and release a product based on artificial intelligence may not be aware that, according

to international law, their duties include conducting human rights due diligence. In addition, it is not always possible to assess the risks of the future impact of artificial intelligence on human rights. This is due to the complex structure of artificial intelligence, which can learn and acquire new skills as it works. Thus, the impact of machine learning AI on human rights at its release and after a certain period of use will be different.<sup>8</sup>

Such risks can be overcome by conducting ongoing human rights due diligence at every stage of the use of artificial intelligence.<sup>9</sup> Additionally, in order to assess the impact of machine learning AI work on human rights, it is necessary and sufficient to create new algorithms and tools that can predict the possible risks of AI for a person in the future.<sup>10</sup>

Finally, all of the above solutions will not work unless the UNGPs principle is applied, according to which human rights due diligence must be initiated at the earliest stage of each production or business process.<sup>11</sup>

#### Notes

- 1 F Raso et al, *Artificial Intelligence and Human Rights: Opportunities and Risks*, Berkman Klein Center for Internet and Society Research Publication, 2018, available at: <http://nrs.harvard.edu/urn-3:HUL.InstRepos:38021439>, last accessed 1 September 2020, p 20.
- 2 *Ibid*, p 32.
- 3 *Ibid*, p 26.
- 4 *Ibid*, p 42.
- 5 Office of the United Nations High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, implementing the United Nations ‘Protect, Respect and Remedy Framework’, 2011.
- 6 Office of the United Nations High Commissioner for Human Rights, *UN Human Rights Business and Human Rights in Technology Project (B-Tech Project)*, further information available at: [www.ohchr.org/EN/Issues/Business/Pages/B-TechProject.aspx](http://www.ohchr.org/EN/Issues/Business/Pages/B-TechProject.aspx), last accessed 16 February 2022.
- 7 Office of the United Nations High Commissioner for Human Rights, *UN Human Rights Business and Human Rights in Technology Project (B-Tech), Applying the UN Guiding Principles on Business and Human Rights to digital technologies, Overview and Scope*, November 2019 (‘UN B-Tech Scoping Paper’), p 5, available at: [www.ohchr.org/Documents/Issues/Business/B-Tech/B\\_Tech\\_Project\\_revised\\_scoping\\_final.pdf](http://www.ohchr.org/Documents/Issues/Business/B-Tech/B_Tech_Project_revised_scoping_final.pdf), last accessed 16 February 2022.
- 8 *Ibid* n 1, p 35.
- 9 UNGPs, Principle 17 (c).
- 10 *Ibid* n 1, p 55.
- 11 UNGPs, Principle 17.