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# IBA Interns' Newsletter

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# ESG and international commercial arbitration

The growing prominence of environmental, social and governance (ESG) considerations in international commerce reflects a broader 'ESG turn' in global governance – where ESG principles derived from regional, national and soft law instruments increasingly shape private legal relationships. Standards and regulatory requirements contained in the OECD Guidelines for Multinational Enterprises[1], the UN Global Compact,[2] the UN Guiding Principles on Business and Human Rights,[3] regional regulations[4] and specific national laws[5] are often referenced in commercial contracts,[6] transforming them into enforceable commitments. As a result, international commercial arbitration, traditionally designed for private disputes, is likely to find itself at the intersection of private law and public interest, tasked with resolving business-to-business disputes in relation to ESG obligations, where such obligations are embedded in contracts that also contain arbitration clauses.[7]

Commercial contracts that typically incorporate ESG-related clauses include supply contracts and share-purchase agreements.[8] In this context, an array of contractual provisions may fit under the ESG umbrella. In supply contacts, corporates and financial institutions, subject to ESG reporting obligations and having to abide by a number of ESG objectives, impose ESG covenants on their counterparties, such as undertakings to ensure that supplied products are free from deforestation or forced labour.[9] In mergers and acquisitions (M&A) transactions, buyers may seek protection against unknown ESG-related risks by obtaining representations and warranties from sellers in relation to proper governance practices, anti-bribery compliance and adherence to applicable laws and regulations. If related issues are identified during due diligence, they may be addressed through indemnities.[10] Contractual clauses also typically specify consequences of breach, including termination, indemnification and remediation.[11]

Beyond offering the advantage of a neutral forum and worldwide coverage by the New York Convention,[12] providing for the regime of recognition and enforcement of arbitral awards across borders, international arbitration possesses several procedural features that make it particularly suitable for resolving ESG-related disputes. These include the confidential nature of proceedings, the parties' ability to appoint arbitrators and experts with specialised knowledge over the subject matter of a dispute, the procedural flexibility that allows parties and tribunals to determine the evidence-taking procedure that suits the needs of the case, as well as to employ techniques for addressing complex disputes, such as bifurcating the proceedings, identifying issues that can be solved without a hearing, handling multi-party or multi-contract disputes through consolidation, joinder or arbitration under multiple contracts.[13]

However, challenges arise when ESG-related arbitrations touch upon the interests of external stakeholders, such as local communities, employees or non-governmental organisations (NGOs). When third parties seek to intervene with allegations of ESG-related harm, tensions over a consensual and confidential nature of arbitration emerge. Additionally, cost disparities may hinder access to arbitration for affected third parties, raising concerns about inequality of arms. Furthermore, if the outcome of arbitration is that a party is liable to a third party in connection with an ESG clause, the enforceability of such an award is at risk.[14]

The Hague Rules on Business and Human Rights Arbitration[15] are the set of procedural rules specifically designed for arbitrations related to the impact of business activities on human rights, in essence addressing some of the concerns over third party and public interests. They inter alia provide for the broad discretion of arbitral tribunals on adapting the transparency regime to the cases before them,[16] as well as for the obligation of tribunals to ensure that an unrepresented

party can present its case in a fair and efficient way, including by adopting more proactive and inquisitorial procedures.[17] The effectiveness of the Rules, though, would depend on the willingness of contractual parties to opt for them in designing dispute resolution mechanisms.

In parallel with resolving ESG disputes, the sustainability of arbitration itself has become a topic of concern. In 2019, an independent arbitrator, Lucy Greenwood, launched the Green Pledge, prompting the arbitration community to consider the environmental impact of their case management practices. This led to the Campaign for Greener Arbitration,[18] whose pre-launch study revealed that offsetting the carbon footprint of a single medium-sized arbitration would require approximately 20,000 trees.[19] In recent years, arbitral institutions have adopted digital case management systems and incorporated default electronic communication,[20] as well as virtual and hybrid hearings options in their rules,[21] alongside making their own sustainability commitments.[22] Some law firms have developed guides offering clients a menu of greener case management options which clients can adopt in a conduct of their arbitrations, as well as to propose to counterparties and arbitral tribunals.[23]

The social and governance aspects of arbitration have also come under scrutiny, prompting a wave of initiatives aimed at aligning arbitral practice with ESG principles.[24] On the social level, diversity, equality and inclusion have emerged as key priorities. The launch of the Equal Representation in Arbitration Pledge[25] in 2016 catalysed the arbitral community's movement towards improving the representation of women in arbitral appointments, with some major institutions reporting near-parity in their institutional appointments in recent years.[26] This momentum has inspired further initiatives, including the African Promise,[27] the Racial Equality for Arbitration Lawyers[28] and the Equal Representation for Expert Witnesses Pledge,[29] each addressing underrepresentation across gender, racial, regional and professional dimensions. Governance concerns have likewise prompted great emphasis on transparency, efficiency, quality and ethics. Arbitral institutions now publish caseload statistics, release guidance notes on various aspects of the proceedings, provide for clear fee structures in their rules, as well as promote ethical standards for arbitrators and party representatives. On a systemic level, these practices contribute to the good governance of arbitration, yet, arguably, a gap still exists between the 'good intentions' of the arbitral community as a whole and the concrete steps taken by each actor concerned.[30]

With the anticipated rise of ESG-related disputes, international arbitration is expected to remain attractive to private parties. Yet, it remains to be seen in practice how public interest concerns will be resolved in a purely commercial context. The arbitration community's willingness to leverage procedural flexibility to enhance both efficiency and sustainability of arbitration may, ultimately, define its role in navigating the evolving nexus between commerce and global governance. However, the impact of institutional and counsel-led sustainability measures may remain limited unless embraced by private parties. As arbitration is fundamentally a creature of contract, it is up to the parties to exercise their discretion in pursuing sustainable case management techniques for their proceedings.

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# Disability-based abortion bans: saving or sacrificing the vulnerable?

Penelope Harrison

## Introduction

Defined by the World Health Organization as 'the termination of a pregnancy prior to 20 weeks' gestation' abortion is, at its core, a medical procedure.[1] Historical records indicate it was first performed around 1550 BC and has remained a staple in every society which has since emerged.[2] Yet, in countries including El Salvador, Poland and the US, legal abortion is sparse.[3] The medical connotation we once knew is being eclipsed by a perceived moral one.

Thanks to groundwork laid by Soviet women[4] and the US Supreme Court's landmark *Roe v Wade* (1973) decision,[5] the choice of whether to carry to term was understood to be a private one, made by the individual concerned. Although anti-abortion campaigners were active, they experienced comparatively little success compared to what they would later know following the advent of social media. Groups like Americans United for Life (AUL) saw their online popularity explode[6] and they successfully campaigned for reason-based abortion (RBA) bans.[7] An RBA is an abortion that is conducted due to a characteristic the foetus is likely to have.[8] Common characteristics include sex and race, but anti-abortion groups have triumphed when campaigning for bans on disability-based RBAs.[9] Supporters argue these bans are necessary to protect the right to life of people with disabilities (Article 10 of the UN Convention on the Rights of Persons with Disabilities). [10] However, human rights defenders are right to call the discussion nuanced – the UNHRC has previously alleged that some nations 'permeate' the decision process 'geared towards the extinction' of certain conditions[11] – many campaigners merely purport to care about this problem. For such people, disability-based RBA bans represent stepping stones to facilitate general restrictions on bodily autonomy.

People with disabilities are not 'gotcha moments' in the debate around reproductive healthcare.

## Box v Planned Parenthood: the rewriting of abortion history

*Box v Planned Parenthood of Indiana and Kentucky* (2019) marked a major milestone in the campaign to restrict abortion access in the US. It asked the US Supreme Court two questions: first, whether an Indiana state law regarding disposal of foetal remains conformed to state interests,[12] then it questioned the legality of an RBA ban based on gender, race, ethnicity and disability.[13] The court refused to address the latter.[14]

Nonetheless, Justice Clarence Thomas has dedicated his opinion to the matter.[15] Through a falsified recounting of historical facts, he implies RBAs represent a form of 'modern-day eugenics'.[16] After misrepresenting quotes from nurse and Planned Parenthood founder Margret Sanger,[17] and even acknowledging that most contemporary leaders of the Black community were in favour of family planning when it emerged,[18] Thomas argues that RBAs are a moral wrong. His reasoning: abortions are 3.5 times more prevalent in Black patients than in their white counterparts[19] – and that rates are higher if a foetus is suspected to have Down's Syndrome.[20] His opinion refuses to consider socio-economic and cultural factors known to influence abortion decisions.[21] Justice Thomas relies exclusively on 'historical guilt-by-association', and not *actual* evidence of potential bias in abortion processes, to justify his views.[22]

The prevalence of such argumentation extends far beyond the US. In 2020, Poland's Constitutional Court found 'eugenic practices' which 'correlate the protection

of the unborn child's right to life with the child's state of health' violated the country's constitution. The court did not present scientific evidence, or any empirical data, when justifying its conclusion.[23] El Salvador also imposes arduous restrictions, outlawing abortion entirely, irrespective of reasoning.[24]

## RBA bans: protecting or persecuting people with disabilities?

The instrumentalisation of disability to justify restricting abortion produces grave consequences – not least for people with disabilities themselves. In December 2024, the Inter-American Court of Human Rights (IACHR) heard the case of *Beatriz et al v El Salvador*,[25] a case concerning a woman with lupus, arthritis and renal failure.[26] Besides her own disabilities that would endanger her life in the event she tried to give birth,[27] the foetus itself also had a condition so severe that it would have been unable to survive outside of her womb.[28] Doctors stressed the necessity of an abortion, and an earlier IACHR decision obliged the state to provide one.[29] The state refused.[30] After Beatriz fell critically ill, the foetus was delivered via an emergency procedure, dying only five hours later.[31] In the subsequent IACHR case, the state was found to have violated Beatriz's rights to health, judicial protection, private life and personal integrity.[32] The court concluded the absolute abortion ban prevented her from seeking appropriate care.[33]

Indeed, even when a state provides exceptions to such a ban in emergencies, the strictness inherent to them makes it difficult for patients with disabilities to access abortions when they are needed. Such findings have been observed in post-*Dobbs* America, with many doctors hesitant to perform necessary procedures, fearing prosecution based on vague and non-medically-defined exception clauses.[34] RBA bans fail to protect this population precisely because they were never intended to do so.

Disability-based RBA bans succeed simply because they *appear* to be as grounded in medical rights as abortion *is*. This false equivalence then allows for pseudo-morality to be at the centre of debates, instead of public health.

Jurisdictions seeking total abortion bans often begin by introducing RBAs. Prior to *Dobbs v Jackson Women's Health Organization* (2022), 17 US states had trigger bans in place, banning abortion automatically once federal jurisdiction was lifted. Of those 17, 14 had also enacted RBA bans.[35] In Poland, the 2020 constitutional ruling was the predecessor to increasing general restrictions which, in effect, amount to a practical ban.[36, 37]

## Conclusion

In point of fact, groups purporting to act in favour of the reproductive rights of people with disabilities should not exclusively advocate against RBAs. Their campaigning should also touch upon matters of forced sterilisation, discrimination against disabled parents, or simply the general stigma surrounding disabled people and the sexual relations they have. Yet, these same groups rarely – if ever – address such issues.

Nobody denies the complex relationship between disability and abortion, but effectively addressing the question requires a commitment to transparency we have yet to see.

Notes

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# Prisoner rights and chicken nuggets: the UK's ongoing tension with the European Court of Human Rights

**Claudia Hopper**

The UK has a tumultuous relationship with the European Court of Human Rights (ECtHR), characterised by frequent accusations of overreach and threats of withdrawal from the European Convention on Human Rights (ECHR). Though the UK's relationship with the Court was previously harmonious, as demonstrated by the domestic incorporation of the ECHR through the 1998 Human Rights Act (HRA), the tone shifted in the mid-2000s.[1] This change was likely at least partially due to a handful of decisions the UK Government vehemently opposed. In 2005, the Court held in *Hirst v United Kingdom* that a UK law blanketly disenfranchising convicted prisoners while in prison violated Article 3 of Protocol No 1 to the ECHR.[2] The UK was slow to comply with the ECtHR's decision, and when a bill was proposed in 2011 to bring the country into compliance, it was soundly defeated 234 to 22.[3] Famously, then Prime Minister, David Cameron, stated during the debate that the thought of allowing a single prisoner to vote made him 'physically ill'.[4] The UK did not fully comply with the 2005 decision until 2017.[5]

In 2012, the UK was involved in legal proceedings regarding the extradition of accused terrorists, most notably Abu Hamza and Abu Qatada. Though treaty negotiations eventually succeeded and the ECtHR allowed the extraditions, UK opinion of the Court was noticeably sour, with Home Secretary, Theresa May, publicly encouraging the UK's departure from the ECHR and the Court's jurisdiction.[6] Over the span of 15 years, the percentage of the British public that perceived the ECtHR as a positive force sunk from 71 per cent in 1996 to 19 per cent in 2011.[7] UK politicians continue to disparage the Court and periodically call for the departure from the ECHR through a repeal of the HRA. In 2016, Theresa May renewed her critiques of the Court, arguing that leaving the ECHR would allow British courts to deport foreign criminals.[8] In 2021, a video was leaked of Foreign Secretary, Dominic Raab, arguing that limiting trade to countries that meet ECHR standards prevents the UK from trading with future trade markets.[9] Furthermore, there are ongoing issues with conservative politicians weaponising minor details from ECtHR decisions to mischaracterise the decisions and cast the Court's judgment into doubt. For example, Theresa May publicly claimed that the Court blocked the deportation of an individual because they had a cat, and Nigel Farage asserted to the British public that the Court blocked a person's deportment because their son did not like foreign chicken nuggets.[10]

Despite the words and actions of the conservative bloc, the ECtHR does not have a wholly hostile relationship with the UK. According to the ECtHR, the UK has the fifth highest rate of implementing Court decisions and thereby closing cases.[11] Amnesty International carried out a 2023 poll and found that 57 per cent of polled UK citizens believe that the UK should stay part of the ECHR and over 90 per cent believed that the next government administration should prioritise reducing the cost-of-living over leaving the ECHR.[12] The potential of the UK leaving the ECHR is further complicated by the fact that it would be a violation of the Good Friday Agreement.[13]

The Good Friday Agreement plays a dual role acting as a peace settlement between the warring parties in Northern Ireland and a bilateral treaty between Ireland and the UK.[14] The Good Friday Requirement requires the rights protections provided by the ECHR itself, not just protections similar or equivalent to the ECHR.[15] However, the HRA itself could be amended without technically violating the Good Friday Agreement, though it would take careful maneuvering and likely fall short of actually pulling from the ECHR.[16]

Though the Conservative party is disproportionately loud in its denunciation of the HRA and the ECtHR, it is still only one party. While it has grappled with possible reformations to the HRA for the past several years, threats to pull from the ECHR have either failed or been empty thus far. Regardless, the possibility of the UK repealing the HRA should be taken seriously and carefully approached so as to cause as little damage to human rights law as possible.

Notes

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Eugenie Hirsch

# Afghanistan joins Myanmar and Syria: how UN independent investigative mechanisms advance accountability

By a resolution of the Human Rights Council (HRC) from 26 September 2025, the United Nations (UN) decided by consensus to establish an Independent Investigative Mechanism for Afghanistan.[1] While not yet operational, this new Mechanism marks a significant milestone in the pursuit of justice for the people in Afghanistan.

This article first explains the function of UN Independent Investigative Mechanisms (IIM) and develops the concrete examples of Myanmar and Syria. It finally considers reactions to, and expectations for, the Mechanism for Afghanistan.

## Understanding UN investigative mechanisms

UN-mandated investigative mechanisms' main role and duty is to foster accountability. To do so, their mandates allow them to record, collect and analyse facts to qualify violations of fundamental rights in legal terms, and to indicate potential responsibilities.[2] They differ from fact-finding missions, of which the mandate is limited to establishing facts and circumstances surrounding alleged human rights violations.

For instance, in 2017, the HRC established the Independent International Fact-Finding Mission on Myanmar (IIFFMM), missioned to establish the facts and circumstances of the alleged violations and abuses in the country. Its mandate ended in 2019 and was replaced by the Independent Investigative Mechanism for Myanmar (IIMM), which was established to collect and preserve evidence in order to prepare files for criminal prosecution.[3] While they have different mandates, they are usually complementary: the IIFFMM has transferred the information it collected to the IIMM.

Similarly, the Independent Commission of Inquiry on the Syrian Arab Republic (COI) works as a fact-finding mission,[4] while the International, Impartial and Independent Mechanism (IIIM) focuses on identifying evidence and linking it to specific crimes and individuals.[5] These examples illustrate how UN mechanisms function, and how they intend to help fill potential accountability gaps.

## Investigative mechanisms and accountability

IIMs are tasked with the mission of assisting in the investigation and prosecution of persons responsible for the most serious crimes committed in the situation and timeframe given. However, their mandate stops at facilitating criminal proceedings.[6] So, how do they concretely assist international and national courts?

Regarding Syria, the need to ensure accountability was strong in 2016, when the IIIM was established. Indeed, for five years, atrocities were being committed in Syria – according to multiple reports, particularly by the COI[7] – without any solution to hold perpetrators accountable for their actions. Indeed, a referral to the International

Criminal Court (ICC) by the UN Security Council (UNSC) was impossible due to a lack of agreement on the question, and no ad hoc tribunal could be established for the same reason.[8]

Here, the IIIM filled a crucial gap, and became a necessary assistant for judicial proceedings. Syria is one of the best illustrations of universal jurisdiction (UJ) cases before national jurisdiction. States such as France, Germany and Sweden have opened cases against alleged perpetrators in the Syrian situation, exercising their powers under UJ.[9] While this is a significant step towards broader accountability, these States face a fundamental limitation: access to evidence. They cannot violate Syrian state sovereignty by entering the territory to collect evidence, testimonies or any related material that could help strengthen their case. Therefore, investigators, prosecutors or judges from national jurisdictions can submit 'requests for assistance' to the IIIM,[10] or use material shared by the Mechanism, which thus provides necessary evidence without breaching state sovereignty.

For Myanmar, the situation differs slightly. The IIMM supports an international court rather than national jurisdictions. In November 2019, the ICC authorised the start of an investigation into the alleged crime of deportation of the Rohingyas, but also into any other crime linked to the situation and within the Court's jurisdiction.[11] The cooperation between the IIMM and the Court has been vital. Indeed, the Court has no jurisdiction over Myanmar territory, and therefore, similarly to the Syrian mechanism, the IIMM helps the Office of the Prosecutor to obtain the evidence it needs to make its case and help in its fight against impunity. It has also, jointly with the ICC, interviewed victims of sexual violence and crimes against children.[12] The evidence obtained allowed the ICC Prosecutor to file an application for a warrant of arrest against Myanmar's acting President Min Aung Hlaing, in November 2024.[13]

Thus, one can see how useful these UN mechanisms can be, from an evidentiary perspective. These experiences offer a roadmap for the new Mechanism for Afghanistan, and highlight the critical role it can play in advancing accountability.

## Prospects for accountability in Afghanistan

Even before the HRC resolution, the International Bar Associations' Human Rights Institute (IBAHRI) highlighted the potential that a Mechanism for Afghanistan could have, in preventing rights abuses. Such mechanism was already seen as a necessary support in accountability efforts, from national proceedings to the ICC and ICJ, as well as transitional justice mechanisms.[14]

The Special Rapporteur on Afghanistan recognised that the creation of the new investigative mechanism is 'a decisive step to ensure that those responsible for serious international crimes will be held to account'.[15] He further acknowledged that the Mechanism will complement the work the ICC is already conducting on the situation.[16] Following the opening of the investigation in March 2020,[17] the Court issued two arrest warrants in January 2025.[18] The investigative mechanism's files and evidence are thus expected to play a crucial role in any potential future trials.

Non-governmental organisations (NGOs) also welcome the decision of the HRC. However, they stress that now that the Mechanism has been established, States should put efforts into making it fully operational as quickly as possible. Amnesty International's Secretary General emphasised that 'establishing the mechanism is only the beginning',[19] while the International Commission of Jurists reminded States that they 'must now act to ensure [that the Mechanism] receives the resources necessary to fulfil its mandate'.[20]

While it is not operational yet, the establishment of the Investigative Mechanism for Afghanistan is not just a symbolic commitment to justice. It is a concrete step towards ensuring perpetrators are identified and held accountable, thus reinforcing victims' support as well as the broader fight against impunity.

Notes

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4 UNHRC Res S-17/1 (2011) UN Doc A/HRC/S-17/1, para 13.

5 UNGA Res 71/248 (2016) UN Doc A/Res/71/248, para 4.
6 UNGA Res 71/248 (2016) UN Doc A/Res/71/248, para 4; UNHRC Res 60/2 (2025) UN Doc A/HRC/60/L.9, para 25; UNHRC Res 39/2 (2018) UN Doc A/HRC/RES/39/2, para 22: 'in order to facilitate ... criminal proceedings'.
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# On gaps and selectivity in international criminal justice

Talia Tanaskovic

Recent initiatives aimed at establishing a special tribunal for the crime of aggression against Ukraine have praised the Special Tribunal for its role in closing the accountability gap, resulting from the Rome Statute's limited jurisdiction over the crime of aggression.[1] On the other hand, the reorientation towards ad hoc solutions[2] has revived questions of selectivity in international justice mechanisms[3] and the most effective means of closing these gaps. Although the International Criminal Court (ICC), with its credible view to universal orientation,[4] is widely seen as the preferred approach in international criminal justice mechanisms[5] it, too, has been subject to serious claims of selectivity.[6] And whereas the Special Tribunal's creation was prompted by one particular gap in accountability, critical perspectives of the Court reveal many more voids in its delivery of justice. In view of these renewed debates over accountability gaps, selective justice and best ways forward, it is worth examining the type of gaps present within the prevailing manifestation of international criminal justice – the ICC.

As an international body, the ICC is a political institution as much as it is a legal one. The political arm of the Court therefore provides for some variation even within a purportedly global legal order. The States Parties to the Rome Statute (as Kendall refers to them, the constituency of the Court[7]) can unevenly influence the Court's work in a number of ways.

In simplest terms, States Parties can disturb

the ICC's mandate through their non-cooperation with the Court. Although this can often go unnoticed, recent headlined examples include Mongolia's failure to arrest Putin during his visit to Mongolia[8] and Hungary's refusal of the same with respect to Netanyahu, and its subsequent withdrawal from the Court.[9] By refusing adherence to the Court's arrest warrants for these individuals, irrespective of subsequent issues of withdrawal, these acts of non-cooperation create measurable gaps within the Court's jurisdiction and its ability to carry out its mandate. States exercise their selectivity in this way in deciding when and when not to cooperate, support or associate with the Court.

Short of full withdrawal or non-cooperation, there are also intermediate ways in which parties can limit the Court's function; namely in their efforts, or lack thereof, to amend the ICC's legal regime, notably with respect to its jurisdiction over the crime of aggression.[10] This 'aggression gap' although legal in nature, exists as an obstacle to justice as matter of political will and the ability of powerful states to block the criminalisation of aggression where it so benefits them.[11] Nevertheless, as has been widely welcomed,[12] this gap is now on course for closure with the establishment of the Special Tribunal. It is notable, however, that a smaller area of the gap is being filled than what exists to the full extent of the Court's jurisdiction over the crime, and this selectivity with respect to ensuring accountability only exacerbates concerns over bias and political motive.[13]

More discretely, States Parties can exert influence over the Court's work through funding. Perhaps more dangerously, as well, as Wiebelhaus-Brahm and Ainley note, this manner of influence allows States Parties to profess support for the uninhibited pursuit of global justice while 'maintaining control behind the scenes'.[14] Criticisms from this perspective view the ICC as a tool of 'donor's justice' in which extreme funding constraints placed on the Court, coupled with a reliance on voluntary contributions, cripple the Court to the extent that the OTP is limited in its areas of investigation[15] absent a positive act of financial support for a certain cause.[16] In such a pick-and-choose environment, it is only natural for the final choices to be called into question, along with the impartiality of the entire system.

The funding limitations do not only reveal selectivity with respect to the Court's situational focus, but on what it aspires to deliver as an institution. As Kendall rightly notes, despite the international criminal justice system's heavy focus on justice to victims and affected communities, the Court's Trust Fund for Victims is left to rely primarily on voluntary contributions.[17] As a result, the system falls short not only on questions of impartiality of subject matter but also on a core component of its mission.

These examples provide only a small portion of the much wider spectrum upon which States Parties have the ability to poke holes in the Rome Statute system, and repair accordingly where so desired. As such, actions of potential detriment to the Court's credibility lie not strictly within the Court itself but with its parties, on the political plane behind its set-up. At this rate, it becomes apparently less useful to speak of bridging and filing gaps in international criminal accountability, as the Court's hold on international criminal justice is probably better described as an archipelago of accountability, with bridges built on most desirable routes and changing sea-levels exposing and re-covering opportunities for justice at the behest of political whims.

Although it might seem more appropriate to speak of selectivity in the context of individual ad hoc initiatives, the issue is clearly one of equal concern to the greater international criminal justice system, which unfortunately is largely dependent on the presence of political interest. And although tempting to blame politics for global injustice, states' interests do not themselves exist in a vacuum. Aside from recognising selective practices in international criminal institutions, it is equally necessary to reconsider where our societal expectations lie and how they differ from the results observed.

Notes

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# Russia's aggression against Ukraine: why another special tribunal?

**Lea d'Oznobichine**

In February 2022, the world watched Russia bring war back to Europe. While tensions had subsisted in Crimea and Donbass since 2014, a full-scale invasion deeply shocked Europeans, not even a century after the Yalta Conference, where the foundations of the postwar international order had been laid.

At San Francisco, the Allies had consecrated the Kellogg-Briand Pact of 1928. The United Nations Charter prohibited the use of force, while the brand new United Nations Organisation was assigned the fundamental purpose of maintaining international peace and security. In practice, however, even Security Council members failed to uphold these principles.

More than 30 years after losing the Cold War, Russia ostentatiously breached the Soviets' promises and invaded Ukraine. Having inherited the USSR's seat at the Security Council, Moscow left no choice to the General Assembly, who denounced Russia's aggression against Ukraine.[1]

Aggression remains a contested concept in international law, only formally incorporated into the Rome Statute in 2018.[2] As the

International Criminal Court (ICC) lacks jurisdiction in Ukraine's case, prosecution seemed unlikely, until the Council of Europe endorsed the establishment of the Special Tribunal for the Crime of Aggression against Ukraine last Spring. This would mark the first time the crime of aggression is prosecuted.

## The Council of Europe's initiative

The 'Core Group on the Establishment of a Special Tribunal for the Crime of Aggression against Ukraine' gathers legal experts from around 40 states who worked together with the Ukrainian authorities, the Council of Europe and the EU's legal services to seek justice for Ukraine in the face of Russia's aggression.

On 9 May 2025, representatives of state and international institutions met in Lviv to formally endorse the establishment of the Special Tribunal based on the Core Group's work.[3] On 24 June 2025, the Council of Europe's Committee of Ministers authorised the Secretary General to sign an agreement with Ukraine.[4]

The Special Tribunal will have the power to investigate, prosecute and try Russian leaders who bear the greatest responsibility for the crime of aggression against Ukraine. As its jurisdiction will be rooted in Ukraine's territorial sovereignty, Ukrainian authorities will refer ongoing domestic investigations and prosecutions related to the crime of aggression to the Prosecutor of the Special Tribunal. The evidence gathered by the International Centre for the Prosecution of the Crime of Aggression (ICPA), created in 2023 and hosted within Eurojust, will also be transmitted to the Prosecutor.

While the Council of Europe had previously ventured into ad hoc jurisdiction, it is the first time it has taken such an active stance. In 2010, a Council of Europe report had noted war crimes committed in Kosovo. Six years later, the Kosovo Specialist Chambers were established, after the prosecutor of the Special Investigative Taskforce of the EU mission in Kosovo concluded sufficient evidence existed. At the time, the ICC's Assembly of States had not activated the crime of aggression yet. It was the case, however, by 2022.

## The ICC's jurisdictional deadlock over aggression

Aggression is a sensitive topic for a lot states, with many sharing a colonial past and having been involved in controversial military interventions. Therefore, the State Parties to the Rome Statute have agreed on specific competence rules regarding aggression, which explain why the ICC lacks jurisdiction in Ukraine's case. Pursuant to Article 15 *bis* of the Rome Statute, the Court only has jurisdiction over a State Party where the state accepts and ratifies the Kampala amendments on aggression and has not opted out of the ICC's jurisdiction over aggression. In other words, the Court cannot exercise jurisdiction over the crime of aggression unless both the victim and the aggressor state have ratified and accepted the Court's jurisdiction over that crime. As of today, 49 states have adopted the amendments, making the Kampala amendments the most ratified amendments to the Rome Statute. However, while Russia has signed but did not become a full party to the ICC; Moscow withdrew from the full joining process in 2016.

While Article 15 *ter* allows the Security Council to refer any situation to the Court, Russia's veto prevents this possibility in Ukraine's case.

Aware of the urgency of Ukraine's situation, a group of states tabled the 'Harmonization amendment' ahead of the Special Session of the Assembly of States Parties on the review of the amendments on the crime of aggression, which took place last July.[5] Aiming to change the current rules in the case of state referral, it sought to harmonise them with the ones applied to the three other core crimes. However, the initiative was ultimately stalled by the opposition of a small group of States Parties, including Canada, France, Japan, New Zealand and the UK.[6] For now, the incentive for ratification is minimal. While a state ratifying the amendments opens itself to the possibility of having its officials judged, it does not guarantee an enhanced level of protection.[7] In the meantime, the Assembly of States Parties convened another special session in 2029.

## What is next?

By prosecuting aggression for the first time, the Special Tribunal will set a precedent and push the boundaries of international

law. Many legal questions will need to be answered, such as the definition of aggression, in absentia trials, or immunities.

In the meantime, several challenges await the nascent tribunal, starting with the money question. Rising inflation and ballooning defence budgets across Europe make funding a real challenge, though the EU has so far committed $11 million.[8]

Political support is an even more tender topic given that the EU's obvious support contrasts startlingly with the Trump administration's silence.[9] Trump is not only sceptical of international law,[10] but he also appears to envision himself as some sort of a 'peace deal broker', regardless of the cost to Ukraine's sovereignty. While negotiations with Putin remain stalled, Moscow is unlikely to welcome this looming threat. The Special Tribunal ought to act quickly if it does not want to get caught up in Trump's new deal.

Notes

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**Melina Poulin**

# Sexual and gender-based violence against women after the fall of Assad: the Interim Constitution and the question of adequate safeguards

## Syria and Assad's legacy: where do women stand now?

After the end of over 50 years of draconian rule in Syria, culminating in the ousting of Bashar al-Assad by Hayat Tahrir al-Sham's (HTS) forces in December 2024, consistent calls[1] for women's representation in all aspects of public life have never been greater. With the first parliamentary elections taking place in October 2025 since the fall of the former regime, after decades of severe political repression, recognition of women's involvement in Syria's recovery is crucial for facilitating the

country's path forward. As seen in the Syrian National Dialogue Conference in February 2025, women have expressed wishes for meaningful roles in peacebuilding efforts, calling for participation in the promotion of peace and security, ascertaining leadership positions and contributing to the transitional justice process. However, following the adoption of the Constitutional Declaration in March 2025, several reservations have been identified when it comes to female representation, particularly when considering provisions on sexual and gender-based violence (SGBV).

As indicated by the provisions of the Declaration, centralisation of power is concentrated largely in the hands of President Ahmed al-Sharaa, who inhabits sole decision-making in the legislative process. This is seen in his mandate to elect members of a higher committee who will elect two-thirds of the People's Assembly (parliament) and his discretion to propose laws (Article 30). Despite the Declaration including its Article 21 provision on the 'status' of women, protecting them from 'all forms of oppression, injustice and violence', women's rights movements within Syria[2] have identified several shortcomings. For example, greater expansion on provisions concerning women have been called for, particularly on a political scale. In the recent elections, women constituted 14 per cent of candidates, highlighting significantly limited female representation in the new government.[3]

Sexual violence in Syria was conducted with a gendered lens under Assad's rule, with violent practices adopted particularly in state prisons. This has been evidenced in the Koblenz Higher Regional Court's judgment,[4] indicting Anwar Raslan under the principle of universal jurisdiction, who was a senior former government official alleged to have committed crimes against humanity. In this judgment, reference was made to sexual violence carried out towards women, providing harrowing witness testimony where women had been subjected to sexual violence in the form of humiliation tactics including rape in front of the victim's spouse, beatings and verbal and psychological abuse.[5] The absence of a unified legal framework and accountability structures holding perpetrators responsible for violating human rights treaties is continuously challenged, given the fragmented governance landscape in Syria.

## What has been happening with women and girls in Syria since the fall of Assad?

With the Constitutional Declaration in force for the next five years, it is important to note the patterns of perpetration of SGBV, which have leaked into Syria's sociopolitical landscape after the fall of Assad. Syria is party to numerous human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture (UNCAT) and the four Geneva Conventions.

Although Syria ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 2002, several reservations to the provisions of the Convention, as seen in Articles 9, 15 and 16, allow the possibility for SGBV to persist. In addition, Syria has not ratified the Rome Statute, which criminally prosecutes SGBV in Article 7 (1) (g) as a crime against humanity and as a war crime in Article 8 (2) (b) (xxii). The role of international criminal law is highly significant, particularly concerning SGBV committed during the civil war. For example, this is especially pertinent in the context of genocide committed against Yazidi women and girls in the Raqqa, Hasakah and Deir-ez-Zor governorates.[6] As it stands, without a clear, domestic legal framework going beyond personal status laws and civil matters concerning marriage, guardianship and family honour, discretion afforded to judges in characterising acts of violence, specific to women's experiences, will continue the cycle of impunity currently taking place.

At present, the remnants of sectarianism and violence, deeply rooted in the former regime's architecture, have led to an upsurge in targeted killings against certain identities in Syria. A UN Commission of Inquiry on Syria chronicled ongoing violations during the coastal violence and revenge killings in Latakia and its surrounding areas in March 2025, including abductions, arbitrary arrests and enforced disappearances, claiming the lives of 100 women.[7] Outside of the coastal massacres, another wave of attacks took place in As-Suwayda in July 2025, a primarily Druze-affiliated city in Syria, where at least 100 Druze women and girls were reportedly abducted, in addition to facing extrajudicial executions.[8]

When considering the transitional authority's response, a fact-finding committee was established to investigate the violence

which took place on the coast. The findings of the investigation were presented at the end of July, and although the committee alleged it would ensure a rigorous investigation, it has been argued that the committee overlooked the extent of the violations against women.[9] Although national commissions of inquiry[10] are a step forward when investigating SGBV, independence, impartiality and women's representation in this process is essential to uphold justice. Given the dearth of a secure law-enforcement structure, international tools, such as the International, Impartial and Independent Mechanism (IIM)[11] and the UN Commission of Inquiry,[12] remain imperative in documenting crimes and preserving evidence over SGBV.

## A path forward

In contributing to Syria's recovery, implementing provisions that expand on women's rights and cover the criminalisation of SGBV remain as important as ever. On a domestic level, legal reform on Syria's personal status laws is necessary in order to align with the provisions of CEDAW, especially where SGBV occurs in private spheres. This is vital in securing survivor-sensitive approaches to investigating and prosecuting SGBV, especially where sectarian rhetoric symbolised systematic violence.

As such, the integration of women's issues in consolidating the new Constitution begins in passing laws that tackle discrimination and violence against women. This is achieved by introducing legislation that specifically criminalises SGBV. In doing so, women can be empowered to proactively take part in the transitional justice process and survivors can be given legal and psychological support. Accession to the ICC's Rome Statute must remain a priority for the transitional government, which would prove useful in offering meaningful justice to victims of SGBV.

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E Wen Wong

# The (language of the) margin of appreciation: from Strasbourg to New Zealand

In *Chief of Defence Force v Four Members of the Armed Forces* ('*Four Members*'),[1] the Supreme Court of New Zealand adopted the language of the 'margin of appreciation' ('margin'), into its domestic rights-adjudication framework. Although this borrowing from the European Court of Human Rights (ECtHR) appears intended to delineate the boundaries of judicial restraint, it risks reproducing the ECtHR's ritualistic and opaque deployment of the doctrine. Drawing on lessons from Strasbourg, I argue that New Zealand's adoption of the term 'margin of appreciation' provides a useful framework for enhancing analytical clarity in rights adjudication, but only if deployed as a transparent device for calibrating the intensity of review, rather than as a rhetorical veil for deference.

## The margin of appreciation: a useful but poorly applied doctrine

### *Uses and justifications*

The margin of appreciation is widely regarded as an 'important'[2] and 'politically necessary'[3] instrument for the ECtHR. The doctrine provides national authorities with a degree of latitude in limiting protected rights, by calibrating the intensity of the Court's proportionality review.[4] The importance of the margin is reflected in two principal justifications.[5] *Functionally*, the doctrine ensures a systemic distribution of institutional competences, reflecting the Court's subsidiary role in the Convention system and the view that domestic authorities are better placed to assess limitations on rights. *Normatively*, the doctrine provides 'pluralism and flexibility' in rights interpretation. When the Court clearly and correctly delineates the scope of the margin, and applies it consistently with clear standards of review, the margin enhances clarity and predictability in rights review.[6] Properly used, the doctrine increases transparency in the Court's reasoning and promotes a 'culture of justification'.[7]

### *Inconsistent and ritualistic application*

Scholars and ECtHR judges have long criticised the Court's inconsistent and ritualistic use of the margin.[8] The Court has invoked the margin in some cases, but not in others with comparable facts, suggesting a rote 'recitation of a formula with a hollow content'.[9] In many judgments, the Court invokes the margin cursorily, only in the conclusion,[10] or without specifying its width.[11] One study found that in two-thirds of cases invoking the margin, the Court did not state its width.[12] In other cases, the Court (mis) calibrates the margin's width with opaque reasoning, or inconsistently applies the determining factors.[13] In further cases, the Court's stated width does not correspond with its intensity of review.[14] This practice reveals an inconsistent,[15] pseudo-technical[16] use of the margin.

Inconsistent and ritualistic application of the margin risks trivialising the doctrine and the broader human rights project.[17] Inconsistency erodes legal certainty[18] and predictability,[19] while rhetorical invocation suggests that the ECtHR is failing to use the margin for the purpose of calibrating the intensity of review.[20] Instead, the Court appears to employ the doctrine to 'assure States that it is not an active court but a deferential one',[21] or as a 'smokescreen',[22] 'black box'[23] or 'ritual formula'.[24] Thus, the ECtHR's inconsistent and ritualistic application of the margin has obscured its purpose as a tool for calibrating the intensity of review.

## Adopting the margin: risks and promise for rights adjudication in New Zealand

### *Transposing the margin: structural and conceptual risks*

In *Four Members*, the Supreme Court of New Zealand invoked a 'margin of appreciation' to assess whether a Temporary Defence Order, providing for the service review of members of the Armed Forces not fully vaccinated

for COVID-19 was 'demonstrably justified in a free and democratic society'.[25] Citing Tipping J in *Hansen v R ('Hansen')*, the Court stated that it affords the legislature and administrative officials 'a reasonable margin of appreciation in the choice of measure'.[26] However, in *Hansen*, Tipping J only drew a 'conceptual parallel' between the margin and its domestic equivalent,[27] acknowledging that domestic courts should not 'read-across' the Strasbourg doctrine.[28] The Supreme Court's (mis)application of *Hansen* parallels Sales J's approach in *R (on the application of S) v Secretary of State for Justice*, a case in the UK.[29] Sales J quoted Laws LJ who had previously acknowledged the *relationship* between the margin of appreciation and domestic deference. However, Sales J interpreted this to mean the margin was 'hard-wired' into Convention rights, such that domestic courts should pass the margin onto the Parliament or Executive.[30]

In *Four Members*, the Supreme Court justified the domestic margin on democratic[31] and institutional competence grounds,[32] mirroring the normative and functional justifications for the European margin. However, this parallel is imperfect. The European margin mediates *vertical* deference from a supranational authority to national authorities, whereas domestic deference is *horizontal*, between the judiciary and the executive or legislature.[33] The ECtHR has itself stated that the doctrine 'cannot have the same application to the relations between the organs of State at the domestic level'.[34] Transposing the margin without appreciating the differences between vertical and horizontal deference risks rights-limiting misinterpretations. In particular, national authorities may misconstrue wide margins as a form of 'human rights clearance',[35] as Austria appeared to do in relying on *SAS v France*[36] to justify its own ban on face-coverings.[37] Furthermore, as Megret warns, a 'decentralised understanding' of the margin may bolster Quebec's Bill 21, which prohibits public servants from wearing religious symbols.[38] If courts such as the Belgian Constitutional Court systematically misinterpret the margin as inviting domestic judicial restraint,[39] it is even more likely that courts *outside* the European Convention system will misinterpret the doctrine. Thus, transposing the margin risks misinterpretation, with tangible consequences for the standard of rights review.

## Translating the margin: from contextual to intensity review

If the Supreme Court's use of margin language is understood as a translation, rather than a transplantation, it may strengthen rights adjudication through intensity-based review.[40] As discussed above, a well-calibrated margin can enhance the transparency, clarity and predictability of rights review, and promote a 'culture of justification'.[41] In particular, margin language may facilitate a shift from contextualism to an intensity-based model of review.

The Supreme Court of New Zealand has followed what Knight describes as a 'contextual review' approach to rights cases.[42] This approach involves 'open-textured, normative appraisal[s]',[43] and abandoning doctrinal devices in favour of 'the ordinary judicial task of weighing ... competing considerations'.[44] Such an approach may yield the same opacity and inconsistency criticised in ECtHR practice. Whereas, properly applied, the margin of appreciation represents an 'intensity of review' approach: a doctrinal framework for explicitly calibrating the strictness of review.[45] The intensity of review may be expressed as a 'sliding scale' or as discrete standards of review.[46] Discrete standards may be preferable, as a sliding scale risks descending into contextual review and its associated opacity.[47] Indeed, the ECtHR's own inconsistent application of the margin has been described as a sliding scale.[48] Knight found that the intensity of review approach performs better than, or as well as, contextual review against all of Fuller's principles of legality.[49] Thus, consistent and precise use of margin language in New Zealand Courts may enhance analytical transparency, predictability and legitimacy of rights adjudication.

Nonetheless, two conditions are essential for effective translation of the margin. First, contrary to the Court's statements in *Four Members*, New Zealand courts must consistently use the term 'margin of appreciation' if the concept is to have its intended effect. Linguistic inconsistency risks confusion, undermining efficiency and clarity and weakening the normative force of judicial review.[50] Second, the Court must clearly calibrate and apply the margin, to avoid the inconsistencies and ritualistic excesses that plague the ECtHR. Indeed, in *Four Members*, the Court referred to its need to decide how closely to review the decision-maker's

justifications, and that parties need to anticipate the Court's approach to a claim.[51] To achieve the latter, New Zealand courts must clearly specify and apply the domestic margin. For example, they must calibrate the margin consistently with the institutional and subject matter factors specified in their jurisprudence.[52] Only under these conditions can the term 'margin of appreciation' serve as a tool of analytical precision, rather than a ritual of deference.

## Conclusion

The margin of appreciation remains a valuable doctrine, not only within the European Convention system, but as a conceptual framework for enhancing clarity, predictability and transparency in rights adjudication, and promoting a 'culture of justification'. However, the ECtHR has failed to fully realise these advantages due to its inconsistent and ritualistic application of the doctrine, which has diminished its explanatory power and obscured its purpose. New Zealand's adoption of margin language presents both risks and opportunities. New Zealand Courts must be wary of the dangers of 'reading across' the margin of appreciation from Strasbourg. However, if properly translated and reclaimed, the margin of appreciation can encourage a useful shift from the veil of contextualism to the clarity of intensity-based review.

Notes

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Precious Onuabuchi

# Algorithmic justice: the future of legal systems or an automation of systemic bias?

The justice system thrives on fundamental principles that form the very foundation of the rule of law. These principles, including fairness and transparency, are essential to its legitimacy. However, systemic biases, which are often made evident through racial discrimination, gender prejudice and socioeconomic disparities, have been a persistent challenge to the justice system.[1] Artificial intelligence (AI) is increasingly positioned to be the future of legal systems, with the promise of improving access to justice, streamlining judicial processes and consequently strengthening the rule of law. Nonetheless, AI systems are trained on carceral knowledge sources which replicate human-based systemic bias within existing judicial structures.[2] Through machine learning, AI models that are exposed to biased examples of justice risk replicating and perpetuating the same bias.

Algorithmic bias refers to a structured and systematic bias point in AI systems, which produces similarly biased outcomes unjustifiably.[3] Algorithmic justice, in contrast, disinherits the institutional bias that informs human-based decision-making in legal systems by ensuring fairness, transparency and accountability in legal processes supported by AI. Realising this ideal outcome requires addressing issues surrounding the design and deployment of AI within the justice system. This article highlights issues of algorithmic bias and pathways to achieve algorithmic justice.

## AI as the future of legal systems

According to a report published by the European Commission for the Efficiency of Justice (CEPEJ), 125 AI tools were being used by courts within the European Union as of February 2025, to improve judicial efficiency and accessibility to justice.[4] These AI tools are deployed for document search, online dispute resolution (ODR) and the prediction of litigation outcomes. Similarly, China's Smart Court System is constructed to deploy algorithmic software and AI tools that encode judges' knowledge.[5] By leveraging AI systems, these tools conduct case management, analyse evidence and provide judgment recommendations. Jurisdictions with a less bold adoption of automated justice are increasingly integrating AI tools through ODR, which is a fast-rising means of settling civil and commercial disputes.[6] By embracing these systems, judicial institutions are able to lower administrative costs, fast-track judicial processes and expand accessibility to justice.

## When bias in AI becomes a judicial problem

It is important to note that bias embedded in AI systems is a technical issue that holds implications for justice when such systems are deployed in judicial processes. Systemic bias in AI systems is represented not only in judicial processes but also in predictive policing[7] and other non-legal sectors.[8] A notable example evidencing systemic bias is the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) algorithm, which is used in the United States criminal justice system. COMPAS is an AI tool designed to predict the likelihood that a defendant will reoffend and to provide sentencing recommendations based on data-driven criteria. Although intended to support judicial efficiency, an extensive investigation conducted by ProPublica and concluded in 2016 found significant racial bias in its outcomes.[9] After accounting for prior offences, future recidivism, age and gender, COMPAS was 77 per cent more likely to assign a higher risk score of possible violent recidivism to African-American defendants than to white defendants. The COMPAS controversy is a landmark case that is emblematic of a broader systemic issue. In Brazil, for instance, the controversial VioGén algorithmic system, used to assess the risk exposure of domestic abuse victims, was alleged to underestimate risks faced by

women significantly.[10] This underestimation reportedly led to the homicidal deaths of several women ranked as 'low risk', according to a 2022 report by Eticas Consulting and the Ana Bella Foundation.[11]

AI systems are often portrayed as unbiased, dispassionate and objective, making data-driven decisions supposedly free from human limitations. However, the persistence of bias in these systems may not only continue systemic discrimination but also amplify it within judicial structures. The challenge of systematic bias is further exacerbated by the 'black box' phenomenon of AI systems.[12] Unlike human-based decisions, where accountability can be traced through transparent reasoning and judicial justification, AI tools function as opaque systems that rarely disclose the logic behind their outcomes. The accountability gap arising from AI systems generating outcomes without interpretable reasoning, combined with the absence of human contextual intelligence, challenges the goal of achieving fairness in algorithmic justice.

## Existing frameworks for algorithmic regulation

The EU AI Act takes a recommendable stand in regulating ethical and responsible AI deployment in legal systems. Recital 61 of the Act categorises AI systems intended for the administration of justice as 'high-risk', thereby requiring bias testing, human oversight and the right to contest decisions.[13] This classification is due to the potential impact of such systems on the rule of law, individual freedoms and the right to a fair trial. Annex III, Paragraph 6 of the Act explicitly includes AI systems used in law enforcement, predictive policing and the evaluation of evidence as high-risk systems, thereby requiring transparency, documentation and human oversight.[14] Criticisms against the Act include the fact that it does not sufficiently mandate the full explainability of deployed AI models.[15] However, certification mechanisms are being considered for AI tools used in judicial systems.[16]

International instruments such as UNESCO's Recommendation on the Ethics of Artificial Intelligence (2021),[17] which is the first-ever global standard on AI ethics, and the Council of Europe's Framework Convention on Artificial Intelligence (2024)[18] address the alignment of AI usage with the rule of law and provide frameworks for redress in systems that affect fundamental rights. Similarly, the OECD AI Principles (2019, updated 2024)[19] emphasise that trustworthy and transparent AI, and emerging standards for algorithmic audits, can be adapted to judicial contexts to ensure fairness and accountability.

## Conclusion

The international community can rise to the occasion by establishing regulatory standards specifically for AI in justice. These standards should include common definitions of bias metrics, and interoperable audit frameworks. Furthermore, they should mandate algorithmic impact assessments of AI systems prior to their deployment in courts and fund independent testing in low-resource jurisdictions. Only then can the justice system harness AI's efficiency without automating the systemic biases it seeks to eliminate.

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**Raquel Clavijo**

# Towards justice for the planet: recognising ecocide and reimagining accountability

## Introduction

Environmental destruction has reached a scale comparable to armed conflict, yet international law continues to treat it as a peripheral concern. Each day, 1.09 million tonnes[1] of pollutants are dumped into our rivers and seas and 150 species disappear.[2] Environmental crimes are a growing global problem endangering not only wildlife but entire ecosystems.[3] There is a widespread and alarming lack of accountability for environmental crimes committed by corporations, government actors and other entities. Corporate accountability, particularly for multinational corporations, continues to depend on voluntary arrangements and soft-law mechanisms. Moreover, the absence of an International Environmental Court (IEC) leaves transboundary crimes without a dedicated adjudicatory forum. The so-called ecocide is observed mostly in the Global South as a result of imperialist practices rooted in colonial rule. Existing solutions – such as bringing cases before the International Court of Justice (ICJ), enhancing home state responsibility or recognising ecocide as a standalone crime – remain underdeveloped.

## The ecocide and international criminal law

Environmental harm caused by human activities has increasingly been recognised as a global concern, with world leaders[4] acknowledging its catastrophic consequences and calling for stronger legal responses. This growing awareness has prompted the emergence of the 'ecocide' movement, which advocates for the incorporation of a new crime against peace into the Rome Statute: ecocide, the environmental counterpart of genocide.

The International Criminal Court (ICC), has jurisdiction over the 'most serious crimes of concern to the international community as a whole'.[5] Currently, four crimes are categorised as such: genocide, crimes against humanity, war crimes and the crime of

aggression.[6] At present, the Rome Statute, the treaty establishing the ICC, mentions the environment only once and indirectly under war crimes in Article 8(2)(b)(iv), limiting its application to armed conflict.[7]

However, ecocide is not confined to actual war, as it can also be perpetuated during peace times. Recent events illustrate this vividly: the ongoing war in Ukraine has led to the destruction of hundreds of thousands of hectares of forests and contamination of rivers; in Gaza, military actions have devastated agricultural land and critical infrastructure, releasing toxic waste into the environment; in peacetime, West Papua continues to experience deforestation for palm oil production, displacing Indigenous communities and eroding biodiversity; and the Gran Chaco region in South America faces widespread deforestation financed by global agribusiness, threatening ecosystems and livelihoods. These contemporary examples are proof that the current international legal system is failing to prevent ecocide. The current framework overlooks the fundamental reality that humans are deeply intertwined with the environment.

Despite this, the ICC has an enormous potential with its binding nature and deterrent power, appearing as an answer to the alarming widespread impunity. The inclusion of ecocide as a standalone fifth international crime under the Rome Statute would stand against the current fragmented framework harnessing the preventive potential of international law and allowing for universal accountability.

## An eco-shift of international law?

A growing debate has emerged around whether international law is undergoing an eco-shift – a movement away from purely anthropocentric frameworks toward recognising nature as a subject of rights.

One of the most prominent proposals in this regard is the Universal Declaration of the Rights of Mother Earth (UDRME). This declaration was first articulated at the World People's Conference on Climate Change and the Rights of Mother Earth held in Cochabamba, Bolivia, in 2010.[8] The declaration seeks to enshrine the inherent rights of the Earth[9] – such as the right to life, water, clean air, integral health – mirroring the symbolic role of the Universal Declaration of Human Rights. Parallel developments at the domestic level suggest that this eco-shift is already underway. In the Andean countries of Ecuador and Bolivia, indigenous views that prioritise harmony with nature rather than economic development have been enshrined in law. The 2008 Ecuadorian's Constitution most radical aspect was Articles 71 to 74 (Chapter VII),[10] with the so-called 'Rights of Nature' articles. Here, the rights of Pachamama (Mother Earth) were enshrined for the first time in a national constitution, granting nature legal standing and allowing citizens to bring claims on its behalf. Article 74 declares: 'Nature, or Pachamama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.'[11] In Bolivia's Plurinational Constitution Preamble,[12] Pachamama is also mentioned, but does not itself enshrine Rights of Nature. However, in 2010, Bolivia adopted the Law of the Rights of the Mother Earth[13] (Ley de los Derechos de la Madre Tierra), where nature is granted the right to life, biodiversity, water, clean air, equilibrium, restoration and freedom from pollution.[14] These constitutional and legislative innovations create enforceable legal avenues to defend ecosystems and natural entities directly. In 2017, the Whanganui River in New Zealand was recognised as the first river in the world to have legal personality. This followed sustained legal advocacy by the Iwi, part of the Māori indigenous community, which culminated in the landmark enactment of the Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.[15]

## Ecocide in domestic legislation: efforts and limits

Currently, 11 states have recognised ecocide in their penal codes.[16] The first state to do so was Vietnam,[17] largely in response to the devastation caused by the use of Agent Orange, a tactical herbicide, used during the Vietnam War. This was followed by Russia[18] in 1996, which introduced ecocide into its criminal code as a distinct crime. After the collapse of the Soviet Union, newly emerged states such the Republic of Moldova,[19] Armenia,[20] Georgia,[21] Ukraine,[22] Tajikistan,[23] Belarus,[24] Kazakhstan[25] and Kyrgyzstan[26] included ecocide in their penal codes.[27] In Europe, France[28] and Belgium[29] recognised the crime in 2021 and 2024, respectively. By criminalising ecocide, states have the potential to reshape

intergovernmental environmental policy, strengthen conservation frameworks and prevent the over-exploitation of natural resources.[30] Ideally, ecocide should primarily be addressed at the domestic level, with international jurisdiction reserved for the gravest and most widespread cases that surpass a defined threshold of severity.[31]

Despite these advances, most states do not recognise ecocide as a standalone crime. Even where domestic law provides some avenues for environmental protection, such cases are typically treated as civil or administrative matters, rather than criminal ones. For instance, in Nigeria, over 500 environmental lawsuits have been filed against Shell Plc in recent decades, many relating to oil pollution in the Niger Delta.[32] While such litigation has occasionally resulted in corporate accountability and compensation orders, it has not amounted to criminal prosecution of large-scale environmental harm.

## Conclusion

Criminal law has a unique capacity to prevent harm: it sets moral boundaries, creates accountability and redirects financial flows. Yet, international criminal law remains anthropocentric, prioritising human welfare while relegating environmental protection to a secondary concern. The international legal system's inability to prevent environmental harm calls for urgent reform. Recognising ecocide among the most serious international crimes would be symbolically transformative and materially necessary. It would signal that the international community no longer tolerates the destruction of the natural world as collateral damage to human progress.

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Ishita Satyajit

# Reimagining the use of artificial intelligence for international human rights law

The gap in effective accountability mechanisms continues to be a significant challenge in the enforcement of International Human Rights Law (IHRL). Having its foundation in state sovereignty and consent, the international legal order has failed to provide redress for harm in the face of mass violations. Today, Artificial Intelligence (AI) and machine learning are not just technical novelties but are emerging as strategic tools with the capability to re-engineer the enforcement mechanisms of IHRL. This article will argue in favour of AI's ability to act as a force multiplier, bolstering the effectiveness of IHRL in three ways: (1) transforming evidence collection in unreachable areas; (2) proactive protection through predictive modelling; and (3) enhancing access to justice for human rights actors and victims alike.[1]

## Transforming evidence collection through data-driven scrutiny

The credibility of IHRL scrutiny depends on the access to comprehensive and verifiable data. In cases where access to such data is denied by states to obscure the truth, AI offers an adversarial capability to shift the locus of control to civil society and international monitoring bodies.

Traditionally, on-the-ground investigations in conflict zones tend to be highly resource intensive and often deliberately closed off by hostile regimes. Utilising AI-assisted remote sensing can provide a critical solution, enabling investigators to operate with greater efficiency and safety across territories that may be otherwise inaccessible.

For instance, a good example of the effectiveness of remote sensing is evidenced through its application in documenting the destruction in Darfur.[2] Given that the environment in the region was too hostile for civil society observers to intervene, Amnesty International commissioned the 'Decode Darfur' project, leveraging machine learning to satellite imagery alongside crowdsourcing, ultimately engaging more than 28,600 digital volunteers in scanning the destruction in remote villages. This led to the documentation of the devastation of 171 villages. Similarly, Human Rights Watch conducted an analysis of the satellite imagery helping them confirm the destruction of 2,800 buildings in Central Darfur.[3]

Another example is the case of Myanmar. During the 2017 ethnic conflicts, Human Rights Watch, in collaboration with Element AI, deployed remote sensing tools that helped in rapidly detecting the burning of Rohingya villages. By reducing the processing time for a large amount of thermal and satellite data, AI enabled the quick extraction of digital evidence which helped corroborate victim testimonies. It also supported in confirming the vast extent of ethnic violence in the region, improving the effectiveness in promoting justice in the case of international crimes.[4]

## Enabling proactive protection and strategic compliance

Given AI's ability to handle huge and varied amounts of information, not only being retroactive but also forward-looking, IHRL could shift from a reactive model to a more preventative model, one that could anticipate risks in advance. This could support states better to fulfil their positive obligations to take all reasonable measures to protect their citizens' human rights. This includes an obligation to invest resources in acquiring the knowledge that could help predict and therefore prevent harm. Such AI-driven predictive facilities have been highly effective in certain scenarios. For example, the Danish Refugee Council Foresight model developed in partnership with IBM, uses machine learning to predict total forced displacement at the national level around one to three years into the future.[5] This includes predictions on internally displaced persons, refugees and asylum seekers. The tool analyses conflict and the surrounding environment

to predict potential food insecurity to allow humanitarian actors to better prioritise interventions and pre-position aid in a strategic manner. This helps in anticipating lives at risk and bridges the divide between humanitarian responses and longer-term development work.[6]

## Enhancing operational capacity and access to justice

Finally, the effective functioning of the human rights system is mostly dependent on the individuals that serve the system. These include lawyers, activists and aid workers who are tasked with carrying out its mandate. AI can play an important role in augmenting their work and protecting their capacity in the long-term.

For instance, the right to fair trial is often hampered by barriers including language and lack of adequate awareness. This is particularly obstructive in cases of migrants and refugees. In such scenarios, AI and machine translation present a real transformative opportunity to extend access to justice. Projects such as the 'Mona' chatbot created through collaboration between the International Refugee Assistance Project[7] and Marhub[8] have been able to offer self-help legal information in multiple languages for refugees. The chat also streamlines the screening process for refugees for direct legal representation.[9]

Furthermore, various other initiatives, such as the Oxford Institute of Technology and Justice,[10] a collaboration between the Clooney Foundation for Justice[11] and the Blavatnik School of Government,[12] are trying to harness the power of AI to improve access to justice in a similar manner. The institute, which launched in October 2025, also aims to invest in research on how to utilise AI for legal proceedings more effectively. One of their projects includes the fair trial advisor, an AI-powered tool providing practical guidance questions related to the fairness of trials.

In addition to this, it is also becoming increasingly common for human rights investigators performing open-source investigations to be at risk of secondhand trauma via heightened exposure to graphic content. AI can significantly contribute to mitigating this by automating a preliminary review and classification of such content to protect investigators from extensive trauma exposures and ensure the longer-term capacity and mental health of the human rights community.

## Conclusion

While AI offers a compelling pathway to overcome certain structural weaknesses of IHRL, beneficial deployment of this technology is conditional upon a robust ethical and governance framework to monitor the associated risks. These could include algorithmic biases and privacy violations. International bodies such as UNESCO have laid down guidelines on the ethics of AI which places human rights and dignity at its core.[13] Principles such as 'proportionality', 'do no harm' and 'human oversight' must be applied at every stage of AI development and use. Ultimately, as long as the need to enhance efficiency does not override the fundamental obligation to respect and protect human rights, AI can be an indispensable ally in the global pursuit of human rights accountability.

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# The IP vs AI paradox: balancing protection and progress in the age of innovation

**Ogonna Annette Onwudiegwu**

Artificial intelligence (AI) has radically transformed the way we live, create and innovate. It has simplified processes, revolutionised industries and emerged as one of the defining innovations of the 21st century. For many, it has become the eighth wonder of the modern world.

But for AI to continue advancing, it must be protected and incentivised. Intellectual Property (IP) law remains the chief driver of all innovations. Yet, this relationship is deeply ironic as AI itself stands on the gravestone of several IPs. A clear example is the recent dispute between Stability AI and Getty Images, where Getty Images alleged that Stability AI used over 12 million of its copyrighted photographs without authorisation, even retaining the Getty Images watermark while using them to train its image generator, Stable Diffusion.[1] Getty Images claimed this not only infringed its copyright and trademarks but also infringed its database rights as it invested heavily in curating its image database.

This tug-of-war underscores the thin line IP laws must walk between encouraging innovation and preventing the unrestrained exploitation of others' creative labour.

## The dual role of IP in AI innovation

Does IP Drive or Restrict AI? Yes, to both. Creators invest significant time, effort and resources in bringing ideas to life. Even when driven by altruistic motives, innovation cannot flourish without a supportive and enabling environment. IP frameworks provide that incentive by granting creators exclusive rights over their works. These rights allow innovators to recoup their investment, fend off free riders and sustain a cycle of creation and reinvention.

In exchange for this limited monopoly, creators must disclose their inventions in a way that allows others skilled in the art to reproduce and build upon them. Typically lasting for about 20 years, this protection eventually lapses into the public domain, allowing others to innovate further.

This principle reflects an essential truth: innovation is incremental.[2] Every breakthrough is built on the foundation of previous knowledge. Hence, IP systems provide mechanisms such as patent pools, fair use exemptions, creative commons licencing and compulsory licencing to ensure that innovation remains accessible and progressive. These frameworks facilitate collaboration, technology transfer and diffusion, helping to lower prices and foster competition. Unsurprisingly, every technological revolution – from the steam engine to biotechnology – has been accompanied by IP law. The AI revolution is no different.

However, IP can also act as a barrier.

Licencing fees are often prohibitive, and access to essential data or tools may be restricted. Also, creators have heavily protested the use of their works in training the AIs. This is especially the case with generative AIs such as chatGPT which rely on copyrighted materials to train its bots. Recent disputes illustrate this vividly.

In *The New York Times v OpenAI*, the newspaper alleged that OpenAI's models were trained on millions of its copyrighted articles without permission and that ChatGPT could reproduce 'nearly identical' text from *Times* publications. The lawsuit argues that such use undermines journalism by diverting readership and revenue.[3]

Similarly, in *Authors Guild v Anthropic*, authors and publishers claimed that Anthropic used entire books to train its AI, Claude, without consent. The case resulted in a landmark US$1.5 bn settlement; one of the largest of its kind.[4] While Anthropic defended its use under the fair use doctrine, the Court drew a distinction between transformative use (training AI for learning) and pirated copies (using illegally obtained data).

At the same time, in Meta Platforms' AI copyright case (*Kadrey v Meta*), the company succeeded on fair use grounds.[5] The Court held that using copyrighted works to train AI was exceedingly transformative, since the purpose of the AI training was analysis rather than replication. However, the ruling did not constitute blanket approval for all AI training.

These cases blur the boundary between protection and innovation, raising legal uncertainty over what constitutes fair use. So when OpenAI, a company that has long defended its training of models on vast copyrighted datasets under the fair use doctrine, accused DeepSeek, a rival Chinese AI developer, of training its models on OpenAI outputs without authorisation, it raised more than a few eyebrows.[6] The incident reignited an old question: when does fair use stop being fair? While some sympathised with OpenAI on the grounds of intellectual property, others saw it as poetic justice – a classic case of the prankster being pranked, and perhaps a necessary irony to propel the evolution of AI.

## The balance: a delicate dilemma

Balancing IP and AI is an intricate dance that depends largely on regional priorities. In the UK, there is a copyright exception that allows text and data mining for non-commercial research if the user has lawful access. In Hong Kong, the Government launched a public consultation on introducing a similar exception but included commercial AI model training. Singapore, on the other hand, has gone further to include a 'computational data analysis' exception for both commercial and non-commercial use, permitting the copying of copyright-protected works for machine learning and AI model development, provided certain conditions such as lawful access are met.[7]

Inconsistent national frameworks create another layer of complexity. For instance, the Getty Images' copyright claims against Stability AI were dismissed in the UK on jurisdictional grounds because the alleged acts occurred outside the country.[8] Yet, AI and the internet operate without borders, raising critical questions about how such disputes should be resolved when they span multiple jurisdictions. Should rights-holders be required to initiate parallel actions in different countries? How should conflicts arising from divergent judicial decisions be addressed?

These dilemmas reveal that the world needs a harmonised global framework for AI and IP, a structure that recognises the borderless nature of the internet and protects the creators within it.

## Conclusion

In today's global innovation ecosystem, AI and IP are locked in a symbiotic tension; neither can thrive without the other, yet neither can dominate entirely. The recent disputes over AI training datasets highlight the need for clarity, consistency and harmonisation in legal frameworks worldwide. Striking the right balance between protection and accessibility is essential not only for safeguarding creators' rights but also for ensuring that AI continues to drive transformative technological progress across industries and borders.

Notes

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