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Canada's implementation of international environmental obligations: the case of the UNFCCC

> 'No place on the planet can remain an island of affluence in a sea of misery. We're either going to save the whole world or no-one will be saved. We must from here on in all go down the same path. One country cannot stabilize its climate in isolation. No country can unilaterally preserve its biodiversity.'[1]

As a fully sovereign State, Canada possesses legal personality as a primary subject of international law,[2] enabling it to assume obligations in relation to environmental protection and the management of the climate crisis. These obligations derive from various sources identified in Article 38(1) of the Statute of the International Court of Justice.[3] In the environmental context, Canada is bound in particular by obligations stemming from two of these sources: customary international law and international treaties.[4]

Moreover, it can be argued that modern international environmental law took shape in 1992 with the Earth Summit in Rio, which culminated in the adoption of the United Nations Framework Convention on Climate Change (UNFCCC),[5] a multilateral treaty ratified by 197 countries, including Canada. Rooted in the precautionary principle, the UNFCCC was notably influenced by the 1987 Montreal Protocol,[6] which successfully tackled ozone layer depletion and introduced the principle of common, but differentiated, responsibilities.

It is, therefore, essential to examine Canada's implementation of the international climate change obligations it has undertaken under the UNFCCC.[7] As a federal state, Canada is particularly well aligned with the 'bottom-up' approach promoted by the UNFCCC since the adoption of the Paris Agreement.[8] Indeed, the decentralised nature of its governance requires meaningful initiatives to originate at the provincial level with respect to managing the climate crisis.[9] However, this decentralisation also entails a division of powers, with each level of government holding exclusive authority over its own areas of jurisdiction. Does this not risk creating obstacles to effective intergovernmental collaboration? And can Canada – as a federation composed of constituent units with interests that are often diverse and potentially conflicting – truly guarantee the coherence and effectiveness of its climate action?

Canada's federal structure and its impact on implementing international climate commitments

The implementation of international climate change treaties in Canada is shaped by the country's federal structure and its dualist approach to international law. In a dualist system, the provisions of a treaty do not have direct legal effect domestically unless they are incorporated through legislation.[10] This contrasts with customary international law, which may be directly applied by domestic courts following a more monist logic.[11]

In the Canadian context, the authority to implement treaties is not centralised. Since a 1937 decision[12] of the Judicial Committee of the Privy Council, it has been well established that both the federal and provincial governments must implement treaties in accordance with their respective jurisdictions under sections 91 and 92 of the Constitution Act 1867. As a result, even where Canada has ratified international treaties – such as the UNFCCC and its related protocols – their implementation requires domestic legislation enacted by the appropriate level of government.[14]

The environment, however, is not an enumerated head of power in the Constitution. As the Supreme Court explained in *Friends of the Oldman River Society*,[15] environmental protection is a matter of shared jurisdiction. Determining which

level of government has the authority to legislate requires identifying the 'pith and substance' of the law in question – whether it falls under federal or provincial jurisdiction.

Provinces have clear jurisdiction over areas of a local or private nature, including municipal affairs, the administration of provincial parks and the management of land and natural resources. This includes exclusive authority over the exploration, development and conservation of non-renewable natural resources, forestry resources and electricity generation within their territory. In contrast, the federal government holds legislative authority over areas such as fisheries, navigable waters and criminal law – powers that can serve as constitutional bases for environmental regulation. This division of powers can lead to tensions. For example, while a mining or forestry project may fall under provincial jurisdiction, federal approvals may still be required if the project affects areas of federal concern, such as fisheries or migratory birds, illustrating the complex overlap in environmental governance.[16]

Importantly, the transboundary nature of greenhouse gas emissions has reinforced the role of the federal government. In *Crown Zellerbach*,[17] the Supreme Court recognised that marine pollution fell under the federal government's jurisdiction through the national concern branch of the 'peace, order, and good government' doctrine. The Court reasoned that pollution cannot be contained within provincial boundaries, and therefore must be addressed federally. Similarly, the federal government's criminal law power provides broad authority to regulate harmful conduct related to environmental degradation.[18] This was recognised by the Supreme Court in *R v Hydro-Québec*,[19] although this power was subsequently somewhat limited.[20]

Ultimately, the effective implementation of international climate change obligations in Canada depends on cooperation between both orders of government. While provinces hold critical jurisdiction over many environmental issues, federal authority may be necessary to ensure consistency and coordination across jurisdictions.[21] This constitutional division of powers presents both opportunities and challenges in translating Canada's international climate commitments into enforceable domestic action.

Notes

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7 These obligations are not new. Canada committed to international environmental obligations relatively early, even when the field was still emerging. Notably, in 1938, Canada was involved in the *Trail Smelter Arbitration* (Alfred P. Rubin, 'Pollution by Analogy: The Trail Smelter Arbitration' (1971) 50 Or L Rev 259) with the US, one of the first international arbitral decisions addressing environmental issues. This case helped establish a foundational principle of customary international environmental law: the 'no-harm rule', which seeks to prevent transboundary environmental harm.
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Brianna Dyer

An inequality of arms: the ICC's failed attempt of the hybrid legal system

Introduction

> 'Equality of arms represents a specific, rigid principle ... which is conceived and framed mainly as a dispute between the two litigants. In order to make the fight fair, the two contenders must have the same chances of winning; it is unthinkable that one side should constantly be in an advantaged institutional position.'[1]

The unthinkable is now commonplace. The International Criminal Court's (ICC) hybrid approach between accusatorial (adversarial) and inquisitorial systems results in an inequality of arms, regularly placing the defence at a setback throughout the trial phase. This article will discuss the differences between the two systems, followed by the two areas where this alleged cohesion results in a disadvantaged defence: judicial involvement and evidential procedure.

Accusatorial v inquisitorial systems

Accusatorial procedural, also referred to as adversarial, is connected to the common law system, whereas the inquisitorial procedure is equated with the civil law system. Although there are many nuances between procedural approaches, there are two primary differences relevant to this discussion: judicial involvement and evidential procedure. In the accusatorial system, the judge is considerably passive, whereas the inquisitorial judge is on a truth-finding mission, involved in evidence examination, calling of witnesses[2] and the overall trial procedure.[3]

Although a hybrid of the two was intended to account for different legal systems when creating an *international* criminal court, it has created severe disadvantages to the defence, especially through power imbalances and evidentiary uncertainty.

Inequality of arms: judicial involvement

The level of involvement of the presiding judge drastically alters the atmosphere of the trial. An active judge is characteristic of the inquisitorial approach, which often results in the Chamber acting as a strong party akin to a prosecutor. Inquisitorial judges are on their own mission to find truth, frequently involved in a second cross-examination of the witness or even calling witnesses to testify for the Chamber, as seen in Trial Chamber V's calling of the former interim president to the Central African Republic Catherine Samba-Panza. Presiding Judge Schmitt said to President Samba-Panza:

> 'I want to make it clear from the outset, you are not here as a witness for one of the parties, not as a witness for the Prosecution or the Defence. You have been called by this Chamber, by the judges of this Chamber, to help us ... determine the truth. This is also the reason why you are questioned first by the judges.'[4]

This inquisitorial approach, common in Germany's legal system (Judge Schmitt's domestic jurisdiction) can be quite invasive to a defence run by common law counsel, especially when the defence must not only account for prosecutorial intervention but judicial intervention as well. This level of involvement can create a combative atmosphere, demonstrating to the defence that it is outnumbered.

This heavy intervention, although understandable in some cases with professional judges, raises further issues when discussing the qualifications of the bench. Kai Ambos is bold enough to note that:

> '[t]he sad reality is, however, that too many judges have no judicial background at all and only pass the eligibility test (Art. 36(3)(b) ICC Statute) because of an all-too-generous interpretation of the requirements of "competence in relevant areas of international law".'[5]

Although Judge Schmitt has ample judicial experience, other judges are former professors or diplomats. This raises the concern of potentially establishing precedent of having an involved judge who does not have the experience to justify such activity, potentially leading to the derailment of a fair trial.

Inequality of arms: evidential procedure

Admission v submission

Each system has a different approach to evidence, such as the 'admission' or 'submission' methods, greatly affecting the defence's approach and preparation to a case. 'Admission' is the 'acceptability of an item of evidence to be incorporated into the trial record' whereas 'submission' is simply presenting evidence before the court.[6] Unless it is formally admitted, parties are unsure if the submitted evidence will be considered or relied upon unless a party explicitly raises an admissibility concern when the evidence is presented.

There is no specification as to when this admissibility evaluation should occur. According to Article 69(4) of the Rome Statute, '[t]he Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence'.[7] In other words, as long as the Chamber rules on the admissibility of evidence at some point, it can choose its own approach.

The accusatorial system rules on the admissibility of each piece of presented evidence as it arises, whereas the inquisitorial system rules on admissibility once all evidence has been presented and the Chamber is in deliberation.[8] The ICC's practice has transformed over the years, from accusatorial to inquisitorial. Initially, the *Lubanga* and *Katanga et al* cases ruled on admissibility of evidence the moment it arose, but *Bemba* took a different approach by considering all items prima facie admitted as evidence.[9] Although this approach was overruled for obvious concerns,[10] the *Blé Goudé* Trial Chamber ruled that it was not in favour of ruling on each item of evidence as it was presented.[11] Today's admissibility approach is inquisitorial, raising concerns for the equality of arms throughout the trial, as this submission model 'can have detrimental consequences in terms of fairness to the parties, in the sense that neither prosecution nor defence may know for sure what evidence will ultimately be considered by the Chamber'.[12]

Al Hassan serves as an example, where the defence repeatedly presented evidence regarding the inadmissibility of the defendant's statements that were recorded while he was tortured at a facility renown for human rights violations. Due to the Chamber's submission approach, the *Al Hassan* defence were at a severe disadvantage, unsure if the defendant's statements were dismissed due to inadmissibility as a result of torture, only to discover that his statements 'were referred to 470 times in the footnotes of the judgment, indicating the extent to which the judges not only found his evidence credible, but relied upon it'.[13] This is just one example of how the hybrid approach fails to ensure an equality of arms throughout the trial phase.

Conclusion

Although it is understandable that the ICC has taken a hybrid approach to represent both common law and civil law jurisdictions, this mixture results in an inequality of arms due to differing levels of judicial involvement and unpredictable evidential procedure. Whether accusatorial or inquisitorial, the defence is consistently disadvantaged, therefore calling into question the possibility of a fair trial. This inequality of arms is a grave concern for an international criminal court entering into a new phase of activity, calling for the arrests of several world leaders. The solution is to create a consistent approach to the Trial Chamber's legal procedure, whether through the result of an amended Rules of Procedure and Evidence or a detailed discussion at the ICC judges' annual judicial retreat to agree on best practices. Much more research is needed to reach a workable solution, but admitting the

failure of the hybrid system is a significant step in this direction.

Notes

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Annah Cocker

When machines kill: the legal and ethical vacuum around AI-integrated lethal autonomous weapon systems

The accelerating deployment of lethal autonomous weapon systems (LAWS), capable of selecting and engaging targets without human intervention, is fuelling a global AI arms race, raising serious legal and ethical concerns.[1] Their growing autonomy, now extending to lethal decision-making,[2] has heightened international scrutiny over their role in military operations. Civil–military integration has become a priority,[3] driven by the rapid development of commercial AI,[4] as the same algorithms used in civilian systems are repurposed for military applications.[5] Leading military powers like the US, China, and Russia are at the forefront of investment. Additionally, a further 44 states, including India, Israel, Turkey, the UK, and the US are actively developing their LAWS capabilities.[6]

Public attention intensified after reports of LAWS use in Libya in 2020,[7] marking the first autonomous battlefield killing, and their continued deployment in Ukraine,[8] underscoring legal and ethical challenges. Key international humanitarian law (IHL) principles such as distinction, proportionality[10] and precaution,[11] require context-specific human judgment, which AI cannot replicate. While Article 36[12] obliges states to review new weapons, its application to LAWS remains inconsistent. The Martens Clause[13] affirms that all weapons must meet the principles of humanity and public conscience. However, transparency gaps and diverging review procedures reveal structural weaknesses, enabling states to evade scrutiny, and reinforcing the need for a binding global instrument.

The deployment of LAWS also threatens core international human rights principles. Their inability to fully interpret human cues[14] or complex social context[15] can undermine the right to life,[16] as they struggle to meet the thresholds for the lawful use of force (necessity, proportionality and last-resort),[17] increasing arbitrary and unlawful killings. Similarly, the right to peaceful assembly[18] is threatened, as AI cannot fully assess the use of force in crowd-control[19] settings, nor can it reliably distinguish between peaceful and violent actors.[20] The

use of algorithmic targeting further erodes human dignity, reducing individuals to data points and patterns,[21] a phenomenon termed 'digital dehumanization'.[22] Questions arise regarding the absence of a moral agent capable of exercising judgement in lethal decision-making and the legitimacy of their use of force. The risk of discriminatory outcomes is significant,[23] as algorithmic biases in training data may disproportionately target or misidentify marginalised groups.[24] Finally, the large-scale, often non-consensual surveillance necessary for LAWS development infringes privacy rights.[25]

The right to a remedy[26] is jeopardised by the 'black box' nature of AI, complicating efforts in tracing processes to attribute liability and develop comprehensive regulations.[27] These systems operate through complex, non-linear layers of computation that lack interpretability, complicating the reconstruction of processes behind outputs. For LAWS, this opacity means the chain of reasoning leading to decisions cannot be reconstructed and fully understood, which risks creating an accountability gap,[28] undermining key legal doctrines of responsibility, foreseeability and due process. Practical verification challenges necessary for compliance are also noteworthy, as the distinction between a remotely controlled and an autonomous system often lies in software, notoriously difficult to inspect or verify externally.[29] To address these challenges, a binding international treaty is essential, which mandates meaningful human control, rigorous testing, verification, and explainable AI, to ensure predictability and accountability. Clear legal obligations across the AI lifecycle are critical to prevent impunity and safeguard rights.

Automation bias amplifies risk by reducing human oversight.[30] The Stanislav Petrov case, where a human overrode false warnings of a nuclear attack, illustrates the importance of human judgment in critical warfare decisions. The same logic applies to LAWS. Over-reliance limits human judgement and jeopardises the benefits of emerging technology,[31] strengthening the need to regulate AI to support human cognitive function and keep humans in the loop, alongside rigorous training.

The UN Secretary-General,[32] the International Committee of the Red Cross[33] and civil society organisations have called for a legally binding international treaty to prohibit autonomous weapon systems, framing it as both a moral and legal imperative. Such legislation would curb the risks of an accelerating AI arms race, which threatens to make warfare more frequent, less costly, and harder to regulate. Public support for a ban is strong,[34] and precedents like the Ottawa Treaty[35] and Convention on Cluster Munitions[36] demonstrate the feasibility of ethical prohibitions on specific weapons. The EU AI Act[37] also offers a useful framework: provisions on transparency, human oversight and liability in high-risk AI could be adapted for military applications. Hence, the path forward is a UN treaty alongside regional regulations to ensure transparency, accountability and human control over military AI.

Nonetheless, significant opposition cautions against an outright ban, given the advancements in commercial AI and its dual use allowing the weaponisation of civilian systems. A ban would create disparity, leaving militaries reliant on commercial availability. Key states including the US and Russia have consistently opposed a ban, exercising veto powers within consensus-based forums like the Convention on Certain Conventional Weapons (CCW). This reluctance suggests a comprehensive ban is unlikely to get universal support. Despite obstacles, momentum is building, with over 70 states calling for new international law on LAWS[38] and a growing convergence around key normative and operational principles for regulation.[39]

The UN General Assembly has discussed the implications of LAWS since 2013, with numerous reports highlighting serious risks. Notably, the informal open consultation on 12 May 2025 convened under resolution 79/62,[40] brought together stakeholders to discuss the growing concerns surrounding this technology, featuring a strong confluence around the need for a legally binding treaty. With autonomous technologies being deployed in conflict and their capabilities expanding, regulatory inaction is no longer tenable. An international legal framework is essential to establish limits before the window to act closes.[41]

Lawyers play a vital role in ensuring LAWS align with international law. Legal experts must engage in treaty negotiations, support global initiatives, and help build enforceable frameworks. A hybrid regulatory approach combining a risk-based framework with binding prohibitions and human rights safeguards is essential to ensure accountability, legality, and ethical oversight

of LAWS. Such a treaty should scrutinise the use of LAWS without human oversight, and safeguard international humanitarian and human rights law. The legal community must act swiftly to uphold the rule of law amid the rapid militarisation of artificial intelligence.

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When protection ceases: how Article 1D of the Refugee Convention and the UNRWA decide the fate of Palestinians seeking refuge

Sadie Kinnersley

Introduction

The 1951 Refugee Convention is the cornerstone of international refugee protections.[1] This Convention is overseen by the United Nations High Commission on Refugees (UNHCR), a body established in 1950 to help the international community deal with the millions of displaced persons following the aftermath of World War II.[2] Of particular relevance to the current conflicts in the world is Article 1D, which dictates who can be excluded from this Convention's protection by defining who qualifies as a refugee.

Article 1D reads:

> 'This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance. When such protection or assistance has ceased for any reason, ... these persons shall ipso facto be entitled to the benefits of this Convention.'[3]

The wording of Article 1D of the Convention eliminates the possibility for any individual who is, at present, receiving aid from other organs or agencies of the United Nations. The meaning of receiving aid from other organs or agencies in the context of Palestinians means registering with and/or in receipt of United Nations Relief and Works Agency for Palestinians Refugees in the Near East (UNRWA) protection or assistance.[4] Palestinians who are not receiving or eligible to receive the protection or assistance of the UNRWA can qualify as a refugee under the 1951 Convention as long as all other conditions are met. For those who have previously received protection or assistance through registration or otherwise, if they wish to qualify as a refugee, they must show 'to a reasonable degree of likelihood' that the assistance or protection has ceased for reasons beyond their control.[5] This article examines how Article 1D applies to Palestinian refugees in the UK in today's context, specifically if the current obstacles facing the UNRWA constitute protection and assistance have ceased.

Relevant rules and judgments

The Court of Justice of the European Union (CJEU) has vast experience in adjudicating refugee claims in relation to Palestinians, and

the provisions of Article 1D are reflected in Article 12(1)(a) of the Qualification Directive 2004/83/EC which has been transposed into the Immigration Rules in the UK.[6] The CJEU's ruling in *El Kott* reaffirmed that assistance or protection must have ceased for a reason beyond that individual's control, such as practical barriers like physically being unable to access UNRWA assistance, either because of active combat zones, financial or political obstacles to the functioning of the UNRWA.[7]

The case of *NB and AB v Secretary of State Home Department* (SSHD), referred to the CJEU for a preliminary ruling in 2022, concerned the rejection of a person of Palestinian origin in their application for refugee status in the UK. The Court observed the gaps in funding in the UNRWA already visible at that time, and opined on the obligation to seek such aid, stating:

> '[I]t is sufficient to establish that UNRWA's assistance or protection has in fact ceased for any reason, so that that body [UNRWA] is no longer in a position, for objective reasons or reasons relating to the person's individual situation, to guarantee him or her living conditions commensurate with its mission.'[8]

Living conditions commensurate with its mission was echoed by the Advocate General in the 2021 opinion to this case stating that the UNRWA must be able 'to fulfil its mandate effectively and ensure that the persons concerned live in dignified conditions'.[9] Therefore, individuals seeking refugee protections in foreign nations should only be required to show that the current protection or assistance they receive from the UNRWA is not commensurate with its mission – ie, it is not able to ensure the persons concerned live in dignified conditions.

Current factual situation of the UNRWA and its functions

In April 2024, an independent review panel released a report investigating Israel's claims that a significant number of UNRWA employees are members of terrorist organisations.[10] This report provided recommendations for improvements and noted that Israeli authorities have yet to provide proof of their claims that any UNRWA workers are members of such organisations.[11] This report also noted that these unproven claims alone had triggered the suspension of $450 million in funding.[12] Israel's Parliament subsequently approved a bill that prohibited the country's authorities from having any contact with UNRWA and prohibited the agency from operating within Israel itself.[13] All UNRWA staff are now banned from entering the Gaza Strip following this legislation, but around 12,000 local Palestinian UNRWA personnel have continued to attempt to provide services to the entire population.[14] Currently, UNRWA flour and food parcels have run out, over one third of essential medical supplies are out of stock and UNRWA schools and buildings continue to be targeted and hit by Israeli forces.[15] Up until 27 May 2025, humanitarian aid had not entered the Gaza Strip for over nine weeks when Israeli authorities imposed a siege on the enclave.[16]

Recommendations

The current situation of the UNRWA is crippled, a statement uncontested by any official investigation into their function.[17] And yet, Palestinians seeking safety in the UK will be denied refugee status protections if they have been registered with the UNRWA unless courts can agree that the aid or protections once offered have effectively and objectively ceased. Given the collapse in UNRWA funding, the recent blockade in the Gaza Strip for Palestinians still in the occupied territories, and the subsequent breakdown of sufficient aid in Palestine and the surrounding areas with an influx of those fleeing the hostilities, it is only reasonable for countries like the UK to allow Palestinians protection under the Refugee Convention pursuant to Article 1D. The courts[18] should evolve with the situation as it unfolds, and adequately assess the reality of the situation for many Palestinians.

Notes

1 1951 Refugee Convention www.unhcr.org/about-unhcr/overview/1951-refugee-convention.
2 'The 1951 Refugee Convention' (*Immigration History*) https://immigrationhistory.org/item/the-1951-refugee-convention/.
3 1951 Refugee Convention and 1967 Protocol relating to the Status of Refugees www.unhcr.org/media/1951-refugee-convention-and-1967-protocol-relating-status-refugees.
4 Case C-364/11 *Abdel El Karen El Kott v Bevándorlási* és Állampolgársági *Hivatal* EU:C:2012:826 (CJEU).
5 Home Office, 'Asylum Policy Instruction: Article 1D of the Refugee Convention: Palestinian refugees assisted by the United Nations Relief and Works Agency (UNRWA)' (9 May 2016), p 7 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/

attachment_data/file/524502/A-on-Article-1D-and-Palestinians-v2_0.pdf.

6 Home Office, 'Asylum Policy Instruction: Article 1D of the Refugee Convention: Palestinian refugees assisted by the United Nations Relief and Works Agency (UNRWA)' (9 May 2016), p 7; Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12.

7 Case C-563/22 *SN and LN v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite* EU:C:2024:494 (CJEU) at [87].

8 Case C-349/20 *NB and AB v Secretary of State for the Home Department* EU:C:2022:151 (CJEU) at [65].

9 Case C-349/20 *NB and AB v Secretary of State for the Home Department* EU:C:2022:151 (CJEU) at [65]; Case C-507/19 *Germany* v XT EU:C:2021:3 (CJEU, 13 January 2021).

10 'UN chief urges Security Council to act on Gaza ceasefire resolution' (*UN News*, 18 April 2024) https://news.un.org/en/story/2024/04/1148821.

11 'Israeli law blocking UNRWA – devastating humanitarian impact for Palestinians?' (*UN News*, 31 October 2024) https://news.un.org/en/story/2024/10/1156326.

12 'Israeli law blocking UNRWA – devastating humanitarian impact for Palestinians?' (*UN News*, 31 October 2024).

13 'Israeli law blocking UNRWA – devastating humanitarian impact for Palestinians?' (*UN News*, 31 October 2024).

14 'UNRWA Situation Report #170 on the Humanitarian Crisis in the Gaza Strip and the West Bank, including East Jerusalem' (UNRWA, 30 April–7 May 2025) www.unrwa.org/resources/reports/unrwa-situation-report-170-situation-gaza-strip-and-west-bank-including-east-jerusalem.

15 'UNRWA Situation Report #170 on the Humanitarian Crisis in the Gaza Strip and the West Bank, including East Jerusalem' (UNRWA, 30 April–7 May 2025).

16 'UNRWA Situation Report #170 on the Humanitarian Crisis in the Gaza Strip and the West Bank, including East Jerusalem' (UNRWA, 30 April–7 May 2025).

17 'Statement by Philippe Lazzarini, Commissioner-General of UNRWA to the United Nations' (UNRWA, 28 January 2025) www.unrwa.org/newsroom/official-statements/statement-philippe-lazzarini-commissioner-general-unrwa-united-nations/.

18 Two months ago, the case of *TAD v Secretary of State Home Department* came before the Upper Tribunal in London examining the requirements of Article 1D of the Refugee Convention, the case focused on whether the First Tribunal was correct in its assessment that found under Article 1D's the UNRWA's protection and assistance had ceased for TAD. The final judgment has yet to be published.

ICC v ICTY v ICTR: which international court comes out on top?

Charlotte Duthie

Introduction

Success in international criminal justice defies easy measurement. The effectiveness of a tribunal must be considered through a range of factors: jurisdiction, jurisprudence and impartiality. However, symbolic justice – the message a tribunal sends to victims and the global community – often outweighs conviction statistics.

The International Criminal Court (ICC) was established in 2002 by the Rome Statute.[1] It has jurisdiction over genocide, crimes against humanity, war crimes and aggression, with 125 states parties as of 2025. Despite initiating 17 full investigations and issuing 40 arrest warrants, only a handful of convictions have been secured: a mere four convictions by trial for atrocity crimes (*Lubanga*,[2] *Ntaganda*,[3] *Katanga*[4] and *Ongwen*[5]), 1 guilty plea (*Al Mahdi*)[6] and a further five convictions for witness tampering (*Bemba*, *Musamba*, *Kabongo*, *Wandu* and *Arido*).[7]

The International Criminal Tribunal for the Former Yugoslavia (ICTY) was established by the United Nations Security Council (UNSC) in 1993 to prosecute crimes from the Balkan conflicts. Though controversial in its legal foundation under Chapter VII,[8] it effectively prosecuted high-level perpetrators, delivering 93 convictions.

The International Criminal Tribunal for Rwanda (ICTR) was created after the 1994 genocide and prosecuted 62 individuals. The ICTR notably prosecuted high-level leaders and recognised rape as a form of genocide,[9] setting important legal precedents before closing in 2015.

Jurisprudential impact

The ICTY contributed robustly to legal standards, particularly in genocide law and liability for aiding and abetting international crimes. *Perisic* established the requirement of a direct connection between the assistance

given and the crime committed, which although was criticised for being unduly lenient, finds importance relevant in the current context of arms provisions for Israel.[10] The ICTY was also the first of its kind to try an individual for sexual violence against men.[11]

The ICTR was the first international tribunal to recognise rape and sexual violence as a means of perpetrating genocide, and addressed how hate speech (via Radio Mille Collines' broadcasting of incendiary propaganda) can be considered incitement to genocide.[12]

The three courts' jurisprudence overlaps and diverges in certain areas. Sometimes this is unproblematic, as in the case of crimes against humanity, where the ICC,[13] ICTY[14] and ICTR[15] all have marginally different definitions, but the ICC definition is more or less accepted by the international community as custom. This itself could point to the ICC as having greater global influence, and thus, be an argument in favour of its jurisprudential effectiveness.

However, divergence of jurisprudence relating to command responsibility is less straightforward. The ICTY *Celibici* judgment was the first elucidation of the concept of command responsibility by an international judicial body since World War II and confirmed the current standard.[16] However, the ICC chose to create a separate regime for the principle of liability for command responsibility when *Bemba*[17] was infamously acquitted for being too remote a commander to be subject to command responsibility.[18]

Political and judicial impartiality

The concentration of power in the ICC is with the independent Prosecutor, and this has resulted in criticism of prosecutorial discretion.[19] Ocampo (2003–2012) was strategic and outspoken in his advocacy, but was condemned for having the wrong investigative priorities, as well as several sexual misconduct allegations.[20] Bensouda (2012–2021) took a slower, more deliberate approach, which ultimately led to fewer convictions and some prominent failed cases, including *Bemba* (where a legally innocent man spent 10 years in custody), which is widely seen as one of the biggest defeats in ICC history.[21] The current ICC Prosecutor, Khan, has been active against Israel and Russia, but is also under investigation for sexual misconduct, the outcome of which will have a huge impact on public confidence in the ICC.[22]

The external perception of prosecutorial impartiality overlaps with the political sensitivity and implications of the three courts' work. African countries have criticised the ICC for its hyper-fixation on African defendants (who make up the entirety of those convicted).[23] Similarly, choosing to prosecute individuals from one side of a conflict over the other, naturally throws up accusations of bias. When Uganda referred itself to the ICC, it tried to restrict the ICC's investigations to crimes committed by the insurgent Lord's Resistance Army (LRA). Despite the ICC rejecting this reservation, no arrest warrants were issued to Ugandan state officials. The ICC has thus, been widely criticised for ignoring President Museveni's abuses in favour of those committed by the LRA.[24]

The ICTY faced similar allegations of bias, as a tool of the West to punish Serbians, but was ultimately seen as a political success through its prosecutions of the former Serbian president,[25] Bosnian Serb political leader,[26] and key military commanders of the Srebrenica massacre.[27] The ICTR only prosecuted Hutus, but this was much less controversial due to the inherent one-sidedness of the Rwandan Genocide. The ICTR relied heavily on Rwandan cooperation, so certain aspects of prosecutorial neutrality were waived in the decision not to prosecute any Tutsi revenge crimes.

Jurisdictional effectiveness

Unlike the ICTY and ICTR, which had primacy over domestic courts, the ICC is bound by the principle of complementarity: it can only intervene when national jurisdictions are unwilling or unable to act.[28] These complementarity barriers meant that the ICC could not take on key players in the Gaddafi regime, due to domestic trials, despite significant due process concerns with the Libyan courts.[29] The ICC's jurisdiction begins in 2002 and requires a referral or the Prosecutor's initiative.[30] While UNSC referrals offer theoretical universality, political vetoes by P5 states limit this in practice. The ICC also faces limitations in prosecuting aggression unless specific jurisdictional criteria are met, which neither Russia nor Ukraine fulfil.[31] By contrast, both the ICTY and ICTR had more straightforward mandates, aiding their practical effectiveness.

Conclusion

The jurisdictional hurdles and difficulties faced by the ICC, particularly complementarity, leave much to be desired for the future of international criminal justice, which the ad hoc tribunals have cleverly sidestepped. The ICC also faces incessant criticism for its alleged political bias and use of prosecutorial discretion, and one could easily argue that a perception of judicial partiality is fatal to success. However, looking forward, there are valid practical concerns about the fragmentation of the international legal system, which cast a reasoned doubt on the decentralisation of international criminal law through the creation of more ad hoc tribunals to deal with specific conflicts, countries or crimes.[32] It is important to acknowledge the symbolic importance of a permanent global criminal tribunal. It sends a message to victims of international crimes across the world that the international legal community has an existing framework for bringing their perpetrators to justice, rather than leaving them hopeful that one might be created pertaining to them at some point in the future.

Notes

1 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 (Rome Statute).
2 *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06-2842 (5 April 2012).
3 *Prosecutor v Bosco Ntaganda* ICC-01/04-02/06-2359 (8 July 2019).
4 *Prosecutor v Germain Katanga* ICC-01/04-01/07-3436 (7 March 2014).
5 *Prosecutor v Dominic Ongwen* ICC-02/04-01/15-1762 (4 February 2021).
6 *Prosecutor v Ahmad Al Faqi Al Mahdi* ICC-01/12-01/15-171 (27 September 2016).
7 *Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* ICC-01/05-01/13-2275 (8 March 2018).
8 UNSC Res 827 (25 May 1993) S/RES/827.
9 *Prosecutor v Jean-Paul Akayesu* ICTR-96-4 (1 June 2001).
10 *Prosecutor v Momčilo Perišić* ICTY-95-14 (28 February 2013).
11 *Prosecutor v Dusko Tadic* ICTY-94-1 (26 January 2000).
12 *Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze* ICTR-99-52 (3 December 2003).
13 Rome Statute of the International Criminal Court art 7.
14 Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted 25 May 1993) S/25707 art 5.
15 Statute of the International Criminal Tribunal for Rwanda (adopted 8 November 1994) S/RES/955 art 3.
16 *Prosecutor v Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo* ICTY-96-21 (16 November 1998).
17 *Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08-3636 (8 June 2018).
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21 *Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08-3636 (8 June 2018).
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24 'ICC: Investigate All Sides in Uganda' *Human Rights Watch* (New York, 4 February 2004) www.hrw.org/news/2004/02/04/icc-investigate-all-sides-uganda accessed 10 May 2025.
25 *Prosecutor v Slobodan Milosevic* ICTY-02-54 (16 June 2004).
26 *Prosecutor v Radovan Karadzic* ICTY-95-5 (24 March 2016).
27 *Prosecutor v Ratko Mladić* ICTY-09-92 (22 November 2017).
28 Rome Statute of the International Criminal Court art 17.
29 *Prosecutor v Saif Al-Islam Gaddafi* ICC-01/11-01/11-466 (11 October 2013).
30 Rome Statute of the International Criminal Court art 13-14.
31 Rome Statute of the International Criminal Court art 8.
32 Leila Sadat, 'Reforming the International Criminal Court: "Lean in" or "Leave"' (2020) 62 WUJLP 51.

Louie Miller

Populism, migration and Article 18 of the European Convention on Human Rights

As a growing number of Council of Europe Member States experience democratic and rule of law backsliding,[1] the European Court of Human Rights ('the Court') has turned with renewed interest to an old and once-neglected provision: Article 18 of the European Convention on Human Rights (ECHR or 'Convention'). Long overlooked, it is now described as a 'bulwark against dictatorial rule', capable of naming and condemning State actions rooted in bad faith.[2]

Article 18 prohibits States from restricting rights 'for any purpose other than those for which they have been prescribed'. The provision therefore allows the Court to scrutinise the true motivations behind State restrictions on human rights and identify 'ulterior purposes'. Violations are rare, however, and typically involve right-wing populist regimes practices intended to suppress dissent, silence judges or dismantle civil society.[3]

The evolution of Article 18: from dormancy to deployment

For decades, the provision was effectively dormant. The Court routinely refused to engage with Article 18, often laconically stating it was 'not necessary to examine' Article 18 separately,[4] even where bad faith was alleged. That changed with *Gusinskiy v Russia*, which marked the first finding of a violation of Article 18.[5] Still, the evidentiary bar remained impossibly high. Judges demanded 'direct and incontrovertible proof' of bad faith, ignoring political context, circumstantial evidence or patterns of State behaviour.[6]

The Court's practice shifted again in its 2017 *Merabishvili* judgment.[7] It considerably lowered the evidentiary threshold and accepted that intent could be inferred from context, including the Contracting State's political climate, patterns of behaviour and institutional dynamics.[8] The overall effect of this evidentiary recalibration is revealing: in the six years following the *Merabishvili* judgment, there have been over 20 violations of Article 18, as opposed to six prior to the judgment.[9]

Migration detention and ulterior purpose

Recent judgments illustrate how Article 18 has become a tool for confronting populist authoritarian practices, such as the suppression of political pluralism,[10] or the stifling of opposition politicians,[11] judges[12] and human rights defenders.[13]

However, Council of Europe Member States are increasingly resorting to sweeping detention measures for migrants and asylum seekers for political goals. Despite this, and notwithstanding the nexus that exists between right-wing populist practices and anti-migrant policies,[14] Article 18 has not been applied in the context of migrants' human rights. A contextual expansion of the Court's ulterior purpose assessment would allow Strasbourg to confront these harmful populist narratives and flag illegitimate limitations of the rights of migrants.[15]

The UK's Illegal Migration Act 2023 provides a striking test case. Broadly, it was introduced to dissuade, for electoral ends, individuals from crossing the Channel and claiming asylum in the UK.[16] The Act failed to safeguard Article 5 of the ECHR, and the previous Conservative Government acknowledged that it fell short of the UK's human rights obligations.[17]

The new Article 18 evidentiary regime developed in *Merabishvili* would allow the Court to take a closer look at the legislative and political context around the Act. Such an examination would likely raise serious concerns about the Government's bad faith. Indeed, the Council of Europe's Commissioner for Human Rights identified ulterior political motivations underlying the Act.[18] Furthermore, the Government's refusal to issue a statement of compatibility

under section 19 of the Human Rights Act, is its attempt to circumvent interim measures issued by the Court,[19] and the absence of meaningful parliamentary scrutiny all point toward an intention to insulate the Act from human rights oversight.[20] More revealing still is the Government's persistent use of inflammatory language, most notably the 'stop the boats' refrain, which serves to create a hostile anti-migrant environment.[21] Drawing on the *Merabishvili* framework, such evidence could support a finding that the purpose of detention under the Act is not migration management, but electoral signalling and deterrence – an ulterior motive falling squarely within the scope of Article 18.

The Italian Government introduced similarly punitive laws which permit the automatic detention of rescued migrants, with the stated aim of deterring sea crossings.[22] Since immigration can and has been imposed as an act of political expediency, it is especially crucial that the Court evaluates whether or not bad faith underpins the decision to detain.

However, the Danish context gives pause for concern in this regard. In *MA v Denmark*, the Court found that legislation imposing a mandatory three-year waiting period for family reunification was excessive and violated the applicant's right to family life.[23] The Danish Government had been warned by, inter alia, the Council of Europe Commissioner for Human Rights that the relevant legislation was not compatible with the Convention.[24] Danish legislators themselves identified the risk of non-compatibility.[25] Domestic authorities wilfully ignored these warnings, and the Court, despite acknowledging the warnings, passed up the opportunity to engage in a substantive examination of the Danish authorities' bad faith and signalled its unwillingness to expand its Article 18 case law to include migrants.

Conclusion

As populist governments increasingly target migrants through strategically punitive detention regimes, the Court must respond with the full weight of the Convention. Article 18 offers a distinctive tool: it allows the Court to look past legal justifications and examine the true motives behind rights restrictions. Its use has grown in response to attacks on democratic institutions, but it has yet to be applied in the migration context, despite mounting evidence of politically driven detention practices.

There is no principled reason for this gap. The Court has the legal framework, the evidentiary tools and the jurisprudential momentum to extend Article 18's scope. What is needed is a commonsensical, proactive approach. As Judge Kūris recommended, 'if it walks like a duck and quacks like a duck, we call that bird a duck'.[26] The Court must be willing to call out bad faith when it sees it and give full effect to the Convention by ensuring that no restriction pursued for illegitimate purposes goes unchallenged.

Notes

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2 Floris Tan, 'The Dawn of Article 18 ECHR: A Safeguard Against European Rule of Law Backsliding' (2018) 9(1) *Göttingen Journal of International Law* 109, 112.
3 eg Case 49872/11 *Tymoshenko v Ukraine* (2014) 58 EHRR 3 (ECtHR); Case 3594/19 *Kövesi v Romania* (2020) 71 EHRR 13 (ECtHR); Cases 68762/14 and 71200/14 Aliyev v Azerbaijan unreported 20 September 2018 (ECtHR).
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5 Case 70276/1 *Gusinskiy v Russia* (2005) 41 EHRR 17 (ECtHR).
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11 Case 72508/13 *Merabishvili v Georgia* 45 BHRC 1 (ECtHR).
12 Case 35599/20 *Juszczyszyn v Poland* unreported 6 October 2022 (ECtHR).
13 Case No 28749/18 *Kavala v Turkey* (2021) 72 EHRR 23 (ECtHR).
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25 Case 6697/18 *MA v Denmark* unreported 9 July 2021 (ECtHR) at [33].
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Sonia Winkels

Rule of law in times of necropolitics

What happens when the law no longer protects life, but governs its disposability? In the 21st century, authoritarian regimes rarely suspend the law – they infiltrate it. They do not need tanks in the street when legislation, judicial silence and bureaucratic compliance can repress just as effectively. This shift reveals what philosopher Achille Mbembe calls *necropolitics*[1]: the political power to decide who may live and who must die.[2] But in today's legal regimes, this power no longer appears as brute force – it is coded in legal procedure, embedded in criminal reforms and enacted through the courts.

Exceptional state powers are no longer an extraordinary measure in moments of crisis; the exception appears increasingly ordinary and procedurally regulated. We see brutal manifestations of this logic in some countries, and yet the pattern suggests something broader, as this seems to be a strategy used beyond the so-called 'authoritarian' states. Exceptionality has become banal – and potentially global. This raises a crucial question: have exceptional state powers – and the politics of death they increasingly sustain – become a defining feature of modernity?

Necropolitics!

In 'Necropolitics', Mbembe shows how the state of exception has been spatialised. It migrates from being a temporal suspension of law into zones where law applies differently, or not at all. These may be refugee camps, prisons, borderlands – or entire neighbourhoods. These are spaces where people are not killed outright, but governed as if already dead.

The exception has been banalised. It is woven into legal reforms, policing tactics, and administrative practices. It is normalised through discourse – 'public security', 'war on drugs', 'counterterrorism' – and legalised through codes, decrees and jurisprudence. The sovereign does not abolish the law; it hollows it out, turning it into a machine that sorts, punishes and abandons.

Across contexts where figures on incarceration are alarmingly high, death does not only mean the end of life. *Necropolitics* means to decide who is protected by the law and who is socially dead. What we see is not lawlessness, but the weaponisation of law to regulate, neutralise and discard.

Legal architectures of disposable life

In El Salvador, the regime of exception has turned criminal law into a mechanism of mass incarceration.[3] Since 2022, the state has detained over 70,000 people. The state of exception, initially authorised under Article 29 of the Constitution to suspend certain rights temporarily, has since been renewed 35 times[4] and used as a legal platform to permanently restructure the criminal justice system. During this period, the Government passed a series of legislative reforms expanding pretrial detention, lowering evidentiary standards and allowing the prosecution of entire groups based on perceived gang affiliation or territorial

association.

There is no effort to individualise guilt. Instead, the law operates as a sorting mechanism: to determine who is governable, who is risky and who is disposable. Those captured by this logic are placed in a juridical condition of being already dead – legally detained, bureaucratically processed and politically abandoned. Their names vanish into trial spreadsheets. Their medical needs go unanswered. Some never leave prison alive.

These individuals are not just punished. They are rendered administratively invisible, subjected to what we might call 'legal disappearance'. They are neither fully alive in the eyes of the state, nor officially dead – they are governed in a permanent state of suspended humanity.

The courts, rather than acting as a check, have become the bureaucratic conveyor belt of *necropower*, orchestrating abandonment. The exception has not replaced legality – it has redefined it.

In Israel and the Occupied Palestinian Territories, Mbembe's necropolitics is fully spatialised. The state of exception is not declared – it is mapped, segmented into regimes of differentiated rights.[5] For Palestinians, administrative detention allows for months, even years, of imprisonment without charge, without trial, and without recourse.[6]

And in the US, the logics of incarceration reveal a system producing not simply confinement, but social death.[7] This extends beyond prison walls: US immigration policies reduce migrants to deportable bodies, not governed as rights-bearing individuals but as threats to be managed, contained or expelled.

If these examples appear extreme, we must ask: are they really so exceptional? Could any country become El Salvador? In France,[8] the emergency powers introduced after the 2015 Bataclan attacks were not dismantled; they were absorbed into ordinary law. This led to home raids and restricted movement without prior judicial approval, enhanced surveillance and condoned discrimination. France's checks and balances could be overridden with the appropriate political will.

Reclaiming the rule of law

This raises a difficult but necessary challenge for legal professionals: What do we mean by 'rule of law' when law itself is used to produce death, exclusion or abandonment?

Let us be clear: the rule of law is not the same as legal order. The mere existence of a court, a statute or a trial does not guarantee justice. The rule of law requires that rights constrain power and that legality be rooted in equality, due process and international human rights standards.

When law is used to eliminate these constraints – when it enables rather than limits state violence – it ceases to be the rule of law. It becomes the rule of death, governed not by justice but by utility, risk management and security doctrine.

Mbembe's warning is clear: modern legal systems have learned to distribute death without rupturing (domestic) legality. The state of exception has not disappeared – it has become administratively invisible.

Whether the exception has become part of modernity or is simply a dangerous global trend is still debatable. But if rule of law is to remain meaningful, it must be more than institutional formalism. It must be a defence of life.

As lawyers, we are taught to place our faith in the human rights system. But in a time when legality so often serves exclusion, perhaps our role is not just to defend that system – but to ask whom it serves, what violence it conceals and how it might be made to protect the lives it claims to uphold.

Notes

1 While Achille Mbembe's concept of necropolitics is complex and situated within a broader critique of sovereignty, coloniality and modernity, this piece engages only with those elements that intersect with the juridical transformations discussed here.

2 Achille Mbembe, *Politiques de l'inimitié* (Paris: La Découverte, 2016) and Noah Christiansen, 'Achille Mbembe's "Necropolitics"' (*Medium*, 2024) https://medium.com/@noahjchristiansen/necropolitics-76ea8b88234c accessed 23 May 2025.

3 Comisión Interamericana de Derechos Humanos (CIDH), *Estado de excepción y derechos humanos en El Salvador [State of Emergency and Human Rights in El Salvador*] (28 June 2024) OEA/Ser.L/V/II, Doc. 97/24 www.oas.org/es/cidh/informes/pdfs/2024/Informe_EstadoExcepcionDDHH_ElSalvador.pdf accessed 20 May 2025.

4 Asamblea Legislativa de El Salvador, *Prórroga del régimen de excepción permitirá mantener niveles de seguridad en El Salvador [Extension of the State of Exception will Allow the Maintenance of Security Levels in El Salvador*] (29 January 2025) www.asamblea.gob.sv/node/13456 accessed 20 May 2025.

5 Jason Burke and Sufian Taha, '"They lock us in like sheep": new Israeli checkpoints and barriers raise fears in the West Bank' *The Guardian* (London, 15 March 2025) www.theguardian.com/world/2025/mar/15/israeli-checkpoints-barriers-raise-fears-in-the-west-bank accessed 27 May 2025) and Suhad Daher-Nashif, 'Colonial management of death: To be or not to be dead in

Palestine' (2021) 69(7) *Current Sociology* https://journals.sagepub.com/doi/full/10.1177/0011392120948923 accessed 27 May 2025.

6 'Israel/OPT: Horrifying cases of torture and degrading treatment of Palestinian detainees amid spike in arbitrary arrests' (*Amnesty International*, 8 November 2023) www.amnesty.org/en/latest/news/2023/11/israel-opt-horrifying-cases-of-torture-and-degrading-treatment-of-palestinian-detainees-amid-spike-in-arbitrary-arrests/ accessed 27 May 2025.

7 Andrew Dilts, 'Carceral Enjoyments and Killjoying the Social Life of Social Death' in Chloë Taylor and Kelly Struthers Montford (eds), *Building Abolition: Decarceration and Social Justice* (New York: Routledge, 2021) https://dilts.org/wp-content/uploads/Dilts-2021-CarceralEnjoyments-FINAL-1.pdf pp 196–223. See Joshua M Price, Prison and Social Death (Critical Issues in Crime and Society) (New Jersey: Rutgers University Press, 2015).

8 United Nations Human Rights Council (UNHRC), *Visit to France: Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism* ((2019) (A/HRC/40/52/Add.4) https://docs.un.org/en/A/HRC/40/52/Add.4.

Gabriela Gómez Mantilla

The rights of victims of terrorism: a case study of the Centro Andino bombing

When terrorism strikes, victims face not only the initial trauma of violence but also the long-term injustice of state neglect. Despite the proliferation of international law aimed at suppressing terrorism,[1] explicit obligations towards its victims have been neglected,[2] with few exceptions.[3] Nevertheless, States retain obligations under human rights law (IHRL).[4] This essay will examine the human rights costs of terrorism through a study of the Centro Andino bombing in Colombia. On 17 June 2017, the explosion of a device planted in a women's bathroom at the Andino shopping mall in Bogotá, killed three women and injured nine people. At the time of this bombing, the country had recently signed a peace agreement and seemed to have political consensus on the importance of recognising and providing reparations to victims and appeared to move beyond political violence. Eight years later, the response to the attack has fallen short. This essay will argue that Colombia's failure to fulfil its international obligations results in the ongoing victims' suffering, mistrust and sense of injustice.

Right to be recognised as victims

Recognising the status of victims is an important part of acknowledging victims' humanity and the costs of terrorism[5] and serves the practical purpose of identifying who must benefit from reparation measures. Efforts to uphold terrorism victims' rights remain hampered by the absence of a comprehensive universal treaty and definition of 'terrorism'.[6] Recurse can be made to soft law instruments,[7] which define victims as all persons harmed as a result of an act of terrorism, including the natural person killed, their immediate family, dependents and those who assisted them.[8]

In the case of the Centro Andino bombing, the recognition of victims has been a long and legally contested process. Initial efforts to be included in the National Registry of victims were denied by national authorities; one victim, who was mutilated in the attack, was told she was 'not a victim of armed conflict'.[9] It was not until late 2019, ie two years after the attack, that the first eight victims were officially recognised, following a court-issued order.[10] The fact that the victims were prompted to turn to the judicial system, filing a constitutional legal action to compel the Unit for Victims to reassess their request for recognition,[11] demonstrates the lack of compliance with IHRL standards. While there is no public information on the identity of those registered, the number of people officially recognised as victims of the attack, stated by the Unit as 'only 9 out of 13 people affected' imply that Colombia may have only recognised direct victims, and not indirect victims.[12]

Right to reparations

Victims of terrorist acts have the right to have an effective remedy and reparations.[13] When restoring the victim to the original situation before the violation is impossible,[14] reparation measures may include compensation, rehabilitation, satisfaction and guarantees of non-repetition.[15] Reparations should encompass all necessary material, medical, psychological and social assistance,[16] and be provided at critical times,[17] including the notification of deaths,[18] identification of bodies, burials, interactions with media and legal proceedings.[19]

Victims of the Centro Andino bombing have repeatedly criticised national authorities for failing to provide reparations, particularly psychological treatment, counselling and emotional support. This neglect has exacerbated their feelings of abandonment, helplessness and post-traumatic stress.[20] Victims have pointed to the heightened vulnerability of those among them experiencing economic precarity. For instance, one victim lost her glasses in the attack and, unable to afford a replacement for a year, received no assistance from the state.[21] A human-rights centred response would have taken into consideration victims' differential needs and provided targeted reparations.

Access to justice

The right to effective remedies also encompasses the victims' right to satisfaction,[22] through measures including full and public disclosure of the truth regarding the facts, causes, and identities of those responsible for the terrorist act.[23] Consequently, the state has a duty to conduct an effective official investigation, to hold those responsible accountable[24] and must ensure victims are kept fully informed of the progress and have an adequate opportunity to participate in proceedings.[25] The lack of adequate victim participation – common in cases of terrorism[26] – contributes to the 'depersonalisation' and marginalisation of victims.[27]

In this instance, victims' right to truth, justice and participation have been undermined, and the harm produced by the bombing remains unpunished. Six days after the bombing, national authorities arrested eight individuals and brought charges of conspiracy to commit a crime, terrorism, homicide and illegal possession of weapons against them.[28] However, months later, the Prosecutor's Office's failure to request an extension of the detention measure within the legal timeframe led to the release of those detained.[29] This fact highlighted the weaknesses of the investigation, potential institutional negligence and cemented doubts about the capacity of the judicial system to provide justice.

In 2022, after years of what victims referred to as 'legal limbo',[30] a new judicial proceeding was opened against Violeta Arango, the alleged material contributor to the bombing.[31] This development was short-lived. The same year, Arango obtained her release and the suspension of arrest warrants after being accredited as a peace mediator at the request of the ELN guerrilla group to participate in peace talks with the Government.[32] While peace negotiations remain a necessary tool to end protracted conflict in Colombia, granting the role of peace mediator to alleged perpetrators of terrorist acts, that could amount to war crimes in the context of armed conflict,[33] can void such talks from legitimacy before public opinion, and ultimately, deny justice to victims.

In response, victims have continued to advocate for justice. In 2024, they issued an open letter to the President, the Prosecutor's Office, the Ministry of Justice and other national authorities denouncing the stagnation of the investigation and ongoing judicial proceedings.34 Victims closed the letter by demanding swift progress in judicial proceedings and urging the Government to engage in direct dialogue with them to find concrete solutions. 35 However, to date, no other individuals have been brought to justice.

Conclusion

The case of the Centro Andino bombing exemplifies the significant gaps in states' compliance with IHRL obligations toward victims of terrorism. Despite initial political commitments and rhetoric favouring truth, reparation and non-repetition, Colombia has fallen short in ensuring access to justice, adequate support and accountability. The failure to recognise all victims, the absence of adequate reparations and stalled legal investigations and proceedings, exacerbated by procedural errors and state-sanctioned concessions, have left victims in a prolonged

state of uncertainty and marginalisation, which largely justifies their suffering, mistrust and sense of injustice.

Notes

1 See, eg Convention on Offences and Certain Other Acts Committed on Board Aircraft (adopted 14 September 1963, entered into force 4 December 1969) 704 UNTS 219; Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971) 860 UNTS 105; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (adopted 23 September 1971, entered into force 26 January 1973) 974 UNTS 177; International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (adopted 24 February 1988, entered into force 6 August 1989) 1589 UNTS 474; International Convention for the Suppression of Terrorist Bombings (adopted 15 December 1997, entered into force 23 May 2001) 2149 UNTS 256.
2 UN Special Rapporteur on Counter-terrorism and Human Rights, 'Protection of human rights by regional organizations while countering terrorism: norms, cooperation, victims of terrorism and accountability' (27 August 2024) UN Doc A/79/324 para 31.
3 International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205 art 3(1) duty to ease the situation of a hostage and secure their release and art 3(2) return of property; International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197 art 8(4) mechanisms to fund victims with funds forfeited from terrorist financing offences.
4 UN Special Rapporteur on Counter-terrorism and Human Rights, 'Human rights impact of counter-terrorism and countering (violent) extremism policies and practices on the rights of women, girls and the family' (22 January 2021) UN Doc A/HRC/46/36 paras 37–38.
5 UN Special Rapporteur on Counter-terrorism and Human Rights, 'Framework principles for securing the human rights of victims of terrorism' (4 June 2012) UN Doc A/HRC/20/14 ('Framework Principles') para 39; OHCHR, 'Terrorism and human rights' (9 September 2020) UN Doc A/ HRC/45/27.
6 Ilaria Bottigliero and Lyal S. Sunga, 'Chapter 33: Redress for victims of terrorist acts in a deteriorating international political climate' in Ben Saul (ed), *Research Handbook on International Law and Terrorism*, 2nd edn (Cheltenham: Edward Elgar Publishing, 2020); Framework Principles para 14.
7 Helen Duffy, '7-International human rights law' in Helen Duffy, *The 'War on Terror' and the framework of International Law* (Cambridge: CUP, 2015).
8 UNGA, 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power' (29 November 1985) UN Doc A/RES/40/34 A(1) and A(2); 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (21 March 2006) UN Doc A/RES/60/147 annex ch V ('Basic Principles') para 8.
9 'Familiares de víctimas del atentado al Centro Comercial Andino: "Después de siete años no ha habido justicia ni reparación"' (NTN24) (*NTN24*, 29 June 2024) www.ntn24.com/noticias-judicial/familiares-de-victimas-del-atentado-al-centro-comercial-andino-despues-de-siete-anos-no-ha-habido-justicia-ni-reparacion-499232 accessed 11 June 2025.
10 'Unidad para las Víctimas incluyó en el Registro Único a afectados por atentado al Centro Comercial Andino' (*Unidad para las Victimas*, 10 December 2019) www.unidadvictimas.gov.co/noticias/55069-2/ accessed 11 June 2025.
11 'Afectados por atentado en el Andino serán reconocidos como víctimas del conflicto armado' (*Canal Capital*, 9 December 2019) www.canalcapital.gov.co/nacion/afectados-atentado-el-andino-seran-reconocidos-victimas-del-conflicto-armado accessed 11 June 2025.
12 'Nueve personas afectadas por atentado en el Centro Andino fueron incluidas en el Registro Único de Víctimas' (*Unidad para las Victimas*, 17 June 2020) www.unidadvictimas.gov.co/noticias/nueve-personas-afectadas-por-atentado-en-el-centro-andino-fueron-incluidas-en-el/ accessed 11 June 2025.
13 International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 Art 2(3).
14 Basic Principles Principle 19.
15 Basic Principles paras 18–23; Framework Principles paras 51–52; UNODC, 'Good Practices in Supporting Victims of Terrorism within the Criminal Justice Framework' (October 2015, online 1 March 2019) ('Good Practices').
16 United Nations Office of Counter Terrorism, United Nations Office on Drugs and Crime and United Nations Interregional Crime and Justice Research Institute, 'Model Legislative Provisions to Support the Needs and Protect the Rights of Victims of Terrorism' (2021) (MLP) www.un.org/counterterrorism/sites/www.un.org.counterterrorism/files/220204_model_legislative_provisions.pdf accessed 10 June 2025 Art 8; UNODC, 'Handbook on Justice for Victims: On the Use and Application of the Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power' (1999) p 18. ('Handbook on Justice for Victims') www.unodc.org/pdf/criminal_justice/UNODC_Handbook_on_Justice_for_victims.pdf accessed 10 June 2025.
17 Handbook on Justice for Victims p.18.
18 MLP Art 9(1)(a).
19 MLP Art 19(2); Good Practices paras 93–94.
20 'Luego de 7 años, persisten los reclamos de justicia por el atentado en el Centro Comercial Andino de bogotá' (*El Colombiano*, 17 June 2024) www.elcolombiano.com/colombia/aniversario-atentando-centro-comercial-andino-bogota-victimas-reclaman-justicia-DI24799291 accessed 11 June 2025.
21 NTN24.
22 MLP Art 16.
23 MLP Art 16; Basic Principles para 22; HRC, 'General Comment No 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004), UN Doc. CCPR/C/21/Rev.1/ Add.13 para 16.
24 Basic Principles; Cased 18299/03 and 27311/03 *Finogenov v Russia* (2015) 61 EHRR 4 (ECtHR) at [268]–[272]; Cases 26562/07, 32574/07, 64669/09, 23389/09, 34679/10, 70276/10, 23338/11, 63924/11, 2677/12, 2725/12, 12557/13, 17755/13 *Tagayeva v Russia* unreported 13 April 2017 (ECtHR) at [496].
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26 UN Special Rapporteur on Counter-terrorism and Human Rights, 'Vision and priorities' (17 January 2024) UN Doc A/HRC/55/48 para 10.
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31 'Por un tatuaje de tortuga identificaron a alias violeta y así pudieron' (*Infobae*, 5 June 2022) www.infobae.com/america/colombia/2022/06/05/por-un-tatuaje-de-tortuga-identificaron-a-alias-violeta-y-asi-pudieron-capturarle/.
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33 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 Art 8(2)(e)(i), intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.
34 'Luego de 7 años, persisten los reclamos de justicia por el atentado en el Centro Comercial Andino de bogotá' (*El Colombiano*, 17 June 2024).
35 'Luego de 7 años, persisten los reclamos de justicia por el atentado en el Centro Comercial Andino de bogotá' (*El Colombiano*, 17 June 2024).