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IBA Interns' Newsletter

SUMMER 2026

IBA Interns' Newsletter

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Civil liability for cross-border due diligence failure: assessing the Yves Rocher judgment from a private international law perspective

Amid a 'historic weakening of corporate accountability rules in Europe',[1] the Paris Judicial Court swims against the tide. While the Omnibus I Directive[2] adopted on 24 February 2026 amended the Corporate Sustainability Due Diligence Directive (CSDDD),[3] the French judge reinvigorated human rights due diligence two weeks later. On 12 March 2026,[4] Yves Rocher was found liable for failing in its duty of vigilance in Türkiye. The judgment is seen as historic because it is the first to award damages under the French Duty of Vigilance Act[5] and to characterise it as an overriding mandatory provision.[6] This qualification allowed the assessment of civil liability under French Law, which justifies reflecting on the Private International Law reasoning underpinning the decision.

Following the dismissal of employees of the Yves Rocher Group's Turkish subsidiaries after they joined a trade union, compensation claims based on Article L.225-102-2 of the French Commercial Code were brought against the parent company in France. This provision foresees the potential liability of a company that has failed to establish a vigilance plan to identify risks and prevent human rights violations in the conditions of the general civil liability regime. The problem was that Article 4(1) of Rome II[7] would have led to the application of Turkish Law as the law of the place of the damage, under which the claims would have been barred. The Court ruled that Article L.225-102-2 fulfilled the conditions of an overriding mandatory provision under Article 16 of Rome II: a close link to the forum and a fundamental interest to be protected under the law of the forum. The Court's arguments were based on: the context of enactment and the objective of the Duty of Vigilance Act; reference to the UN Guiding Principles on Business and Human Rights, OECD Guidelines and the CSDDD; insisting that victims were affected, and damages occured, abroad; the special character of the due diligence civil liability regime addressing serious human rights violations; ensuring effective claims; enabling access to justice; and facilitating access to redress. The Court noted that while the Omnibus I Directive removes the harmonised regime governing civil liability and the uniform qualification as overriding mandatory provision, it does not prevent Member States from having their own regimes. This reasoning allowed the Court to set aside Turkish Law in favour of the French provisions on liability for due diligence failure, also applicable to prescription, making it possible for compensation claims to be assessed. The Court found that the parent company had committed a fault by excluding its subsidiaries from its vigilance plan and that this omission was causally linked to the employees' prejudice.

However, at the time of the judgment, the Omnibus I Directive had not yet entered into force. The Directive removes Article 29(1) and Article 29(7) of the CSDDD whereby 'Member States shall ensure that a company can be held liable for damage' and 'the provisions of national law transposing this Article are of overriding mandatory application'. Therefore, it remains to be seen whether this first-instance decision will shape a precedent.

The qualification of liability rules for non-compliance with due diligence obligations as overriding mandatory provisions is not obvious: among conflict of laws mechanisms in Rome II, Article 16 is put forward,[8] but the exception clause in Article 4(3) is also recommended,[9] while the public policy exception of Article 26 is considered as well. However, using Article 4(3) would be less protective of victims and less foreseeable for companies than Article 16: it is a case-by-case approach based on circumstances, with a greater burden of proof requiring proving a closer connection to the country in which the parent company at the origin of the damaging conduct is domiciled. In cases with subsidiaries far down the supply

chains in countries distant from the country of domicile of the parent company, victims do not have any element of connection to this country. On the contrary, the close link between the mandatory law of the forum and the situation required under Article 16 is easier to demonstrate: it is only required to establish a close connection with the forum, not to demonstrate that this connection is manifestly closer than the connection to the place of damage. On the other hand, a 'value-oriented interpretation' of the exception clause in Article 4(3)[10] could lead to applying the law of the country where the parent company is domiciled in cases where such countries do not foresee liability for due diligence failure like in France, but still have due diligence obligations and provide for more generous general liability regimes than the hypothetical country where the damage occurred (for example, Germany and the Netherlands[11]). Regarding the public policy exception, it is subject to even greater judicial discretion[12] and legal uncertainty: the content of 'ordre public' depends on the political and societal climate, which would not be favourable to human rights violations in supply chains (a case in point is the Omnibus I Directive adopted only two years after the CSDDD), it requires an *in concreto* analysis on a case-by-case basis while overriding mandatory provisions that apply objectively, and it operates as an ex-post-mechanism while an overriding mandatory provision directly applies in lieu of the law of the place where the damage occurred.

In the absence of a national legislative intervention and with a step backwards by the European legislator, the judge resolved the question of qualification. With its characterisation as overriding mandatory provisions, the Court settled on a cross-border application of the Duty of Vigilance Act and reinforced the protection of human rights. It is a 'judicial consecration of the extraterritorial effectiveness of the duty of vigilance'[13] highlighting the impact that judicial reasoning and Private International Law can have on due diligence litigation.[14] Indeed, it shows that despite the removal of Article 29(7) of the CSDDD, a foreign law that is less protective of human rights and that has less procedural safeguards will not necessarily apply.[15] Relying on the judge's use of conflict of laws mechanisms could make up for policy and legislative reluctance.

Given that the Omnibus I Directive has called into question the qualification as an overriding mandatory provision initially set in the CSDDD, the reasoning in the Yves Rocher case could likely inform future judicial and legislative reflection as other Members States navigate the uncertainty reintroduced by the Omnibus I Directive while implementing the CSDDD and adapting their national liability regimes.16 As noted in the judgment, the Omnibus I Directive does 'not preclude Member States from introducing, in their national laws, more stringent provisions' (Article 4(4)). This suggests that the reasoning in this case is not an isolated development; it could be a precursor of a broader European movement.17

Notes

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3 Directive (EU) 2024/1760 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 [2024] OJ L2024/1760.

4 Tribunal Judiciaire de Paris, Judgment of 12 March 2026, RG No 22/04017.

5 LOI No 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1).

6 Jean-Jacques Daigre, 'Affaire Yves Rocher: responsabilité d'une société mère française pour insuffisance de son plan de vigilance à l'égard de filiales étrangères (2026) *Recueil Dalloz* D. 2026. 628.

7 Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199.

8 Gabrielle Holly, Mathilde Dicalou, Alix Myczkowski and Fatmanur Caygın, 'Making the Corporate Sustainability Due Diligence Directive work for people' (Danish Institute for Human Rights, 2026), 73 www.humanrights.dk/files/media/document/DIHR_CSDDD_Guide_digital_May%202026.pdf accessed 15 May 2026.

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10 European Law Institute, *Business and Human Rights: Access to Justice and Effective Remedies* (2022) 55.

11 French Senate, Memorandum on Corporate Duty of Vigilance in Europe (April 2024) 8 www.senat.fr/lc/lc333/lc333.pdf accessed 15 May 2026.

12 Jennifer Zerk and Gabrielle Holly, 'Access to Justice in the CSDDD: Symposium Event Report' (Danish Institute for Human Rights, September 2025) 43 www.humanrights.dk/files/media/document/A2J%20symposium%20event%20report-kopi_NEW.pdf accessed 15 May 2026.

13 Reagan Intole, 'Affaire Yves Rocher: la consécration prétorienne de l'effectivité extraterritoriale du devoir de vigilance, entre loi de police et responsabilité raisonnable' (2026) *Les Petits Affiches* No LPA204h0.

14 On the role of Private International Law, see European

Law Institute, Business and Human Rights: Access to Justice and Effective Remedies (2022) 44, 57.

15 Zerk and Holly, 'Access to Justice in the CSDDD: Symposium Event Report' (Danish Institute for Human Rights, September, 2025) 49.

16 Holly, Dicalou, Myczkowski and Caygın, 'Making the Corporate Sustainability Due Diligence Directive work for people' (Danish Institute for Human Rights, 2026), 71–72.

17 Intole, 'Affaire Yves Rocher : la consécration prétorienne de l'effectivité extraterritoriale du devoir de vigilance, entre loi de police et responsabilité raisonnable' (2026) *Les Petits Affiches* No LPA204h0.

Arianna De Vita

The use of autonomous weapon systems in armed conflict: human war or AI war?

Autonomous weapon systems and the accountability gap in international criminal law

One of the main issues in international humanitarian law (IHL) and international criminal law concerns the consequences of the proliferation of new military technologies.[1] In particular, the problem relates to autonomous weapon systems (AWS), meaning weapons 'out of the loop'.[2] This implies that these weapons function without the supervision or control of human operators and are therefore characterised by unpredictability in targeting. Autonomous weapons may target enemies without human intervention, potentially breaching the principles of proportionality and the distinction between civilians and combatants as enshrined in Articles 48 and 51 of the Additional Protocol I to the Geneva Conventions.[3]

To consider a specific case, the Israeli Defence Forces are using cyber and new drone technology in the conflict against Hamas, including the use of drones and unmanned aerial vehicles (UAVs).[4] These sniper drones have been used to target civilians and journalists in Gaza, thereby violating IHL and raising issues of accountability.[5] In this respect, the Israeli army has developed AI-based programmes named 'Lavender', 'Gospel' as well as 'Where's Daddy', which generate targets for assassination and place them on kill lists.[6] These systems reportedly play a key role in bombing Palestinians, by influencing Israeli military operations and with AI -generated decisions being treated as if they were human decisions.[7] The indiscriminate bombing is allegedly a consequence of AI's identification of junior Hamas operatives as targets, while in practice contributing to the mass killing of Palestinians in Gaza.[8] Therefore, these machines violate the rule of war due to the absence of distinction between Palestinian civilians and Hamas operatives in the identification of the target.[9]

Significant difficulties arise with regard to criminal responsibility deriving from the use of AWS. The issue is particularly relevant in relation to war crimes under Article 8 of the Rome Statute, which are committed in the context of an armed conflict and involve serious violations of IHL. The challenge lies in the difficulties of holding an individual liable for violations committed by AWS, thereby creating a potential accountability gap before the International Criminal Court (ICC).[10]

The limits of superior responsibility in the age of autonomous weapon systems

Article 28 of the Rome Statute establishes the responsibility of military commanders who have effective command and control, where they knew or should have known about the crimes and failed to take necessary and reasonable measures to prevent or punish them. This provision regulates individual responsibility and is based on elements such as the superior–subordinate relationship. However, difficulties arise in holding individuals responsible when attacks carried out by AWS result in unexpected violations of IHL. Furthermore, for the doctrine of command responsibility to apply, the subordinate must meet the criteria for committing a war crime. Scholar

Guénaël Mettraux has argued has argued that, for superior responsibility to arise, the subordinate must commit an underlying offence that meets all the constitutive elements of the crime. However, a machine cannot fulfil the mental element required under Article 30 of the Rome Statute.[11]

The notion of superior responsibility is understood as inter-personal in nature.[12] Moreover, the existence of superior responsibility is grounded in the concept of effective control. The ICC in its *Bemba* decision established that effective control implies the ability to prevent or repress the commission of crimes.[13] Among the factors necessary to establish effective control, the Court considered, *inter alia*, the power to issue orders.[14] In this context, commanders have a limited ability to influence the behaviour of AWS in order to ensure compliance with IHL.[15] Moreover, it is difficult to impose IHL obligations on AWS, as they are not human beings. As underlined by scholar Marco Sassoli, the key distinction lies in the fact that a weapon system is an object, whereas a human being is a subject of law. In this sense, a combatant is a human being insofar as they are an addressee of legal obligations.[16]

Nonetheless, an alternative view raised by scholar Alessandra Spadaro suggests that, although the notion of effective control does not apply directly within the doctrine of superior responsibility, AWS may operate without human intervention while still remaining under human control before and during their deployment. From this perspective, autonomy consists in the ability of a system to achieve objectives set by its operator without receiving further external instructions.[17] The consequence of this approach is that responsibility shifts from the targeting phase to earlier stages, such as planning, research, development, certification and deployment. Accordingly, responsibility for war crimes involving AWS would lie with the humans involved in designing and deploying the system.[18]

Nevertheless, several challenges persist. This type of control differs from the doctrine of superior responsibility, which traditionally concerns relationships between human actors. In addition, AWS does not possess legal personality under international law and the ICC has jurisdiction only over natural persons. Ultimately, attributing responsibility for crimes committed by the weapon operator would stretch existing ICL frameworks on individual criminal responsibility, particularly in light of the established criteria for superior responsibility. In this respect, it would be difficult for a superior to prevent or punish machines.

Conclusion

The doctrine of superior responsibility represents a potential solution to the responsibility gap for war crimes committed by machines. However, challenges to its applicability persist, particularly due to the absence of explicit regulation in the Rome Statute. Given the need for further development of ICL, the current priority should be to ensure sufficient control over autonomous weapons and to establish clear accountability for wrongful acts. This is reflected in the concept of meaningful human control, which requires that humans retain control over military actions in order to ensure compliance with IHL.

Human control can be ensured through state responsibility in the study, development, acquisition or adoption of new weapons, as established under Article 36 of the Additional Protocol I (API). This is also upheld by the principle of humanity embodied in the Martens Clause, which provides that lethal force should not be used against unlawful targets.[19] The International Court of Justice, in the Legality of the Threat or Use of Nuclear Weapons, stated that the Martens Clause represents an effective means of addressing the rapid evolution of technology.[20] This may imply that Israel is implementing, and is therefore responsible for, technology that is used in a manner contrary to the principle of humanity.

Regarding criminal individual responsibility for cyber-operations, the ICC Office of the Prosecutor has published a Draft Policy on Cyber-Enabled Crimes under the Rome Statute which enables the prosecution of such acts in a manner similar to war crimes committed through conventional means.[21] This opens the door to commanders' responsibility for war crimes committed through AWS. In addition, effective control by commanders may exist on a failure to act, as established by the International Criminal Tribunal for the former Yugoslavia in the Halinovic case, namely the failure to prevent the use of AWS in violation of IHL.[22] Consequently, this research suggests the further development of the Rome statute to clearly regulate the responsibility of State

officials and military commanders for the use of AWS in violation of IHL. This would, for instance, make it possible to prosecute IDF commanders for the use of AI programmes such as 'Lavender' and 'Gospel'.

Notes
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2 Alessandra Spadaro, 'A weapon is no subordinate: autonomous weapon systems and the scope of superior responsibility' (2023) 21(5) *Journal of International Criminal Justice* 1119, 1120.
3 Protocol Additional to the Geneva Conventions and Relating to the Protection of Victims of International Armed Conflict (adopted 12 August 1949, entered into force 8 June 1977) 1125 UNTS 3 arts 48, 51.
4 Anwar Mhajne, 'Israel's AI Revolution: From Innovation to Occupation' (*Carnegie Endowment for International Peace*, 2 November 2023) https://carnegieendowment.org/sada/2023/11/israels-ai-revolution-from-innovation-to-occupation accessed 15 May 2026.
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6 Submission by the State of Palestine on autonomous weapon systems to the UN Secretary-General pursuant to resolution 78/241 adopted by the General Assembly on 22 December 2023, p.5; Emily E Bobenrieth, 'Gaps and Seams in the Law of Armed Conflict for AI-Enabled Cyber Operations' (*Lieber Institute West Point*, 10 December 2025) https://lieber.westpoint.edu/gaps-seams-law-armed-conflict-ai-enabled-cyber-operations/ accessed 15 May 2026.
7 Amjad Iraqi, '"Lavender": The AI Machine Directing Israel's Bombing Spree in Gaza' (*+972 Magazine*, 3 April 2024) www.972mag.com/lavender-ai-israeli-army-gaza/ accessed 15 May 2026.
8 Iraqi, '"Lavender": The AI Machine Directing Israel's Bombing Spree in Gaza' (*+972 Magazine*, 3 April 2024).
9 Ibid.
10 Spadaro, 'A weapon is no subordinate: autonomous weapon systems and the scope of superior responsibility' (2023) 21(5) *Journal of International Criminal Justice* 1119, 1120.
11 Guénaël Mettraux, *The Law of Command Responsibility* (Oxford: Oxford University Press, 2009), p 139; The Prosecutor v Sainovic ICTY-05-87, 26 February 2009; *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City* [1935] PCJI Series A/B, No 65; Thomas Burri, 'International Law and Artificial Intelligence' [2017] *German Yearbook of International Law 91*, 103.
12 Mettraux, *The Law of Command Responsibility* (2009), p 139.
13 *Prosecutor v Bemba* (Trial Chamber III) ICC-01/05-01/08-3345, 21 March 2016, Bemba Gombo, para 183.
14 Ibid.
15 Spadaro, 'A weapon is no subordinate: autonomous weapon systems and the scope of superior responsibility' (2023) 21(5) *Journal of International Criminal Justice* 1119, 1124.
16 Marco Sassoli, 'Autonomous weapons and IHL: advantages, open technical questions and legal issues to be clarified' (2014) 90 *International Law Studies* 308.
17 Tim McFarland, *Autonomous weapon systems and the law of armed conflict: compatibility with International Humanitarian Law* (Cambridge: Cambridge University Press, 2020), p 76.
18 Spadaro, 'A weapon is no subordinate: autonomous weapon systems and the scope of superior responsibility' (2023) 21(5) *Journal of International Criminal Justice* 1119, 1126–1127; Michael Schmitt, 'Autonomous Weapon Systems and International Humanitarian Law: a reply to the critics' (2013) *Harvard National Security Journal Features; Prosecutor v. Stanislav Galic* IT-98-29-T, Trial Chamber, 5 December 2003; *Prosecutor's office of Bosnia and Herzegovina v Dukic* case no X-KR-07/394.
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21 Harriet Moynihan, Philippa Webb and Amal Clooney, 'Legal Accountability for Malicious Cyber Operations' (Oxford Institute of Technology and Justice, 2025) www.techandjustice.bsg.ox.ac.uk/insights/legal-accountability-malicious-cyber-operations accessed 15 May 2026; 'Statement by ICC Prosecutor Karim A.A. Khan KC on Conference Addressing Cyber-Enabled Crimes through the Rome Statute System' (ICC, 22 January 2024) www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-conference-addressing-cyber-enabled-crimes-through accessed 15 May 2026.
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Matilde Gamba

Under siege: the crisis of humanitarian aid delivery in the Gaza Strip

Humanitarian aid refers to material or logistical support provided in response to crises, aiming to save lives, alleviate civilian suffering and preserve human dignity.[1] It is both an ethical imperative and a legal obligation. Under International Humanitarian Law (IHL), parties to a conflict must allow impartial, needs-based relief for civilians. Failing to ensure timely, unhindered humanitarian access heightens civilian vulnerability, leaving entire communities trapped without the means to survive.[2]

In the Occupied Palestinian Territory, particularly in the Gaza strip, the question of humanitarian access has become a defining legal and political challenge. The Rafah crossing illustrates the complexity of facilitating aid delivery in protracted

conflict settings. This raises a broader set of questions: what occurs when the legal duty to permit humanitarian relief confronts its politicisation, instrumentalisation or even weaponisation? Can humanitarian action truly remain effective when constrained by entrenched power dynamics?

Legal framework[3]

IHL establishes a clear legal framework governing humanitarian assistance in armed conflict. The Geneva Conventions and their Additional Protocols establish that all parties to an armed conflict are under the obligation to permit relief operations and the passage of consignments of essential goods for civilians, including enemy civilians.[4]

Article 59 of Convention IV, applicable to occupied territories, in states where the population is inadequately supplied, the occupying power 'shall agree to relief schemes' and must facilitate them 'by all the means at its disposal'.[5] These duties presuppose that humanitarian action must be able to function unhindered and free from political interference.

Grounded in the principles of humanity, neutrality, impartiality and independence,[6] humanitarian aid must refrain from engaging in 'political, racial, religious [or] ideological controversies',[7] and provide assistance solely based on the need and long-term recovery of the affected population.

Customary IHL strengthens these obligations. Rule 55 of the International Committee of the Red Cross (ICRC) international humanitarian law customary database requires conflicting parties to 'allow and facilitate rapid and unimpeded passage'[8] of impartial humanitarian aid, subject only to control measures that do not obstruct delivery. Similarly, Article 23 of the Fourth Geneva Convention permits regulation of timing, routes and inspection of consignments, but only insofar as such control does not impede effective delivery.[9]

The Rafah Border Crossing

The Rafah Crossing is the southernmost exit point of the Gaza Strip, bordering Egypt's Sinai Peninsula. Following the escalation of hostilities in October 2023, Israel's closure of the Erez Crossing and Kerem Shalom left Rafah as Gaza's primary gateway for humanitarian assistance.[10] However, when, in May 2024, Israel took operational control of the Palestinian side of the crossing, it effectively seized Gaza's last major humanitarian corridor.[11]

As aid convoys were left stranded and food supplies destined for civilians spoiled while awaiting clearance, Israel consolidated a broader system of control over access points, regulating access in terms of movement, timing, volume and the types of goods authorised to pass.[12] Humanitarian access was further constrained through a system of 'mandatory coordination', whereby even authorised aid deliveries required Israeli military approval for movement within the Gaza Strip.[13] According to the United Nations Office for the Coordination of Humanitarian Affairs (OCHA), in March 2024 only 26 per cent of humanitarian missions were facilitated, while 40 per cent were denied, 20 per cent delayed, 11 per cent impeded and three per cent withdrawn.[14]

Under the January 2025 ceasefire framework, Rafah remained under Israeli control and was used primarily for limited medical evacuations subject to Israeli and Egyptian approval. By early 2026, access remained intermittent under strict Israeli oversight. After the escalating security conditions in Iran at the end of February, the crossing reopened on 19 March 2026, but it functions only under highly restrictive controls.

Humanitarian crisis in the Gaza Strip

Since 7 October 2023, the humanitarian impact of the Gaza war has been catastrophic. According to the Palestinian Ministry of Health, at least 71,800 Palestinians have been killed, including over 21,200 children, while more than 171,200 have been injured.[15] More than two million people lack adequate shelter, water, food or medical care, and over 1.9 million have been displaced amid bombardments.[16] The healthcare system has been severely degraded by strikes and fuel shortages, leaving over 20,000 patients in urgent need of medical evacuation. However, only around 180 patients were successfully evacuated during the brief reopening of the Rafah crossing in early 2026.[17]

Repeated closures of Rafah, particularly after its seizure in May 2024, drastically restricted assistance. At times, only 50 Palestinians per day were permitted to cross on foot, and humanitarian convoys faced prolonged inspections or were denied entry entirely. As a result, over 2,000 trucks of

food and medicine accumulated in Egypt's El-Arish while people inside Gaza faced mounting starvation.[18]

While humanitarian access has increased since the ceasefire, inflows still fall far short of the scale needed. Aid organisations stress that the number of trucks entering Gaza must be significantly increased to ensure adequate delivery of food, water, medical supplies and other essential goods. Even at peak entry, UN agencies stressed that aid inflows only met basic survival needs.[19]

An estimated 1.6 million people remain in acute food insecurity, including five per cent facing catastrophic levels of hunger, while over 101,000 children are at risk of acute malnutrition.[20] Without a substantial and sustained increase in daily deliveries, Gaza's civilian population will continue to face severe deprivation. Should hostilities resume or humanitarian actors be forced to scale back operations, EU experts warn that famine conditions could re-emerge by spring 2026.[21]

Weaponisation and politicisation of humanitarian aid

Israel's consolidated control over the crossing transformed it into a mechanism of strategic domination over the civilian population. By dictating access and egress, Israeli authorities transformed humanitarian assistance into a tool of coercive governance.[22] In this way, Israel controlled not only the flow of aid but also dictated the broader rhythms of civilian life: who could escape bombardment, who remained trapped and who received life-saving assistance. These practices amounted to what has been defined as a 'systematic policy'[23] whereby control over movement became a central instrument of siege and collective punishment.

Violations of IHL

These coercive policies amount to grave violations of IHL and a broader framework aimed at depriving Gaza of the means for civilian survival. As the occupying power, Israel is legally obligated to facilitate unhindered delivery of humanitarian relief. Instead, the prolonged closure of Rafah, the vetting of those permitted to leave or return, and arbitrary restrictions represent a systematic breach of these duties.

These measures also engage core IHL prohibitions, including the ban on collective punishment and, critically, the prohibition on the starvation of civilians as a method of warfare.[24] By obstructing the entry of food, fuel and medical supplies, Israel directly contributed to the onset of hunger and famine. The population has thus been trapped in a cycle of deprivation that constitutes cruel and inhuman treatment, amounting to war crimes under international law.[25]

Erosion of humanitarian aid

This reality fundamentally challenges the oversimplified assumption that humanitarian aid can operate independently of political interests.[26] The humanitarian principles of humanity, neutrality, impartiality and independence presume that assistance can be delivered in a politicised environment without becoming entangled in power dynamics.[27] Yet such assumptions overlook the extent to which political actors can – and do – deliberately manipulate humanitarian access to advance military or political objectives.

The case of the Rafah Crossing demonstrates how the idea of 'apolitical' humanitarian aid collapses when political actors weaponise control over movement. Rather than functioning as a neutral portal for life-saving assistance, Rafah was repurposed into a political instrument in which access was shaped less by humanitarian needs than by the strategic value of permitting or withholding relief. In such a context, humanitarian organisations are not operating in a vacuum and ideological narratives inevitably seep into operational decisions. In Gaza, humanitarian aid has been transformed into a bargaining chip rather than a protected lifeline. The consequences are borne overwhelmingly by civilians, who face the cumulative human costs of delayed relief, restricted evacuations and systemic deprivation.

Notes

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2 International Rescue Committee/UK, 'What Is Humanitarian Aid and Why Is It Important?' (10 February 2025), www.rescue.org/uk/article/what-humanitarian-aid-and-why-it-important accessed 17 May 2026.

3 It is important to clarify that the legal obligations governing humanitarian assistance depend on the classification of the conflict. IHL imposes different rules

on international armed conflicts, non-international armed conflicts and situations of occupation. The proper classification of the hostilities involving Israel and Hamas remains the subject of significant disagreement. Many in the international community consider Israel's presence and control in the Gaza Strip and West Bank to amount to an occupation, whereas others view the current hostilities with Hamas as a non-international armed conflict between a state and a non-state armed group. Nonetheless, irrespective of the conflict's classification, all parties are bound by the obligation to allow and facilitate humanitarian relief for civilians in extreme need, particularly where denial of such assistance risks mass starvation. These obligations apply equally to Israel and Hamas.

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Taufique Ahmad

Assessing the legality of US sanctions imposed on the International Criminal Court

Introduction

On 6 February 2025, the United States unilaterally imposed sanctions on the International Criminal Court (ICC).[1] Although the US has previously taken hostile measures against the Court, the decision of the world's largest economy to sanction an international institution – particularly the court of last resort for the gravest international crimes – warrants close legal scrutiny.[2] Central to this issue is whether the sanctions possess any valid basis under international law. This article will first outline the nature and scope of the sanctions before examining two principal grounds on which their legality may be challenged. While this is not intended to be an exhaustive analysis, it seeks to provide insight into an increasingly significant and timely issue.

The nature and scope of the sanctions

The Trump administration imposed sanctions on the ICC through Executive Order 14203, targeting non-Americans involved in ICC investigations or prosecutions of 'protected persons', those materially supporting such activities and individuals linked to sanctioned persons.[3] Initially directed at Chief Prosecutor Karim Khan, the sanctions later expanded to six judges and two deputy prosecutors.[4] Measures included travel bans and blocking US-based property and transactions.[5] Their broader impact, however, extends beyond direct restrictions as European banks reportedly closed accounts of sanctioned judges to avoid US repercussions.[6] More significantly, the sanctions seek to obstruct ICC prosecutions concerning alleged serious international crimes.

The illegality of the sanctions

Incompatibility with the US Constitution

First, the sanctions imposed on the ICC may be considered unlawful from a domestic perspective due to their incompatibility with the US Constitution. In his critique of the sanctions, Curtis Doebbler identifies four principal constitutional concerns: (1) an overreach of executive authority; (2) a violation of the separation of powers; (3) an infringement of freedom of speech; and (4) interference with due process rights.[7] The first two concern foundational constitutional principles, while the latter two involve specific constitutional protections.

The issue of executive authority is particularly significant. US Supreme Court jurisprudence, including *National Federation of Independent Business v Department of Labor, Occupational Safety and Health Administration*[8] and *West Virginia v Environmental Protection Agency*,[9] demonstrates that a 'clear statement from Congress' is required where the Executive seeks to take action of major national or political significance.[10] Yet, in imposing sanctions on the ICC, no such express congressional authorisation was provided. This raises serious constitutional concerns regarding the scope of presidential power.

The sanctions also raise substantial free speech issues. The First Amendment has historically been interpreted extremely broadly, permitting restrictions on expression only in narrowly defined and compelling circumstances, such as where there exists a 'clear and present danger' to national security.[11] It is quite difficult to locate such a strong threat to US national security in the request for arrest warrants of non-US individuals. Consequently, the sanctions appear completely inconsistent with established First Amendment principles. Furthermore, such an argument was made by a federal judge in *Smith v Trump* in 2025 in Maine district court where judge Nancy Torresen said the order 'appears to restrict substantially more speech than necessary to further that end'.[12]

Therefore, from a domestic perspective the sanctions imposed on the ICC, are wholly unconstitutional because they undermine core constitutional principles and because they infringe specific constitutional rights.

Incompatibility with international law principles

Secondly, the unilateral sanctions imposed on the ICC raise significant concerns regarding their compatibility with international law. Although the legality of unilateral sanctions remains a contested area, the specific nature and target of these measures creates even greater legal ambiguity.

More broadly, former ICC President Chile Eboe-Osuji, commenting on earlier US sanctions against the Court in 2021, observed that coercive threats by a state against a court of law 'doesn't happen [...] in any country we know'.[13] At their core, such sanctions interfere with the administration of international criminal justice and may therefore be regarded as fundamentally incompatible with the rule of law.

Specifically, the sanctions appear to conflict with the principle of judicial independence. This principle is protected both within the ICC founding framework, the Rome Statute,[14] and in soft-law instruments such as the United Nations Basic Principles on the Independence of the Judiciary.[15] Although the US is not a party to the Rome Statute, the principle itself reflects a widely accepted norm of international legal order. By targeting judges and prosecutors engaged in judicial functions, the sanctions arguably undermine that independence.

As well as this, as Dr Abbas Poorhashemi highlights, such sanctions, referring to the similar 2021 sanctions, run counter to core purposes of the Charter of the United Nations, to which the US is a party.[16] In particular, the Charter promotes international cooperation and the development of international law, while article 2(5) obliges Member States to assist the UN in actions consistent with its purposes.[17] Thus, unilateral measures against an independent international court therefore sit uneasily with these obligations. As Poorhashemi contends, such conduct is 'not acceptable under contemporary international law'.[18]

There is also support for this position within international human rights jurisprudence. The UN Human Rights Committee has previously held that sanctions resulting in the expulsion or imprisonment of lawyers violated protections contained within the International Covenant on Civil and Political Rights.[19] Although ICC judges and prosecutors have not been imprisoned or expelled, these decisions suggest a broader principle that punitive measures targeting legal professionals may unlawfully interfere with access to justice and the administration of law.

Overall, while the legality of unilateral sanctions remains debated, the measures imposed against the ICC appear inconsistent with several established principles of international law. Beyond their legal ambiguity, they also risk obstructing the work of a court tasked with prosecuting genocide, crimes against humanity and war crimes. This also appears to align with research findings that 'unilateral sanctions imposed by states frequently do not align with the principles of state sovereignty and international law'.

Conclusion

In conclusion, the sanctions imposed against the ICC raise serious concerns under both US constitutional law and international legal principles. Domestically, they appear to exceed executive authority and interfere with constitutional rights, while internationally, they undermine judicial independence and the effective administration of international criminal justice. More broadly, the sanctions set a concerning precedent: if powerful states can economically pressure international courts when investigations become politically inconvenient, the credibility of international justice mechanisms may be weakened significantly.

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Jan Jaroscak

The emperor has no just wars: the Trump administration's misappropriation of just war theory in Iran

Introduction

Amid resounding condemnation by legal scholarship of the joint United States and Israeli military campaign against Iran as an operation of 'pre-emptive (collective) self-defence',[1] the American leadership has been left in search of an alternative justification. It is telling that the Trump administration – who has publicly distanced itself from the constraints of international law[2] – has now turned to extra-legal arguments. Speaking at a Turning Point US event on 14 April 2026, Vice President JD Vance unveiled the new rationale: the 'more than a 1,000-year tradition of just war theory', a doctrine rooted in Catholic theology.[3] The appeal came just days after the head of the Catholic Church, Pope Leo XIV, denounced the Iran War, proclaiming that God 'does not listen to the prayers of those who wage war, but rejects them'.[4]

This article explores the three cumulative criteria of just war theory: (1) sovereign authority; (2) just cause; and (3) right intention. It argues that the US war against Iran fails to meet each one of them.

Foundations of just war theory

The foundations of just war theory can be traced back to St Augustine (354–430), who condoned war only under strict circumstances: 'to punish wrongs' or 'to restore what has been unjustly taken'.[5] Peace, nevertheless, remained the ultimate goal.[6] The theory was crystalised into doctrine by St Thomas Aquinas (1225–1274), who, in the seminal *Summa Theologica*, established that for a war to be just, it must:

- be waged by a sovereign authority;
- have a just cause; and
- be animated by the right intention.[7]

These principles have underpinned the Catholic tradition ever since, eventually finding its place in the Church's Catechism (CC 2307–2309).[8] While the just war doctrine strongly influenced the codification of today's legal framework on the prohibition on the use of force, it does not form part of positive law.[9] In the words of David Luban, '[a] feature

of the law of war that makes it essentially different from just war theory is that its rules and standards must be detachable from the [moral] reasoning that justifies them'.[10] Be that as it may, moral just war arguments have continued to permeate contemporary legal debate, notably through the 'humanitarian intervention' and 'responsibility to protect' doctrines of the late 20th and early 21st century.

Just war theory and the Iran War

Vance's invocation of just war in Iran is an attempt to resurrect the theory, whether legal or not. It will now be assessed against its own criteria.

Sovereign authority

While Aquinas accepted the separation between Emperor and Pope, granting each the power of 'sovereign authority' to wage war, he 'gave a special role to the papacy through its role as both spiritual and secular authority'.[11] Accordingly, some argue that 'just wars' could not historically 'be conducted without or against the authority of the spiritual power'.[12] This makes the Iran War extraordinary in that Pope Leo XIV – a member of the Augustinian Order and spiritual heir to the father of just war theory – has explicitly denounced it as unjust.[13] Vance's response warning the Pope 'to be careful when he talks about matters of theology'[14] is thus a fundamental misappropriation of the doctrine he invokes. In a faithful reflection of just war theory and the Church's established practice, Bishop Massa replied by reasserting that the Pope 'is not merely offering opinions on theology, he is preaching the Gospel and exercising his ministry as the Vicar of Christ'.[15] The authority in this case is undermined from within.

Just cause

Just cause restricts recourse to war only as a response to an actual wrong suffered, typically in the form of self-defence to illegal aggression.[16] The notion of a 'preventative war' – responding to 'speculation about events in the future' – has been consistently rejected by the Vatican, notably by Pope Benedict XVI who insisted that it finds no place in Catholic teaching.[17] In the case of Iran, neither the US nor Israel suffered such a wrong prior to Operation Epic Fury; it was launched proactively with 'no imminent armed attack by Iran against these two states, nuclear or otherwise'.[18] Any contrary assertion is entirely undermined by the Trump administration's own previous statement following Operation Midnight Hammer in June 2025, in which it claimed that 'Iran's nuclear facilities have been obliterated' and set back 'many years'.[19] The attack, a mere eight months later, is thus not only a manifest violation of the Charter of the United Nations, it is a war with no just cause.

Right intention

Finally, a just war must be guided by the right intention, namely 'the advancement of good, or the avoidance of evil'.[20] Thus, even an authority who has a just cause can wage an unjust war 'if he acts from wrong motives'.[21] Cardinal Robert McElroy's observations on the Iran War are critical here: 'You cannot satisfy the just war tradition's criterion of right intention if you do not have a clear intention.'[22] Indeed, the US administration's objectives in Iran are 'absolutely unclear', having provided at least ten separate rationales, ranging from the elimination of nuclear threats, to regime change, to rectification for alleged Iranian interference in the 2020 and 2024 US elections.[23] Trump's rhetoric, however, is more revealing. Most explicitly, his threat that '[a] whole civilization will die tonight, never to be brought back again',[24] is fundamentally at odds with the principle that a belligerent 'never has the right to ruin the vanquished enemy as a nation'.[25] Such a punitive war, unconstrainted by proportionality or 'Christian modesty', is not condoned by just war theory; it is precisely the type of action the founders of the doctrine sought to prohibit.[26]

Conclusion

The Trump administration's retreat to theology to justify its war in Iran leads to a single conclusion: the Emperor, as it turns out, has no just wars. Condemned by the papacy, divorced from just cause and led by erratic rhetoric, the war – whether clothed as one of self-defence or one of humanitarian intervention – finds no basis in Augustinian or Aquinian roots. The Emperor's position is untenable, not only under international law, but also under the very doctrine he claims as his own.

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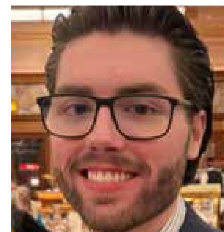
Matteo Reed



A retreat from the future? Questioning the UK's recent AI copyright reversal

In the relentless march of technological progress, the law often finds itself struggling to apply old doctrines to new paradigms. Nowhere is this clearer than at the intersection of artificial intelligence (AI) and copyright. In March 2026, following a consultation that ran from December 2024 to January 2025, the Government of the United Kingdom attempted to bridge this gap with its 'Report on Copyright and Artificial Intelligence',[1] which, for a fleeting moment, offered a pragmatic path forward. It proposed a broad text and data mining (TDM) exception for AI development, crucially balanced by an opt-out mechanism for rightsholders.[2] Yet, almost as soon as it was unveiled, technology secretary Liz Kendall[3] withdrew the proposal amidst a firestorm of criticism from creative titans such as Sir Elton John.[4] This hasty retreat was a significant misstep that jeopardises the UK's AI future. The landmark High Court judgment in *Getty Images v Stability AI*, handed down in November 2025, illuminates why, showing that the government's abandoned proposal represented not a threat to creators, but a sophisticated and necessary solution to a legal quagmire – one that should be reconsidered.

The proposal

At its heart, the government's proposal was an elegant compromise. It sought to amend the UK's copyright framework to permit the computational analysis of vast amounts of text and data to identify patterns, a process fundamental to training models such as ChatGPT. The existing TDM exception in UK law is limited to non-commercial scientific research,[5] and the new proposal would have expanded this, creating a default rule that lawfully accessed, copyrighted material could be used for AI training.[6]

The proposal's true ingenuity lay in its counterbalance: the opt-out. Rightsholders would be empowered to expressly reserve their works from being used for TDM. They could simply embed a machine-readable signal in a website's metadata or terms of service. This would create a rebuttable presumption in favour of innovation, recognising that scraping the entire internet for individual licences is an impossible task that would stifle AI development in the UK, while handing creators a clear mechanism to put their works off-limits. This was not an expropriation of creative rights, but a modernisation of how those rights are asserted in a digital age.

The *Getty* judgment

While policymakers debated this framework, the High Court was grappling with the messy reality of the status quo. Its highly anticipated judgment[7] sent shockwaves through the UK's tech and creative sectors.[8] Among other things, Getty's central allegation was that Stability AI had engaged in both primary and secondary copyright infringement by training its Stable Diffusion model on millions of its images without a licence and then importing the model into the UK.[9] Though secondary infringement was the weightiest of the issues considered, the strand of the judgment relevant for this discussion is the one on primary infringement.

Crucially, Getty's primary infringement claim failed, as it could not show that Stable Diffusion had been trained on its images in the UK.[10] In this sense, the judgment affirmed the importance of territoriality in copyright, as primary infringement could not be considered without evidence that it occurred in the UK. Indeed, unless *Getty* is overturned on appeal,[11] models trained abroad but imported to the UK would still avoid liability on this basis.[12]

The judgment hence illuminated the need for legislative clarity, showing why the status quo is not a neutral ground but one tilted towards costly, complex and uncertain legal battles. It is precisely this problem that the Government's March proposal could have resolved.

The opt-out as the antidote

Viewed alongside the implications of *Getty*, the opt-out appears not just sensible, but prescient. The ruling forces UK-based AI developers to either secure licences for an

unquantifiable volume of data (a practical impossibility) or operate under a constant cloud of legal threat, if they want to develop their models in the UK under the current rules. For rightsholders, the *Getty* decision is equally grim, confirming they have no primary infringement claim in the UK if their work is scraped to train a model overseas.

The TDM exception with an opt-out would have fixed this, by enticing AI developers to the UK, bringing them squarely under a framework that prevents primary infringement[13] and respects creator choice. The central legal question would have shifted from the intractable 'is training a model on millions of images an act of infringement?' to the simple 'did the rightsholder employ a recognised, machine-readable opt-out?'. This would replace a litigious, retroactive system with a prophylactic one by providing legal certainty for innovators and empowering creators with a digital 'No Trespassing' sign that carries legal weight.

Furthermore, such a system would naturally encourage the development of licensing markets. Creators willing to have their work used for training could simply not opt out, or could enter bespoke licensing agreements, creating new revenue. Importantly too, the government *could* have pursued a far more damaging option for creators. A broad TDM exception with no opt-out would have been most enabling for the UK's AI sector, as the government's AI Impact Assessment conceded,[14] and creators would be right to oppose this. Instead, a far more reasonable proposal was rescinded – an error that will surely prove costly.

Many have also been reluctant to welcome updates to copyright law on the basis that intellectual property (IP) rights ought never to be modified or supposedly 'weakened'. However, this ignores the UK's consistent history of altering IP rights to foster growth. The creation of copyright itself in the Statute of Anne (1710) was such an act. More recently, the Hargreaves Review (2011), commissioned to ensure the UK's IP framework was fit for the digital age and could promote growth, argued that the UK's IP laws were falling behind and stifling innovation. It resulted in a series of copyright alterations in 2014, including the aforementioned TDM exception for non-commercial research,[15] introduced to facilitate a boost in UK tech development. Expanding this with an opt-out would be the next logical step in this evolution, not a radical departure, given the technological landscape in which IP rules must operate.

The price of inertia

The current regime achieves the worst of both worlds.[16] It drives AI development and investment abroad, while leaving domestic creators with no recourse when those foreign-trained models are deployed here. This creates an unsustainable environment for a sector the government claims to champion,[17] and will surely cripple smaller AI firms, as the government's report recognised.[18]

A wait and see approach will merely prolong uncertainty and stagnation, which the government also has admitted.[19] Though the creative industries' concerns about uncompensated use are valid, their proposed solution – maintaining a restrictive status quo that forces AI innovators to 'more enabling environments'[20] – is self-defeating. The *Getty* judgment has laid bare the instability of this approach, promising a future of endless litigation that will benefit none but the lawyers. As observers have noted, the judgment should be a wake-up-call for compromise and the creation of a mechanism that allows 'all interested parties to thrive'.[21]

The UK stands at a crossroads. It can continue down a path of legislative inertia, ceding its potential as a global AI hub to jurisdictions with clearer rules. Or it can demonstrate true leadership by reviving the principles of its March report. Withdrawing the proposal was a concession to fear, not a victory for creative rights. The TDM exception with an opt-out is a sophisticated, balanced, and forward-thinking solution by protecting creators' autonomy while fostering the innovation that will define the next century.[22] It is time for policymakers to look past the backlash, recognise the missed opportunity and steer the UK back towards a framework fit for the age of AI.

Notes

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The *Lafarge* case: corporate responsibility and international crimes – why convicting under financing terrorism offence is insufficient

Millicent Walthew

The Lafarge case

The *Lafarge* case has been described as a 'milestone in the fight against impunity for companies doing business in war and conflict regions'.[1] It started with a criminal complaint filed before French courts in 2016 by former employees of the company's subsidiary, Lafarge Cement Syria, and two non-government organisations (NGOs).[2] They accused the company of buying raw materials from diverse jihadist groups and compensating them to be able to maintain its business activities in the region. The complainants sought to have multiple charges brought, including financing of terrorist activities and complicity in crimes against humanity. The latter was subjected to multiple appeals, and after a period of back and forth between French courts, the Supreme Court found that there was sufficient evidence to move forward with criminal proceedings.[3] These charges have

been separated into distinct proceedings.[4] The most recent development in this case is 13 April 2026 Paris Criminal Court decision, which found the company guilty of financing terrorism.[5] This conviction, even though appealed, is undoubtedly a positive development in corporate accountability especially that of multinationals. However, the decision should not lead to the neglect of ongoing proceedings relating to complicity in crimes against humanity. Stopping at terrorist financing would lead to a prosecution that does not tell the whole story. This case highlights the complex relationship between terrorism-related offences and core international crimes (genocide, crimes against humanity and war crimes).[6]

The attractiveness of terrorism-related offences

There is a growing concern that convictions of perpetrators and accomplices of international crimes are falling short of properly covering the full scope of the crime through charges being brought only for terrorism or related offences. But why is this the case? What makes terrorism-related offences more attractive to prosecutors? There are a couple of answers to this question, but first it should be highlighted that in many countries, for example in France or the United Kingdom, a single unit is responsible for prosecuting both terrorism crimes and war crimes or crimes against humanity. A preference for terrorism offences is noticeable implicitly through the name of these units – The Counter Terrorism Division in the UK, or Le Parquet national anti-terroriste in France – but also explicitly by observing the multiplication of prosecutions for terrorism, omitting international crimes.[7] One main advantage of only pursuing terrorism offences is that the evidence required is often not located in a conflict zone, and proving it can be more straightforward.[8] In the *Lafarge* case, terrorist-financing is more easily proven than complicity of crimes against humanity. The latter offence requires an important additional element: proof of knowledge of the criminal conduct. This was highlighted by the Supreme Court, which stated that to be complicit, it does not require to share the *mens rea* of the principal; however it does require knowledge of the criminal conduct and that through their aid or assistance, they are facilitating its commission.[9] This must be proven on top of the commission of international crimes by the terrorist groups, which already constitutes a real challenge for investigations (nature and scale of crimes with thousands of victims and witnesses, multiple perpetrators, evidence in multiple jurisdictions, and in different languages etc),[10] and prosecutions (for example, proof of intent and contextual elements constituting the crime: widespread or systematic attacks). Furthermore, the duration of the proceedings varies significantly between the two offences, terrorism related ones being usually faster.[11] In a context where the judiciary is facing increasing budgetary constraints, a lower-threshold offence could be seen as a more efficient choice by the prosecutor.

The importance of prosecuting international crimes

Prosecuting solely under terrorism-related offences leads to an accountability and impunity gap where the charges do not encompass the full scope of the criminal act and the human rights violations entailed in core international crimes. For example, the conviction of terrorist financing does not punish directly the complicity in international crimes committed against the Yazidi population. Terrorism is a crime against state security and public order, not individuals. Thus, victims and their testimonies play a very small part, if any, in the proceedings.[12] This leads to an incomplete depiction of the crimes, facts and history. For a 'full and effective reparation', it is important to recognise the liability of legal persons for their participation in core international crimes.[13] Furthermore, terrorism charges are defined at a national level and are not based on a common international definition. Domestic discretion over terrorism offences may lead to overly broad and vague definitions, or on the contrary, limit accountability. The lack of unity between national legislations further deepens the accountability disparities, especially when it comes to multinational corporations operating in different jurisdictions.

Moving forward

There are several promising avenues to explore in view of developing a stronger and more comprehensive legal framework, both

nationally and internationally, for demanding corporate responsibility in international crimes.

A notable obstacle to corporate liability is the limited jurisdiction of the International Criminal Court – article 25 of the Rome Statute limiting it to natural persons. This highlights the need for states to adopt a complete legislative framework incorporating international crimes and corporate liability at a national level. For example, the penal codes of Iraq or Syria do not criminalise international crimes such as genocide, and perpetrators of these crimes have been prosecuted solely under terrorism offences, which comes with a longlist of issues.[14] National legislative reform is more of an immediate possibility, whereas an amendment to the Rome Statute could be a part of long-term reform of international law. For example, the Malabo Protocol which revised the Statute of the African Court of Justice and Human Rights established jurisdiction over corporations for a number of international crimes.[15] Furthermore, the draft Articles on the Prevention and Punishment of Crimes Against Humanity of the International Law Commission are also an interesting way of incorporating and strengthening liability of companies. Through this Convention, a clear obligation could be established for States to adopt all necessary measures to hold all legal persons accountable.[16]

In cases such as *Lafarge*, it is less about choosing one offence over the other, but rather about finding the correct qualification of the crime and this can be done through cumulative charges. Following the 2026 conviction of terrorism financing which constitutes a major 'win', it is essential that the significance of any future landmark ruling on complicity in crimes against humanity is not lessened. The work is far from over for victims who continue to seek full recognition of the crimes and corporate accountability.

Notes

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7 For example, many Daesh fighters in the UK have only been prosecuted and convicted of terrorism offences: Joint Committee on Human Rights of the UK Parliament, 'Accountability for Daesh crimes', Second Report of Session 2024–25, HC 612/HL121, 13 May 2025, p 13TRIAL International, 'The simple way out? Why international crimes must not be prosecuted as terrorism' (30 March 2020) *Universal Jurisdiction Annual Review* 11.
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11 Tanya Mehra, 'Doubling Down on Accountability in Europe: Prosecuting *Terrorists* for Core International Crimes and Terrorist Offences Committed in the Context of the Conflict in Syria and Iraq' (December 2023) 17(4) *Perspectives on Terrorism* 88.
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13 TRIAL International, Briefing paper: 'The Liability of Legal Persons in the Future Convention on the Prevention and Punishment of Crimes Against Humanity' (22 January 2026) p 2.
14 For example, violations of fair trial standards, lack of legal safeguards and the use of the death penalty. See Joint Committee on Human Rights of the UK Parliament, 'Accountability for Daesh crimes', Second Report of Session 2024–25, HC 612/HL121, 13 May 2025, paras 39–40.
15 Article 46C: *Corporate Criminal Liability*, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (also known as Malabo Protocol), adopted on 27 June 2014.
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Julia Petrikić

From discriminatory application to discriminatory design: Israel's death penalty for terrorists bill from a comparative perspective

Introduction

On 30 March 2026, the Israeli Knesset passed the 2025 Penal Law Bill (Amendment No 159) (Death Penalty for Terrorists) mandating capital punishment by hanging for intentional killings that constitute terrorist acts. Although Israel has not formally abolished the death penalty, it was only carried out once against Adolf Eichmann in 1962. Israel has since consistently voted in favour of UN General Assembly Resolutions calling for a moratorium on executions.[1] Although there have been previous attempts to pass legislation formalising the death penalty for 'terrorist murder' in Israel and the Occupied Palestinian Territory (OPT), the present Bill constitutes its first successful enactment.[2]

Apartheid South Africa provides a comparative framework for examining how capital punishment may operate within, and reinforce, systems of racial discrimination. The relevance of this comparison is underscored by the International Court of Justice's 2024 *Policies and Practices* Advisory Opinion, wherein it found that Israel's legislation and measures in the West Bank and East Jerusalem amount to a violation of article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination.[3]

This article contends that, although apartheid South Africa illustrates how formally neutral death penalty laws can produce overtly discriminatory outcomes within a repressive state system, the Israeli framework entrenches discrimination at the level of legislative design itself, resulting in a de facto targeting of a specific racial group.

A brief introduction to the death penalty in apartheid South Africa

During the apartheid era, South Africa had one of the highest execution rates in the world, with estimations attributing 47 per cent of the world's executions to South Africa at one point.[4] The political weaponisation of the death penalty in South Africa manifested itself through the expansion of capital offences and its discriminatory application.

Under the Afrikaner National Party, capital offences were significantly expanded to target anti-apartheid activism. While historically capital punishment was limited to murder (mandatory), treason and rape, the government introduced new capital offences to target liberation movements. These included sabotage, 'training or obtaining information that could further an object of communism' and the broadly defined category of 'terrorism'.[5] Although executions for political offences were common in the early-apartheid era, most notably the hanging of 60 Pan Africanist Congress members, the government strategically retreated from this strategy in the late 1980s in the face of increasing international condemnation.[6]

More significant, however, was the influence of the apartheid state ideology resulting in striking disparities in the racialised administration of the death penalty.[7] For instance, during a one-year period, 47 per cent of black defendants convicted of murdering white victims were sentenced to death, whilst no white defendants received the death penalty for murdering black victims.[8] These disparities were reinforced by structural inequalities, as indigent black defendants had little access to experienced legal representation and faced language barriers in court proceedings.[9]

Thus, although the legal framework governing capital punishment did not explicitly target one racial group, its administration produced deeply discriminatory outcomes, reinforcing and sustaining the broader system of white supremacy.

The Israeli Death Penalty for Terrorists Bill

The 2025 Amendment introduces two parallel legal frameworks, distinguishing between cases tried before military courts in the occupied West Bank – exercising jurisdiction exclusively over Palestinians – and those heard by civil courts within Israel and East Jerusalem.[10]

In the West Bank, the law stipulates the amendment of Section 209 of the Security Provisions Order mandating the death penalty for those convicted of intentional killing amounting to an 'act of 'terrorism' as defined under Israel's Counter-Terrorism law or, where 'special circumstances' exist, life imprisonment.[11] In civilian courts, the amended Penal Law 5737–1977 provides that 'he who intentionally causes the death of a person with the aim of negating the existence of the State of Israel [...] shall be sentenced to death or life imprisonment'. [12]

The most consequential aspects concern the dismantling of key judicial safeguards. The imposition of a death sentence no longer requires prosecutorial requests or support, while the previous requirement of a unanimous decision by a judicial panel composed of a bench, holding at a minimum the rank of lieutenant colonel, has been replaced by a simple majority decision, irrespective of rank.[13] The automatic right to appeal is confined to the conviction, rather than the death sentence itself.[14] Most significantly, the possibility of commuting a finalised death sentence or granting a pardon was eliminated in its entirety – a position fundamentally incompatible with Israel's obligations under article 6(4) of the International Covenant on Civil and Political Rights (ICCPR).[15] Additionally, the final death sentence must be carried out within 90 days, with the possibility of the Prime Minister requesting a stay of executions for no more than 180 days where ambiguous 'special reasons' exist.

Comparison

Both regimes illustrate how capital punishment may be weaponised by demanding its imposition for politically motivated conduct associated with a certain racial group. While apartheid South Africa criminalised specific conduct to target and suppress anti-apartheid activists, UN experts note that Israel's Bill is designed to exclude Israeli citizens from its scope and 'effectively singles out Palestinians for execution'.[16] In addition, apartheid South Africa provided for 'extenuating circumstances', allowing for the substitution of the death penalty to a lesser sentence, baring similarity to Israel's 'special circumstances' before military courts.[17] In both instances, these circumstances are plagued by ambiguity, which in South Africa's case, more often than not left a defendant's life at the mercy of a judge's 'personal penal philosophy'.[18] The final similarity pertains to the absence of an automatic right to appeal in both systems.[19]

The key distinction, however, lies in the degree of judicial discretion and procedural safeguards retained within each system. Unlike apartheid South Africa, the Israeli Bill abolishes avenues for pardon or commutation of final sentences and introduces an accelerated execution timeframe of 90 days. Leaving aside the recurrent criticism for the military courts' failure to meet fair trial standards[20], the exclusion of Israeli settlers and citizens from the jurisdictional scope of the military courts and the imposition of a death penalty by such courts against an occupied people, in and of itself, constitutes a violation of international law.[21]

Finally, this comparison inherently operates on uneven normative footing, as Israel – contrary to apartheid South Africa – remains bound by the ICCPR's provisions prohibiting the arbitrary deprivation of life.[22]

Conclusion

Both systems demonstrate how capital punishment may be employed in a discriminatory fashion. The crucial difference lies in the abdication of procedural safeguards in Israel and the OPT, entirely at odds with Israel's international obligations. A mandatory death penalty in conjunction with the lack of possibilities for a pardon or commutation of sentence is inherently arbitrary and a violation of international human rights law.[23] South Africa's system was uniquely cruel in its blatant prejudice and mass application, yet the design of the Israeli Bill and its operation through military courts exclusively prosecuting Palestinians is rooted in racial discrimination, raising concerns that are not only analogous to, but in certain aspects, exceed those practices associated with apartheid South Africa. As of the time of writing, whether the Bill will enter into effect remains to be seen as it is currently pending judicial review before Israel's Supreme Court following petitions by Arab legal rights groups and opposition Knesset members.[24]

Notes

1 Ron Dudai, 'Restraint, Reaction, and Penal Fantasies: Notes on the Death Penalty in Israel, 1967–2016' (2018) 43 Law & Soc Inquiry 862, 863. Since the 1967 Israeli occupation of the Occupied Palestinian Territory (OPT), the death penalty has remained a lawful sanction in military courts, yet, to this day it has never been imposed; United Nations General Assembly Resolution 62/149 (18 December 2007) A/RES/62/149; UNGA Res63/168 (18 December 2008) A/RES/63/168; UNGA Res65/206 (21 December 2010) A/RES/65/206; UNGA Res67/176 (20 December 2012) A/RES/67/176; UNGA Res69/186 (18 December 2014) A/RES/69/186; UNGA Res71/187 (19 December 2016) A/RES/71/187; UNGA Res73/175 (17 December 2018) A/RES/73/175; UNGA Res75/183 (16 December 2020) A/RES/75/183; UNGA Res77/222 (15 December 2022) A/RES/ 77/222; UNGA Res79/179 (17 December 2024) A/RES/79/179.

2 Dudai, 'Restraint, Reaction, and Penal Fantasies: Notes on the Death Penalty in Israel, 1967–2016' (2018) 43 Law & Soc Inquiry 862, 863. The Knesset rejected the Death Sentences for Murder in Circumstances of Terror Bill (1 June 2015) which sought to ease certain procedural hurdles (such as the requirement for unanimous decisions by the judges) in the imposition of the death penalty.

3 International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195, art 3 ('States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction'); 'Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion)' [2024] ICJ Rep 753, para 229.

4 Barand van Niekerk, 'Hanged by the Neck until You Are Dead' (1969) 86 S African LJ 457, 458.

5 Peter Norbert Bouckaert, 'Shutting Down the Death Factory: The Abolition of Capital Punishment in South Africa' (1996) 32 Stan J Int'l L 287, 291; Mark S Kende, 'The Constitutionality of the Death Penalty: South Africa as a Model for the United States' (2006) 38 Geo Wash Int'l L Rev 209, 212.

6 Kende, 'The Constitutionality of the Death Penalty: South Africa as a Model for the United States' (2006) 38 Geo Wash Int'l L Rev 209, 213; Bouckaert, 'Shutting Down the Death Factory: The Abolition of Capital Punishment in South Africa' (1996) 32 Stan J Int'l L 287, 292. The sentencing of the Sharpville Six sparked an international outcry, with prominent world leaders appealing for clemency, ultimately resulting in the commutation to a lengthy prison sentence by President PW Botha.

7 Bouckaert, 'Shutting Down the Death Factory: The Abolition of Capital Punishment in South Africa' (1996) 32 Stan J Int'l L 287, 293.

8 Bouckaert, 'Shutting Down the Death Factory: The Abolition of Capital Punishment in South Africa' (1996) 32 Stan J Int'l L 287, 293.

9 Kende, 'The Constitutionality of the Death Penalty: South Africa as a Model for the United States' (2006) 38 Geo Wash Int'l L Rev 209, 222.

10 Committee on the Elimination of Racial Discrimination, 'Statement on the Adoption of the "Death Penalty for Terrorists Law" in Israel' (29 April 2026); Amnesty International, 'Israel/OPT: Legislative Proposals on Death Penalty Violate International Law' (3 February 2026) ACT 50/0677/2026, 2.

11 Amnesty International, 'Israel/OPT: Legislative Proposals on Death Penalty Violate International Law' (3 February 2026) ACT 50/0677/2026, 2.

12 Penal Law Bill (Amendment No 159) (Death Penalty for Terrorists) s 301A(c).

13 Amnesty International, 'Israel/OPT: Legislative Proposals on Death Penalty Violate International Law' (3 February 2026) ACT 50/0677/2026, 2.

14 UN Human Rights Committee, General comment No 36 Article 6: right to life (3 September 2019) UN Doc CCPR/C/GC/36, paras 41 and 46. The lack of an effective right to appeal may amount to a violation of the fair trial guarantees under ICCPR art 14.

15 Amnesty International, 'Israel/OPT: Legislative Proposals on Death Penalty Violate International Law' (3 February 2026) ACT 50/0677/2026, 5; ICCPR (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 6(4).

16 Office of the High Commissioner for Human Rights, 'Israel's death penalty law constitutes discriminatory regime of capital punishment: UN experts' (2 April 2026) www.ohchr.org/en/press-releases/2026/04/israels-death-penalty-law-constitutes-discriminatory-regime-capital accessed 17 May 2026.

17 Bouckaert, 'Shutting Down the Death Factory: The Abolition of Capital Punishment in South Africa' (1996) 32 Stan J Int'l L 287, 290 and 292.

18 Christina Murray, Julia Sloth-Nielsen and Colin Tredoux, 'The Death Penalty in the Cape Provincial Division: 1986–1988' (1989) 5 S Afr J on Hum Rts 154, 165.

19 Murray, Sloth-Nielsen and Tredoux, 'The Death Penalty in the Cape Provincial Division: 1986–1988' (1989) 5 S Afr J on Hum Rts 154, 159, 165 and 169. In South Africa, the issue of seeking leave to appeal was further complicated by the aforementioned structural barriers for black defendants, who were represented by inexperienced counsel, resulting in a greater number of unsuccessful petitions or no petitions being lodged at all.

20 UN Human Rights Council, 'Torture and genocide: Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Francesca Albanese' (23 March 2026) A/HRC/61/71, para 75; OHCHR, 'Thematic Report: Israel's discriminatory administration of the occupied West Bank, including East Jerusalem' (7 January 2026), para 52.

21 OHCHR, 'Israel: Türk says draft proposals on death penalty for Palestinians must be dropped' (2 January 2026) www.ohchr.org/en/press-releases/2026/01/israel-turk-says-draft-proposals-death-penalty-palestinians-must-be-dropped accessed 17 May 2026; OHCHR, 'Thematic Report: Israel's discriminatory administration of the occupied West Bank, including East Jerusalem' (7 January 2026), para 52.

22 ICCPR art 6; UN Human Rights Committee, General comment No 36 Article 6: right to life (3 September 2019) UN Doc CCPR/C/GC/36, para 37 ('mandatory death sentences that leave domestic courts with no discretion as to whether to designate the offence as a crime warranting the death penalty, and whether to issue the death sentence in the particular circumstances of the offender, are arbitrary in nature').

23 UN HRC, General comment No 36 Article 6: right to life (3 September 2019) UN Doc CCPR/C/GC/36, para 37 ('The availability of a right to seek pardon or commutation on the basis of the special circumstances of the case or the accused is not an adequate substitute for the need for judicial discretion in the application of the death penalty').

24 'Urgent Petition to Israeli Supreme Court Against the Death Penalty Law: Racist Legislation Enshrining Inhumane Punishment and Systemic Oppression' (*Adalah*, 31 March 2026) www.adalah.org/en/content/view/11564 accessed 17 May 2026.