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State responsibility and climate action: can the International Court of Justice's advisory opinion reshape international investment law?

Introduction

The International Court of Justice's (ICJ) unanimous advisory opinion on the obligation of states in respect to climate change is a historic decision which is poised to shape discussions inside courtrooms, cabinet meetings and climate conferences.¹ Reactions to the advisory opinion have centred on its implications for strategic corporate climate litigation.² However, this focus threatens to distract from a more comprehensive analysis of the advisory opinions' impact. In this article, I will highlight how the advisory opinion could reshape international investment law, ensuring that a better balance is struck between investor protections and environmental and human rights obligations.

Investment law: a major barrier to state climate action

To understand why the advisory opinions' potential impact on international investment law is important, it is important to first highlight the tensions between climate action and investor protection.³

Investment treaties are designed to encourage foreign investment and thus, provide foreign companies with extensive protection, such as limits on state expropriation powers and promises that states will ensure their fair and equitable treatment (FET), and full protection and security of investments.⁴ The Energy Charter Treaty, a multilateral energy-related investment agreement, even has a sunset clause which ensures that pre-existing foreign investors retain protection for 20 years after a state has left the treaty.⁵ Whenever an investor feels that their rights have been violated, they are able to use

their exclusive, private right of action to legally challenge states.⁶ This process is usually through the investor–state dispute settlement (ISDS) mechanism, which enables investors to bypass domestic courts in favour of international arbitration.

In the face of recent state-driven climate mitigation initiatives, fossil fuel investors have relied on their extensive protections under investment treaties to challenge state climate action. According to the United Nations Conference on Trade and Development (UNCTAD), one-third of all ISDS cases are initiated by energy supply or extractive industries.⁷ Since 1993, 63 per cent of cases involving the fossil fuel industry were either decided in favour of the investors or settled, with only 22 per cent of cases being decided in favour of states.⁸ Moreover, the average award that a fossil fuel investor wins is five times the average award amount in other investment disputes.⁹

It has become increasingly clear that fossil fuel companies are by far the biggest beneficiaries under existing multilateral and bilateral investment treaties.¹⁰ The success rate of fossil fuel investors and the large sums that they have been awarded through investor–state disputes prompted the Intergovernmental Panel on Climate Change to warn that the current investment law framework may be creating a 'regulatory chill', acting as a significant barrier to ambitious state climate action.¹¹ Thus, under the current international investment framework, if a state wants to take climate action, it risks violating investment agreement provisions, triggering lengthy and costly arbitration battles in which fossil fuel investors are more likely to win.



What does the ICJ Advisory Opinion say?

In its advisory opinion of 23 July 2025, the Court confirmed (among many other things) that under customary international law, all states have an obligation to prevent significant harm to the environment.¹² This obligation entails a duty of due diligence, requiring states to use ‘all means reasonably available to them’ to avoid activities that cause significant environmental harm.¹³ Under this duty, the state not only has to monitor its own activities, but it also has an obligation to regulate any private corporations within its jurisdiction or control.¹⁴ Significantly, the Court singles out ‘the granting of fossil fuel exploration licences or the provision of fossil fuel subsidies’ as actions that may constitute an internationally wrongful act.¹⁵ The Court may have explicitly referenced these two actions, given the numerous fossil fuel investor cases against states initiated on the basis that plans to phase out or remove fossil fuel subsidies and exploration licences harmed their investments.

The potential impact on investor–state disputes and investment treaties

The ICJ’s recent advisory opinion could give states new ground to stand on in investor–state disputes when it comes to defending climate policies. Instead of treating environmental regulation as a matter of policy discretion, the Court describes climate action as a legal duty under international law. That reasoning might help states rely more firmly on the ‘police powers’ doctrine, arguing that measures such as coal phase-outs, restrictions on fossil fuel licencing or the removal of subsidies are not unfair or arbitrary but reasonable steps consistent with their international obligations and good faith measures to protect public health.

This interpretation could also influence how tribunals view claims from fossil fuel investors. Alleged violations of investor protections such as FET may become harder to prove if the measures in question are tied to international climate duties. This is because the opinion makes future state policy shifts more foreseeable, which diminishes an investor’s argument that their ‘legitimate expectation’ was that the state would maintain their reliance on fossil fuels.¹⁶

At the same time, renewable energy investors might also find the opinion useful. If a government were to roll back support for

clean energy, investors could argue that such a move is completely inconsistent with the Court’s interpretation of climate obligations and, therefore, unreasonable and arbitrary. Thus, the advisory opinion could be used as a tool that strengthens the hand of states defending climate regulation while also helping renewable energy investors push back against measures that undermine the clean energy transition.

Obviously, a renewable energy investor or a state’s chance of success will still depend on the facts of each case. However, the Court’s interpretation of state obligations is a significant factor for tribunals to consider when assessing the tension between the state’s right to regulate in the public interest and investor protections.¹⁷

Beyond individual disputes, the opinion may add weight to broader calls for reform of the international investment law.¹⁸ Some states may be encouraged to revise their investment treaties to better protect their right to create environmental regulations or to introduce stronger climate due diligence requirements for foreign investors.¹⁹ Even where treaties are not amended to include explicit environmental carve-outs, the ICJ’s reasoning could guide reinterpretation.²⁰ Judge Sarah Cleveland underscored this in her separate declaration, writing that ‘the interpretation of investment instruments must be informed by States’ obligations in respect of climate change under international law, including the stringent due diligence standard’.²¹

Conclusion

While the potential implications of the advisory opinion are certainly not guaranteed, it may nevertheless prove to be an important catalyst in rethinking the relationship between investment law and state climate obligations. Given the significant impact that investment treaties have had on state climate action, it is especially important to monitor any developments in investment law.

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Jessica Featherston



Progress or pretense: examining the Syrian transitional government's human rights record seven months after the fall of Assad

On 8 December 2024, Bashar al-Assad, President of the Syrian Arab Republic since 2000, was overthrown by opposition forces and forced to flee the country. Assad's regime was characterised by state repression and widescale human rights violations, including torture, enforced disappearances and unlawful killings.¹ After the Assad regime was toppled, many looked

to new leadership in Syria with cautious optimism.² In the aftermath of the brutal civil war, the opposition forces established the Syrian transitional government, headed by President Ahmed al-Sharaa, which is intended to govern Syria until 2030.³ The transitional government has pledged to respect human rights.⁴ Seven months after the fall of the Assad regime, is the new government following its commitments?



The Assad regime was toppled by an offensive largely orchestrated by the opposition group known as Hay'at Tahrir al-Sham (HTS).⁵ In post-Assad Syria, HTS has been officially dissolved.⁶ However, its former members make up much of the driving force behind the Syrian transitional government. Notably, President al-Sharaa is the former leader of HTS and its predecessor, the al-Nusra front.⁷ Both HTS and the al-Nusra Front were Islamist organisations, and the EU and the UK consider HTS to be an active terrorist organisation, despite its apparent disbandment.⁸

Upon rising to power, the Syrian transitional government vowed to uphold and protect minority rights, marking a sharp departure from the Assad regime.⁹ On 13 March 2025, President al-Sharaa signed a temporary constitution, which will expire when the transitional government's authority ends in 2030.¹⁰ At the time he signed the constitution, al-Sharaa stated that he hoped it would mark the beginning of 'a new history for Syria, where we replace oppression with justice'.¹¹ The Constitution provides for equality before the law based on race, religion, gender and lineage.¹² It states that, while the head of state must be Islamic and that Islamic jurisprudence will serve as the primary source of legislation, 'freedom of belief is protected' and all citizens have the right to practice their religion.¹³ Under Chapter Two: Rights and Freedoms, the government swears to uphold human rights, including the right to free speech and expression, political participation and due process.¹⁴ Chapter Two Article 18 asserts the right to human dignity, freedom from torture and freedom from arbitrary arrest.¹⁵ Additionally, Chapter Two Article 21 states, 'The State shall guarantee the social, economic and political rights of women, and protect them from all forms of oppression, injustice and violence'.¹⁶ It also specifically guarantees women the right to education and work.¹⁷

The Syrian transitional government's promises have been met with cautious optimism from the international community, with the UK, EU and US all removing sanctions against Syria earlier this year.¹⁸ However, many also expressed concerns regarding the temporary constitution and transitional government. The Syrian Democratic Forces (SDF) has criticised the Constitution for failing to reflect the diverse ethnicities and religions that make up Syria,

citing its use of the term 'Arab' in 'Syrian Arab Republic' and lack of reference to Kurds, Assyrians or other ethnic groups.¹⁹

In April 2025, Human Rights First (HRF) visited Syria to examine the state of Syria in the time since the transitional government took power.²⁰ HRF noted that some promising developments have occurred, including the transitional government's agreement with the Kurdish-led SDF.²¹ HRF interviewed human rights defenders throughout the region, who espoused both hope that the new government would lead Syria to a brighter future and worry that the government would quickly back down from its commitments.²² One particularly salient concern was that the transitional government would not respect the rights of citizens to practice religions other than Islam, as many key positions in the government were assigned to advocates from a severe form of Islam.²³ A notable example is that the first minister of justice to be appointed was captured on video several years ago presiding over the execution of two women for 'prostitution and corruption'.²⁴

Immediately following the toppling of Assad, Islamist extremists began committing increased sectarian violence in Syria. In December 2024, an Alawite shrine was attacked and desecrated and a Christian Christmas tree was burned.²⁵ Around March 2025, extremist Islamist militia members killed hundreds of innocent people in Syria's coastal region. Most of the victims were Alawite, and the militias were largely affiliated with the transitional government.²⁶ Additionally, attacks against Syria's Druze minority were carried out by Islamist supporters of the new government in April of this year, resulting in over 100 deaths.²⁷ The Syrian Observatory for Human Rights (SOHR) has reported 425 deaths in vengeful attacks between the fall of the Assad regime on 8 December 2024 and 11 February 2025.²⁸ Additionally, many of the human rights defenders interviewed by HRF expressed concern about the future for women in Syria.²⁹ The transitional government's 'Women's Affairs Office' has commented that due to their nature, women should 'take care of themselves, take care of their families, and take care of their husbands'.³⁰ Female judges in Syria's Homs region have reported that they may no longer be permitted to serve as judges.³¹ Since February 2025, Amnesty International has reported that at least 36 Alawite women and girls have been abducted throughout Syria,

finding that police failed to meaningfully investigate the abductions in all but one case.³² The transitional government has marginalised and minimised women’s political involvement, and HTS previously enforced a conservative approach to Islamism with regards to gender in areas it controlled.³³

Human rights conditions have largely improved under the Syrian transitional government compared to the Assad regime. However, there are several areas of concern under the new government, including the treatment of religious and ethnic minorities and women. These concerns are particularly salient due to the new government’s roots in HTS and Islamist extremism. The international community must keep a close eye on the state of affairs within Syria during the next several years to ensure that the transitional government maintains its commitments to human rights once the initial period of the new regime has passed.

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Reuben Holland



Towards ending impunity: roadmapping a ‘pure’ universal jurisdiction framework in the UK

The International Criminal Court (ICC) suffers from inconsistent membership and the eroding support of the international community.¹ Meanwhile, interstate and intrastate conflict see

international crimes committed daily.² The principle of universal jurisdiction (UJ) offers an opportunity to overcome these barriers to accountability, but the UK’s narrow interpretation of the principle renders it idle.



The present article argues that strengthening this definition is necessary and proposes legislative amendments to the International Criminal Court Act 2001 (ICCA) that prime a robust and effective framework.

The first section contextualises and defines UJ. The second introduces the German UJ framework, which exemplifies a ‘pure’ UJ standard. The third section outlines the UK’s current UJ framework, which the fourth strives to strengthen via specific legislative amendments.

Universal jurisdiction

Domestic courts are primarily responsible for prosecuting international crimes committed on their territory.³ However, international criminal law is often engaged in contexts of democratic regression, civil war and authoritarian rule, all of which compromise judicial independence. Extraterritorial criminal jurisdiction redresses this in part. Secondary states can prosecute international crimes when the accused or the victim are its nationals, so-called ‘active personality’ and ‘passive personality’.⁴ However, when secondary states lack capacity or political will,⁵ or a situation remains purely domestic,⁶ jurisdictional gaps remain.

UJ grants national courts jurisdiction over extraterritorial international crimes where neither active nor passive personality exists, filling this gap.⁷ UJ is a tool to address crimes ‘so grave that they affect the international community as a whole’.⁸

In total, 163 states have incorporated UJ into national legislation, but approaches vary.⁹ This article focuses on two elements of legislative drafting that determine UJ’s effectiveness: personal jurisdiction and whether the use of UJ is mandatory or optional.

‘Pure’ universal jurisdiction: the German framework

German courts hold UJ over war crimes, crimes against humanity and genocide, ‘even when the offence was committed abroad and bears no relation to Germany’.¹⁰ Thus, personal jurisdiction is unlimited: Germany can prosecute international crimes committed anywhere, by anyone. Additionally, the Prosecutor has a ‘responsibility to prosecute’ anyone accused of international crimes who is expected to be in Germany.

In the words of the German Federal Prosecutor and Senior Public Prosecutor, this obligation ensures that:

‘[T]he investigation of international crimes does not depend upon political considerations ... [it is] not possible to refrain from prosecuting due to foreign policy.’¹¹

Dispensing with the obligation, ‘overriding public interests’ or the risk of ‘serious detriment’ to the German state can be relevant, but these categories are guided by an objective framework.¹² As such, and ‘unlike the UNSC and the ICC’, UJ in Germany, is relatively unconstrained by political intervention or inaction.¹³

Practically, this framework has convicted non-Germans for international crimes committed outside of Germany, against non-Germans. In 2021, German courts convicted two former officials of Asaad’s Syria of crimes against humanity,¹⁴ which boasts impunity from the ICC and UNSC.¹⁵

Limited universal jurisdiction: the UK framework

The UK holds pure UJ over ‘grave breaches’ of the Geneva Conventions¹⁶ and alleged perpetrators of torture, providing the accused are not extradited to foreign courts.¹⁷ Since 2001, UJ is held over genocide, crimes against humanity and war crimes, but suffers from two weaknesses.¹⁸

First, personal jurisdiction is limited. It is a crime ‘to commit genocide, a crime against humanity or a war crime’ under section 51(1) of the Criminal Justice Act 1988 for England and Wales and section 58(1) for Northern Ireland.¹⁹ However, if committed outside the UK, prosecution is only possible if committed by a UK national, resident, or those subject to UK service jurisdiction (section 51(2); section 58(2)).²⁰ The UK’s Joint Commission on Human Rights (JCHR) posits that allowing ‘prosecutions for some international crimes irrespective of nationality and residency while limiting jurisdiction’ over others is unreasoned.²¹

Second, all UJ cases must be approved by the Attorney General (AG), under section 53(3).²² They can consider ‘public interest issues including international relations and national security’.²³ While the AG has, as of 2021, never refused consent to prosecute under UJ,²⁴ no tangible principles guide the exercise of this discretion.²⁵

Towards pure UJ in the UK

The following legislative amendments to the ICCA widen the UJ framework and safeguard it from political will. First, as endorsed by the JCHR,²⁶ the limited scope of personal jurisdiction must be amended. Secondly a responsibility to prosecute must be introduced.

Personal jurisdiction

To exercise UJ over all individuals for genocide, crimes against humanity and war crimes and ancillary conduct, the following must be considered:

First, in sections 51(1) and 58(1) ('it is an offence for a person to commit genocide, crimes against humanity and war crimes');

'After "person", insert "whatever his or her nationality"

After "war crime", insert "in the United Kingdom or elsewhere".'

Second, in sections 52(1) and 59(1) (ancillary conduct) repeat the above amendment.

Third, omit sections 52(4) and 59(4), which reiterate personal jurisdiction as enunciated under sections 51(1) and 58(1).

These amendments ensure that any individual can be prosecuted in the UK for genocide, crimes against humanity and war crimes.

Responsibility to prosecute

While national interest and security can render the prosecution of international crimes inadvisable, without high standards on when such considerations can prohibit justice, UJ remains subject to political whim. Two amendments revise this.

First, incorporate an obligation to prosecute accused persons found in the UK. In section 53(4)(a) ('if the offence is not committed in England or Wales, proceedings may be taken');

Replace 'may' with 'must'

After 'taken', insert 'if the accused is expected to be in the UK'.

Second, to section 53(3), attach strict parameters for when that obligation can be disposed of, by defining national interest and security.

These revisions implement a *de facto* obligation to prosecute and strictly guide its dispensing.

Conclusion

Without robust, comprehensive legislation incorporating a strong interpretation of UJ into domestic law, the principle remains feasible in narrow factual scenarios and vulnerable to geopolitical considerations. German 'pure UJ' illustrates that the UK's regulatory framework is lacking. Widening personal jurisdiction for genocide, war crimes and crimes against humanity, and creating an obligation to prosecute suspects found in the UK, moves towards ending impunity and strengthening accountability.

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- 17 Criminal Justice Act 1988 s 134; cf UNCAT art 7(1).
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Trials *in absentia*: legal standards and safeguards

Trials *in absentia* are a contentious issue in international law. While *in absentia* trials allow states to avoid indefinite delays when an accused evades justice, they raise concerns regarding due process and the legitimacy of verdicts delivered without these defendants present. The presence of the accused is crucial because it allows them to challenge evidence, cross-examine witnesses and present their defence. The International Covenant on Civil and Political Rights (ICCPR) provides that any person charged with a criminal offence has the right 'to be tried in his presence'.¹ Similarly, the European Convention on Human Rights (ECHR) protects the right to be informed of charges in a language the accused understands, to have adequate time and facilities for defence and to defend oneself in person or through legal counsel.² The European Court of Human Rights (ECtHR) ruled in *Colozza v Italy* that the right to

participate in one's trial is a cornerstone of fair trial rights.³ However, neither the ICCPR nor the ECHR outright forbids trials *in absentia*; instead, the ECtHR has clarified that these trials are lawful if extreme safeguards are observed: proper notification, retrial rights and legal representation.⁴

Proper notification is perhaps the most detailed safeguard when it comes to case precedent. Diligent efforts to notify the accused of the charges and the trial date must be made.⁵ In *Mbenge v Zaire*, the UN Human Rights Committee emphasised that *in absentia* judgments presuppose that states have made diligent efforts to notify the accused of the charges and trial date.⁶ The ECtHR similarly stressed in *Somogyi v Italy* that vague or informal knowledge of proceedings is insufficient to establish a waiver of the right to attend.⁷ Courts must ensure that notification has been carried out with procedural and substantive diligence.

Gary Ruderman



Mere assumption that the accused is aware of proceedings, such as widespread media coverage, does not meet this standard. In *Sejdovic v Italy*, the ECtHR rejected Italy's argument that the accused had waived his right to appear simply because he was untraceable.⁸

Sejdovic also held that if there is any doubt of the accused's knowledge of the proceedings, the court must, if it already had the trial *in absentia*, offer the accused the right to a retrial if the accused is obtained; not doing so would violate fair trial rights.⁹ This contrasts with *Medenica v Switzerland*, where 'the ECtHR held that because Medenica had actual knowledge of the proceedings against him, had unequivocally waived his right to be there, and was able to instruct a counsel of his choosing, there was no obligation on Switzerland to provide an automatic retrial'.¹⁰ The Court of Justice of the European Union (CJEU) has similarly emphasised the importance of retrial rights for *in absentia* cases, holding that retrial procedures under Directive 2016/343 must comply with EU principles of equivalence and effectiveness laws.¹¹ A retrial must be granted unless the accused was properly informed of the judgment, received the full decision and understood their rights, including how and where to apply for a new trial.¹² The CJEU has further clarified that retrials for *in absentia* convictions do not necessarily need to occur before the same court, provided the accused is promptly informed of the judgment and has a realistic opportunity to exercise their rights under the Directive.¹³ This stricter framework complements ECtHR safeguards and offers a robust model for ensuring *in absentia* trials remain fair and legitimate.

The accused may waive their right to be present, but such a waiver must be unequivocal and voluntary. The ECtHR has held that waiver of fair trial rights cannot be lightly presumed and must be attended by minimum safeguards proportionate to its importance.¹⁴ Evasion of justice, where an accused deliberately avoids attending their trial despite proper notification, can justify *in absentia* proceedings. However, in cases such as *Stoyanov v Bulgaria*, the ECtHR cautioned that absence alone does not establish intentional evasion.¹⁵

Even where an accused has validly waived the right to attend, they retain the right to legal representation; denying this right would render proceedings unfair.¹⁶ The ECtHR illustrates the importance of this

right, and it also allows those accused of a criminal offence to exercise other trial rights, including the right to defend themselves and examine and cross-examine.¹⁷ While an accused is allowed to waive their right to be present at a trial, international human rights standards require their absence to be fulfilled by a defence counsel that was appointed by the court or one selected by the accused.¹⁸ ECtHR jurisprudence also emphasise that representation must not only be appointed but also effective, free from undue influence or pressure and proportionate to the seriousness of the charges.¹⁹

While the aforementioned analysis deals with the lawfulness of *in absentia* trials when the accused chooses not to attend their trial, the other common scenario for lawful *in absentia* proceedings is when the accused is removed because of inappropriate behaviour in the courtroom.²⁰ The ECtHR has confirmed that a defendant can be removed for persistent disruption, and the trial may proceed *in absentia* so long as procedural safeguards are observed.²¹ Ultimately, international law accepts that *in absentia* trials may proceed in exceptional circumstances, but only if rigorous procedural safeguards are in place. Ensuring meaningful notice, the right to a retrial upon appearance and effective legal representation preserves the delicate balance between efficient justice and the fundamental rights of the accused.

Notes

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- 3 *Colozza v Italy* (A/89) (1985) 7 E.H.R.R. 516.
- 4 European Convention on Human Rights Art 6(3).
- 5 European Convention on Human Rights Art 6(3); *Council of Europe, Committee of Ministers, Resolution (75)11 on the Criteria to Be Followed in Criminal Proceedings in the Absence of the Accused* para 2 (17 September 1975), <https://rm.coe.int/09000016804f7581> accessed 8 September 2025.
- 6 Communication No 16/1977, UN Doc CCPR/C/OP/2 at 76 (1983).
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- 10 *Medenica v Switzerland* (20491/92) unreported, 16 January 2001 at [59]; Ravina Ambwani, 'Extending the International Criminal Law Scope of Absentia Trials Towards Death and Mental Capacity' (Canadian Bar Association, 21 October 2024), www.cba.org/sections/international-law/resources/extending-the-international-criminal-law-scope-of-absentia-trials-towards-death-and-mental-incapacit/#_ednref63 accessed 8 September 2025.
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12 *VB II v Procureur général près la cour d'appel de Paris* (C569/20) EU:C:2022:303.

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14 *Hermi v Italy* (18114/02) (2008) 46 E.H.R.R. 46.

15 *Stoyanov v Bulgaria* (25714/05) unreported 25 March 2014.

16 *Neziraj v Germany* (30804/07) unreported 8 November 2012.

17 European Convention on Human Rights Art 6.

18 *Neziraj v Germany* (30804/07) unreported 8 November 2012 at [50].

19 *Colozza v Italy* (A/89) (1985) 7 E.H.R.R. 516; *Lala v Netherlands* (14861/89) (1994) 18 E.H.R.R. 586 at 34.

20 See Jeremy McBride, 'Overview of the European Standards Regarding Criminal Proceedings Held in Absentia' (Council of Europe, September 2024), <https://rm.coe.int/overview-of-the-european-standards-regarding-criminal-proceedings-held/1680b2d095> accessed 8 September 2025.

21 *Idalov v Russia* (5826/03) unreported, 22 May 2012 at 178.

Article 7(1)(k) and gender apartheid in Afghanistan

Oliver Bates



This article sketches how the Taliban's attacks on women could be charged as crimes against humanity of gender apartheid under the Rome Statute. To prove a crime against humanity under Article 7(1), the prosecution must show that the perpetrator committed an attack that was widespread or systematic, and directed against a civilian population, with knowledge of the attack. To specifically prove gender apartheid under 7(1)(k) as an other crime against humanity, the prosecution must show the attack was of similar character to the other enumerated acts and caused great suffering or serious injury to body or mind.

In Afghanistan, the Taliban banned women from attending university or secondary school, travelling over 72 kilometres without a male chaperone, accessing healthcare without a male chaperone, working for a non-governmental organisation (NGO), appearing on TV entertainment, playing sports, going to the gym and going to the park.¹ Government officials have shut down women-run businesses, some shopkeepers will not serve women without an accompanying male and some hospitals will not provide medical care to female patients without an accompanying male.² Women are flogged for adultery and practicing homosexuality.³ These policies and actions are the actus reus for the gender apartheid.

The chapeau of Article 7(1)

To prove these events are a crime against humanity, the prosecution must prove that the perpetrator committed an attack that was widespread or systematic, that the attack was directed against a civilian population and the perpetrator had knowledge of the attack.

An attack 'is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1 against a civilian population'.⁴ The Trial Chamber for the ICTR in *Musema* found that an 'attack may also be non-violent in nature ... [such as] exerting pressure on the population to act in a particular manner'.⁵

The ICTY in *Kunarac* defined a 'civilian population' as those who are not 'members of the armed forces and other legitimate combatants'.⁶ The *Ongwen* Court found that civilians must be the primary target of the attack and 'not an incidental victim of it'.⁷

Widespread entails a massive, frequent, large-scale action carried out collectively with considerable seriousness and directed against multiple victims.⁸ The *Katanga* Court found 'widespread' to exclude random or isolated attacks⁹ while systematic references the organised nature of the acts and the improbability of their random occurrence.¹⁰

The UN Special Rapporteur reporting for the United Nations High Commissioner for Human Rights concluded that 'the Taliban's institutionalized system of discrimination, segregation, disrespect for dignity and the

exclusion of women and girls constituted in and of itself a widespread and systematic attack on the entire civilian population of Afghanistan'.¹¹

Finally, the prosecution must show the perpetrator knew 'that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population'.¹² Article 30(3) defines knowledge as 'awareness that a circumstance exists or a consequence will occur in the ordinary course of events'.¹³ The court can infer knowledge and the higher mens rea of intent from the 'relevant facts and circumstances'.¹⁴ The relevant circumstances are the manifest restrictions on women perpetrated at every level of the Taliban. The Special Rapporteur found the attacks by the Taliban are 'organized at the highest level of de facto governance and following a regular pattern'.¹⁶ These circumstances show knowledge. While the chapeau elements are readily satisfied, charging gender apartheid under subsection 7(1)(k) presents more complex legal challenges.

Subsection (k)

The prosecution must then show the attack was of a similar character to the other enumerated acts and that the attack caused great suffering or serious injury to the body or mind.

An 'other' crime against humanity must be materially distinct in at least one element not already included in the other enumerated crimes.¹⁷ Apartheid is included in the Rome Statute under Article 7(1)(j) and defined in Article 7(2)(h) as acts 'committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime'.¹⁸ For gender apartheid, the materially distinct element is gender – it is not the conduct of the crime.

The situation is further complicated by the *Muthaura* pre-trial chamber's concluding that Article 7(1)(k), as a residual category, is limited 'if a conduct could be charged as an other specific crime under this provision [7(1)]'.¹⁹ In the other times where courts have recognised Article 7(1)(k) crimes, the conducts has been differnt from existing categories – such as forced marriage in the *Ongwen* case and forced circumcisions in the *Muthaura* case. Because gender apartheid has

the same conduct as apartheid, but a different victim class, the *Muthaura* standard could preclude it as an Article 7(1)(k) crime.

The other statutory hurdle is the canon *expressio unius est exclusio alterius* which says the expression of one thing is the exclusion of others.²⁰ By putting race into the definition of apartheid, the drafters excluded other forms of apartheid – including gender. The court would need to decide whether the exclusion of an inhumane act by *expressio unius* bars it as another inhumane act.

The last element to prove is serious harm. Serious harm need not be permanent or irremediable, yet it must involve harm that goes beyond temporary unhappiness, humiliation or embarrassment.²⁰ *Ongwen* held that intentionally causing great suffering or serious injury is a question of fact.²¹ The Special Rapporteur found that 'living under an institutionalized system of gender-based oppression is inherently dehumanizing and causes physical and psychological harm'.²²

The Taliban's systematic oppression of Afghan women constitutes gender apartheid and can be successfully prosecuted under Article 7(1)(k). The *Muthaura* limitation can be distinguished by recognising gender as a material distinct element from racial apartheid. The *Expressio Unius* argument can be circumvented by recognising the drafters left Article 7(1)(k) in the Rome Statute to capture emerging forms of inhumane acts like gender apartheid. Most compellingly, the victims themselves identify the harm they suffer as gender apartheid, and the Rome Statute required the court to listen to the views and experiences of the victims and recognise the specific harm they suffered.²³

Notes

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- 7 *Prosecutor v Ongwen* Case No ICC-02/04-01/15-1762-Red, Public Redacted Trial Judgment para 2675 (4 February 2021) ('Ongwen Trial Judgment').
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- 21 *Ongwen* ICC-02/04-01/15 Decision at para 88.
- 22 Afghanistan Report at 11 para 31.
- 23 Rome Statute Arts 54(1)(b) and 68(3).

Marie Adeishvili



The effectiveness of ethics codes: 'window-dressing' for law firms?

Large corporate law firms invest heavily in appearances: skyscrapers, sleek interiors and carefully curated branding. Should the ethics code be read as part of this performance, or as a tool that genuinely shapes professional behaviour?

Regulating ethics

The regulation of lawyers was once relational: reputations and professional ties constrained behaviour. Lawyers, seen as 'men of honour', were assumed to 'instinctively' know how to act.¹ Over time, however, professional misconduct and corporate scandals created the need for formal systems to oversee and enforce ethical behaviour.

Regulating ethics may sound contradictory; imposing external rules on something that is so personal to each individual is difficult. Yet organisations can build 'ethical infrastructures' to shape conduct.² These operate on two levels: *formal* (documented and standardised) and *informal* (the values and relationships that define organisational culture).

A code of conduct and ethics is one type of *formal* ethical infrastructure, communicating values of the firm and guiding lawyers' behaviour, at least in principle. Codes may build trust with clients, reinforce employees' morale and confidence in the firm and

act as a 'bargain' between society and the profession: lawyers enjoy privileged status but agree to meet defined standards.³

Codes may be internal (firm-drafted) or external, such as those issued by regulators such as the Solicitors Regulation Authority (SRA) in the UK. They embody collective standards and aspirational ideals, but are they effective in promoting ethical practices?

Ineffectiveness of codes

Research into codes produces mixed results, but many studies suggest their effect is largely 'decorative'⁴: they rarely influence ethical behaviour, at least independently of other 'organisational variables' such as ethical culture and climate.⁵ One study of Fortune 500 firms found that codes failed to encourage self-regulation or foster ethical culture.⁶ Another study found that firms have used codes as corporate self-defence in response to allegations of misconduct,⁷ highlighting their role as public-relations tools rather than genuine safeguards.⁸

Codes, when they *merely* exist and are disregarded, produce a 'cynical response', increasing the likelihood of employees engaging in unethical behaviour.⁹ This is supported by anecdotal evidence of partners deliberately ignoring or manoeuvring around the SRA's provisions.¹⁰

Some argue that ‘lawyers in large corporate firms have little awareness of the SRA Code of Conduct’s provisions because the firm itself is the primary site of normative control’.¹¹ Accordingly, to be effective, codes should be thoroughly embedded in the organisational environment.

Conditions for effectiveness

A weak reinforcement of the code, for example, when senior figures actively contradict or dismiss the code, is more damaging to ethical behaviour than having no code at all.¹² The Enron scandal illustrates this risk: despite an extensive ethics code, its ‘cowboy’ culture rewarded rule-breaking and aggressive, individualistic conduct.¹³ This environment enabled fraudulent practices, including concealing debt and publishing false financial data.

Ethics codes are unlikely to succeed if they function solely as a tool of top-down control. They are not meant to be mere ‘compliance documents’.¹⁴ Research indicates that codes become effective when managers both act in accordance with them and encourage open dialogue on ethical issues.¹⁵

Therefore, codes must be reinforced by the informal systems and ethical climate of the firm. Integration can take several forms: involving staff in drafting or revising the code; actively applying it in boardroom discussions to resolve dilemmas; and using it as a reference point for corporate ethical decisions.¹⁶

Codes and moral character

Codes alone cannot instill moral behaviour. In the context of evolving societal standards and issues, irrespective of how detailed the code may be, it cannot anticipate every ethical dilemma. Here, a lawyer’s professional moral character (PMC) – defined as ‘fixed behavioural attributes relevant to legal practice’ – ‘acts to fill the gap’.¹⁷ However, new entrants to the profession may possess their *personal* moral character, but do not yet have the experience of dealing with ethical issues arising during legal practice and hence, their PMC is undeveloped. Codes can assist in this development, providing ‘a prima facie reason to act’ (but not a ‘decisive’ one – this comes from individual moral judgement).¹⁸ Well-drafted codes, which reflect common issues encountered by lawyers and provide broad guidance on what

constitutes effective and ethical behaviour, can serve as a starting point for newer professionals when resolving dilemmas.

Drafting and design

Effectiveness of codes also depends on their drafting. While internal firm codes vary, the SRA’s Code of Conduct applies to all solicitors. The Code’s language, written in the second person, addresses the individual lawyer and reinforces the personal responsibility to act ethically.

The Code is ‘outcomes-focused’, which ‘leaves it to firms and individuals to determine how to achieve the outcomes set out’.¹⁹ This flexibility is valuable: overly prescriptive codes risk becoming outdated, generate more disagreement, and encourage ‘creative compliance’²⁰ – ways to avoid the explicit terms of the codes. Research further stresses the need for codes to remain clear and accessible.²¹

Debate continues over whether the Code should explicitly address common dilemmas.²² While its breadth arguably provides sufficient guidance, incorporating case studies or contextual factors could better support ethical decision-making.²³

Sanctioning mechanisms can also reinforce the effectiveness of codes. The SRA warns that ‘a serious failure to meet our standards ... may result in our taking regulatory action’. However, taking action may be expensive, time-consuming and difficult to prove, especially amongst complicit lawyers. Hence, cultivating an internal culture of ethics, guided by but not dependent on the code, is essential.

Conclusion

If disregarded in daily practice or deployed for defensive or reputational purposes, codes of ethics risk undermining the very values they claim to enshrine. Yet their potential should not be underestimated. Properly designed and embedded, codes can shape the profession in three ways. First, they anchor behaviour when reinforced through a consistent ethical culture, one in which leaders model and uphold their provisions. Secondly, they remain effective only if drafted with clarity, flexibility and accessibility, enabling lawyers to adapt them to shifting professional and societal contexts. Finally, well-drafted codes serve an educational function, guiding new entrants in developing



the professional moral character needed to handle dilemmas that rules alone cannot resolve. Framed and lived this way, codes of ethics transcend performative window-dressing and become genuine instruments of integrity.

Notes

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The ghost of empire at the UNFCCC COP: operationalising the International Court of Justice's climate duties

As we continue to face the 'existential threat' of climate change, we must trace down the voice holding action still.¹ The 'ghost of empire' that sits amongst us is the imprint of colonial legacies inside climate institutions.² It moves through structures, tools and languages, deciding who sets the agenda, who counts as a 'Party', which Parties have voices and which solutions are thinkable. Seen through a postcolonial lens, the United Nations Framework Convention on Climate Change's (UNFCCC) Conference of the Parties (COP) still carries the 'ghost' observed in the commodification of and violence against the environment, marginalisation of indigenous peoples and politicising what should be scientific imperatives.³ This article argues that these colonial dynamics explain much of climate inaction and misplaced action, especially climate finance. Moreover, the International Court of Justice's (ICJ) recent advisory opinion on the obligations of states with respect to climate change may be a tool to resolve these colonial challenges.⁴

To what extent can postcolonialism explain climate action?

Postcolonialism is a practical lens that examines how rules and institutions, which may appear neutral, can reproduce older power asymmetries. A postcolonial reading of climate processes centres on the instrumental, structural and discursive powers that inform action. Instrumentally, powerful coalitions define the norms and language. Structurally, state-centric architecture sidelines those not neatly represented by states. Discursively, market logic dominates environmental solutions, distancing them from grounded understandings of the environment.⁵ The result is a pattern scholars describe as 'carbon colonialism'.⁶

Article 6 of the Paris Agreement – which establishes an international carbon market mechanism – is a case in point. Indigenous leaders have documented how carbon markets under Article 6 perpetuate past injustices by repackaging extractivism as 'nature-based solutions', and protested the removal of 'human rights' from the final text.⁷ Their critiques map the colonial pattern of excluding the voices most connected with and affected by climate change.⁸ The result is a persisting divide between the developed, leading the processes, and resource-constrained developing, struggling to secure access to badges, translation services or travel finance to explain the injustice of reducing environmental action to market mechanisms.⁹

Colonialism is active in environmental harm, and the echoes of its violence are absent from climate considerations. The Israeli forces' bulldozing of Palestine's last remaining seed bank is an erasure of a living memory with obvious ecological consequences.¹⁰ Colonial legacies shape exposure to cyclones across the Caribbean and other islands.¹¹ Such actions reveal how violence against land and knowledge systems continues and why the principle of free, prior and informed consent must be treated as foundational at COP.¹²

Climate finance as a site of postcolonial asymmetry

The postcolonial lens is the clearest in climate finance, where such an analysis reveals the underlying priorities of the Parties. Developing countries pressed for a standalone agenda item clarifying the implementation of Article 9.1 of the Paris Agreement regarding the legal duty of developed countries to provide climate finance.¹³ Developed countries resisted and deflected, pointing to Article 9.1's adjacent

relevance to other agenda items, diluting the discussions on climate finance. The middle ground was a resort to private consultations, not a clarifying answer, which is symptomatic of how agenda control can neutralise demands for accountability.¹⁴

Given the power imbalances, negotiation friction is not merely procedural but determines whose priorities count based on an unequal framework. When finance obligations are fragmented, ambitious action in vulnerable countries remains theoretical, and trust in multilateralism erodes.¹⁵ The postcolonial framing, thus helps us explain inaction as what happens when old hierarchies survive inside new regimens.

The role of the ICJ's Advisory Opinion in decolonising climate processes

On 23 July 2025, the ICJ issued an advisory opinion that changed the centre of gravity of environmental law.¹⁶ The Court affirmed that states have customary obligations to prevent significant harm and to cooperate in good faith.¹⁷ It bridges the climate with human rights obligations, clarifying that acts and omissions contrary to these can constitute internationally wrongful acts with legal consequences for breaches.¹⁸

The following two features arguably make the opinion a decolonising tool.

First, it converts ambiguity into leverage. Where obligations under Article 9.1 were dismissed, the opinion affirms the duties of states to regulate emissions and mitigate harm, which encompasses financial support. Developing countries, therefore, have a powerful tool to urge meaningful action in climate negotiations. Not adopting implementational financial policies reflective of national capabilities can constitute a breach of international law. This allows space in litigation to invoke the clarified duties and obtain remedies for breaches.¹⁹

Secondly, it centres humans, not the market, within the climate.²⁰ By tying climate harm to human rights and extending the responsibility of states to private actors within their jurisdiction, the Court validates longstanding Indigenous and community claims about cumulative, structural harm that were too often sidelined at COP.²¹ Unlike when the removal of 'human rights' under Article 6 was an alarming dismissal of the vulnerable, the opinion unanimously stresses beyond doubt that protecting the climate system is an international human rights obligation.

From diagnosis to direction

Postcolonial theory helps us trace the justifications for climate inaction and evaluate the effectiveness of current climate action. Understanding the current dynamics governed by colonial legacies illuminates the paths for addressing challenges and inequalities.²² The advisory opinion can disrupt the cycle of climate colonialism by framing moral claims into justiciable ones and anchoring process reform in customary law, human rights, and state responsibility.

One implication is that the COP agenda should be built around scientific necessity, consistent with legal obligations of good faith, not on top of unjustly negotiated agendas. That means a proper space for Article 9.1 implementation, mainstreaming FPIC, and treating indigenous people as active managers and leaders of the environment.²³ A second, hopeful implication, is that an 'advisory' opinion now acquires practical force by enabling coalitions to convert law into leverage and leverage into resolution, finance and action.

The ghost of empire lingers where voices are filtered, knowledge commodified, and duty reframed as optional. Decolonising climate action means dismantling architectures of exclusion so that planetary priorities set the rhythm.

Notes

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