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Human Rights Law Committee News

Committee Update of the International Bar Association's Section on Public and Professional Interest

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International Bar Association

Conferences 2017–2018




2017

7 OCTOBER 2017 SYDNEY, AUSTRALIA
Young Lawyers' Training Course: The Fundamentals of International Legal Business Practice

8 OCTOBER 2017 ICC SYDNEY, SYDNEY, AUSTRALIA
Focus on Advocacy in International Arbitration: Making an Impact

8–13 OCTOBER 2017 INTERNATIONAL CONVENTION CENTRE, SYDNEY, AUSTRALIA
IBA Annual Conference 2017

IBA 2017 Sydney 8–13 OCTOBER
ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

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2–3 NOVEMBER 2017 MANDARIN ORIENTAL HOTEL, HONG KONG SAR
Asia Pacific Mergers and Acquisitions

4 NOVEMBER 2017 HANOI, VIETNAM
IBA-APAG International Arbitration Training Day: Introduction of the IBA Soft Laws

4–5 NOVEMBER 2017 QUEEN MARY UNIVERSITY OF LONDON, LONDON, ENGLAND
IBA-ELSA Law Students' Conference: International Human Rights Law

6–7 NOVEMBER 2017 HILTON SÃO PAULO MORUMBI, SÃO PAULO, BRAZIL
Latin American Anti-Corruption Enforcement and Compliance

10 NOVEMBER 2017 MOSCOW MARRIOTT ROYAL AURORA HOTEL, MOSCOW, RUSSIAN FEDERATION
9th Annual 'Mergers and Acquisitions in Russia and CIS' Conference

13 NOVEMBER 2017 CORINTHIA HOTEL, WHITEHALL PLACE, LONDON, ENGLAND
Once in a Lifetime Opportunity or Cliff-Edge Threat: The Antitrust Implications of Brexit

15 NOVEMBER 2017 LEVEL 39, 1 CANADA SQUARE, CANARY WHARF, LONDON, ENGLAND
European Start Up Conference

15–17 NOVEMBER 2017 THE GRANGE ST PAULS, LONDON, ENGLAND
8th Biennial Global Immigration Conference

15–17 NOVEMBER 2017 LABADI BEACH HOTEL, ACCRA, GHANA
Rising to the Challenge of Africa's Economic Development – The Role of the Legal Profession

16 NOVEMBER 2017 FOUR SEASONS HOTEL LONDON AT PARK LANE, LONDON, ENGLAND
Private Equity Transactions Symposium

16–17 NOVEMBER 2017 MONDRIAN LONDON, LONDON, ENGLAND
Building the Law Firm of the Future

30 NOVEMBER – 1 DECEMBER 2017 HILTON BUENOS AIRES HOTEL, BUENOS AIRES, ARGENTINA
The New Era of Taxation: How to Remain on Top in a World of Constant Evolution

1 DECEMBER 2017 MOSCOW MARRIOTT HOTEL NOVY ARBAT, MOSCOW, RUSSIAN FEDERATION
11th Annual Law Firm Management Conference

7–8 DECEMBER 2017 MILLENNIUM BROADWAY HOTEL, NEW YORK, USA
Investing in Asia

7–8 DECEMBER 2017 JUMEIRAH FRANKFURT, FRANKFURT, GERMANY
4th Annual Corporate Governance Conference

2018

18–19 JANUARY 2018 HONG KONG SAR
IBA Law Firm Management Conference: Growth Prospects for Law Firms in Asia

29–30 JANUARY 2018 etc. venues FENCHURCH STREET, LONDON, ENGLAND
7th Annual IBA Tax Conference

1–2 FEBRUARY 2018 THE WESTIN PARIS – VENDOME, PARIS, FRANCE
6th IBA European Corporate and Private M&A Conference

14–16 FEBRUARY 2018 PARIS INTERCONTINENTAL, PARIS, FRANCE
IBA/ABA International Cartel Workshop

23–24 FEBRUARY 2018 HOTEL EUROSTAR GRAND MARINA, BARCELONA, SPAIN
3rd Mergers and Acquisitions in the Technology Sector Conference

25–26 FEBRUARY 2018 HILTON PUERTO MADERO, BUENOS AIRES, ARGENTINA
21st Annual IBA Arbitration Day: the Rule of Law created by International Arbitrators – Between Pacta Sunt Servanda and Bona Fide

5–6 MARCH 2018 CLARIDGE'S, LONDON, ENGLAND
23rd Annual International Wealth Transfer Practice Law Conference

8–9 MARCH 2018 HONG KONG SAR
3rd IBA Asia-based International Financial Law Conference

9–10 MARCH 2018 THE TAJ MAHAL PALACE, MUMBAI, INDIA
The Changing Landscape of M&A in India – New Opportunities in a Dynamic India

11–13 MARCH 2018 INTERCONTINENTAL LONDON PARK LANE, LONDON, ENGLAND
19th Annual International Conference on Private Investment Funds

14–16 MARCH 2018 HYATT REGENCY HOTEL AND INTERCONTINENTAL PRESIDENTE HOTEL, MEXICO CITY, MEXICO
Biennial IBA Latin American Regional Forum Conference

20 MARCH 2018 NEW DELHI, INDIA
Pre-International Competition Network Forum

MARCH 2018 LONDON, ENGLAND
Insurance – Into the Unknown: Challenges and Opportunities

Full and further information on upcoming IBA events for 2017–2018 can be found at: **bit.ly/IBAConferences** @IBAevents

IN THIS ISSUE

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This update is intended to provide general information regarding recent developments in human rights law. The views expressed are not necessarily those of the International Bar Association.

From Chair

Neelim Sultan
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Dear Human Rights Law Committee members,

Welcome to this current edition of the Human Rights Law Committee Update, which I hope will keep you both interested in our work and motivated to join us as soon as possible!

At a time when it must seem to human rights lawyers everywhere that the world has taken leave of its senses, it becomes perhaps even more important that our collective voices find the space to be heard. There is certainly much to arouse the concern, if not anger, of human rights lawyers as we see growing evidence that respect for the primacy of the rule of law is under sustained attack in many jurisdictions and the very concept of human rights is often ridiculed in both developed and developing countries as a luxury that cannot be afforded.

I would hope that this only serves to strengthen our commitment to the work that many of us within the membership of the IBA are engaged in. Within that work, the importance of the rule of law cannot be underestimated. Respect for the rule of law is an essential pre-requisite for any society based on democratic principles, since it enforces minimum standards of fairness – both substantive and procedural – for all citizens and provides the context within which respect for human rights work can be promoted and maintained.

The articles within this issue make the point far more powerfully than this brief introduction can possibly do, and also emphasise the value of sharing our experiences with each other. I wholeheartedly commend them to our members and look forward to hearing from you all with ideas for future articles.

All the best,
Neelim

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From the Editor

Welcome to the 2017 Committee Update of the IBA Human Rights Law Committee (HRLC). This committee update is truly international in that its authors reside in nine different countries: Australia, Belgium, Brazil, Canada, El Salvador, Kenya, the Netherlands, Slovenia and the United States. It is particularly good to have three Australian authors in anticipation of the IBA's Annual Conference in Sydney. Several of the topics included in this issue will also be the topic of presentations sponsored by the HRLC at the Annual Conference in Sydney. In fact, three of the presentations supported by the Committee will address the first topic of the update, which is the freedom of movement as a human right. In our world of refugees, immigrants and migrants, the headlines are full of tragedies related to the difficulties of managing the freedom of movement in relation to economic concerns. Of course, the fear of terrorism also plays a role here. Our articles look at the issues of the refugee crisis and examine one country's asylum procedure. Even the issue of piracy is reviewed in these articles. At the Annual Conference, the HRLC will sponsor panels to review refugee issues relevant to our host country of Australia, the concept of asylum as a right and the grant by some countries of dual citizenship.

Our second topic is equally in the headlines. We address here the right to information, particularly information obtained through the internet. Few other freedoms than the freedom to obtain information instils such fear in the dictatorships run by either individual dictators or by party dictatorships. Our authors look at the right of individuals to own the information they obtain from the internet and posit the question of whether the right to tweet is limited to heads of state. At the Annual Conference, the Committee will lead a presentation on use of firewalls in the internet and its impact on human rights.

A third topic is the particularly sensitive issue of what liability might international organisations such as the United Nations have to individuals whose humans rights are denied. As debated in these articles, the question is whether such organisations should be given immunity in order to encourage their activities or whether they should be held liable for injuries suffered by those who are under their protection. The article on the topic related to cholera and Haiti puts a particularly human face on this difficult issue. The final session to be sponsored by the Committee at the Sydney meetings Annual Conference will likewise be on this issue of liability of organisations such as the UN. If these articles are any indication, this panel presentation should include some very interesting conversations.

The area of international human rights has long been one dominated by what is often referred to as soft law. The source of this soft law primarily is based upon UN guidelines or International Labour Organization (ILO) conventions. The question now is whether there is hard law that will truly support the rule of law to protect international human rights. Our articles on the role of the rule of law in international human rights look at the issue from both a local and a global perspective on topics from land rights in Cambodia to LGBT rights in El Salvador. The articles also look to whether the efforts to make the soft law into hard law may conflict directly with the existing hard law in many countries. For example, one article addresses whether labour laws in many countries would actually be in conflict with ILO conventions.

Finally, in a topic close to your Editor's heart, two of our authors address the role of bar associations in international human rights. In particular, they study the creation and initial activities of the International Human Rights Committee created by the State Bar of Texas. I must admit that, as the Chair of that Committee, I am a bit biased, but I encourage you to read this article for two reasons. First, as a member of your own local bar, you may find some of our experience helpful in establishing a similar committee or section on the topic with the goal of educating the members of your local bar on the types of issues we address in this update and other issues related to international human rights. Second, I invite you to give me any comments you may have concerning the scope, goals and activities

of the Texas Bar Committee. At last year's IBA Conference, I gave a presentation on this topic and during the questions after my presentation, it was brought home to me the importance of language in describing international human rights. Upon my return to Texas, I proposed that the goals and purposes of this Committee should be translated into Spanish, one of the primary languages spoken in my home state. That translation is complete. Such input can only be gained by the interchange of ideas from people across the world, which is the primary goal of this update and the IBA's Annual Conference. I hope you join me in this exchange of ideas and read each of the articles in this issue, attend the Conference presentations sponsored by the IBA's Human Rights Law Committee in Sydney and give me feedback either in person in Sydney or by using my email above.

I greatly appreciate the input of our authors. I look forward to suggestions or submissions from each of you in the future. See you in Sydney.

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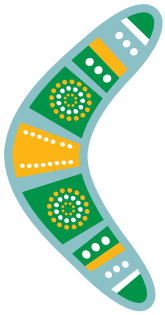

IBA 2017 Sydney

8–13 OCTOBER

ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

Human Rights Law Committee sessions

Monday 0930 – 1230

Race and refugee issues in Australia: are policies of detention and separation working?

Presented by the IBA's Human Rights Institute, the Human Rights Law Committee and the Immigration and Nationality Law Committee

Has Australia become a detention society? The detention of refugees on Nauru and (until recently) Manus Island, and the attempts to address problems within indigenous communities, highlight the conundrum in balancing community needs with individual rights.

This session is the first of a duo that is convened cooperatively by the IBA's Human Rights Institute, the Immigration and Nationality Law Committee and the Human Rights Law Committee. This session will accompany the second session in this suite: 'Rights without borders?: Is the concept of asylum alive and well in a post-truth world?', which is taking place on Tuesday, 0930 – 1230 and is also co-hosted by all three entities as well as the European Regional Forum. The first session will focus solely on Australia, while the second session will explore the current situation of refugees and asylum seekers in a global context.

Therefore, in this session, a panel of experts will discuss issues related to asylum seekers and Aboriginal and Torres Strait Islanders communities in Australia both historically and in the present-day. The panel will explore relevant legislation, highlight the role of the legal profession and non governmental organisations (NGOs) and discuss whether innovative models can provide forward-thinking solutions that enhance the work of bodies such as the United Nations. The panel will discuss these issues in an informal way and will also participate in an audience Q&A.

The IBA's Human Rights Institute, the Immigration and Nationality Law Committee and the Human Rights Law Committee look forward to sharing experiences and discussing the way forward with attendees of both this session and the session on Tuesday as they will complement each other, provide insight into these issues at a national and international level and, most importantly, provide an opportunity from legal professionals to meet and learn from each other.

Tuesday 0930 – 1230

Rights without borders: is the concept of asylum alive and well in a post-truth world?

Presented by the Human Rights Law Committee, the European Regional Forum, the IBA's Human Rights Institute and the Immigration and Nationality Law Committee

The session aims to consider a multiple jurisdiction response from the panel on the treatment of asylum seekers who enter (or are unable to enter) target countries. It and will draw on speakers from a number of the most-affected countries including the US, France, the UK and Australia.

This session will complement the session 'Race and refugee issues in Australia: are policies of detention and separation working?', which is taking place at 0930 – 1230 on Monday and is also being jointly presented by the Immigration and Nationality Law Committee, the Human Rights Law Committee and the IBA's Human Rights Institute.

The session on Monday will consider asylum seekers and refugees within the domestic setting of Australia, while this session will provide an overview of the international treaty framework imposing obligations on adhering countries to provide asylum and subsidiary protection.

The session will examine whether the obligation of non-refoulement in international law, requiring signatory state actors not to return persons and vessels from state borders to conditions of danger or loss of liberty, could be used more proactively to provide urgent or immediate aid and assistance at border or entry points.

We hope to explore the concept of a 'humanitarian visa' to allow legal entry of asylum seekers into the target

country pending applications in order to rescue them from danger or save lives.

The treatment of asylum seekers who have entered the target country borders whether on land or sea, and their conditions of detention pending application will be of special focus, including the legality of 'warehousing' and other forms of detention facilities.

Finally, the overall framework for the discussion will consider the impact of media/social media coverage of the refugee crisis on host countries' responses to the idea of offering asylum. Is there evidence of a more tolerant response in countries where there is largely accurate factual reporting, for example, of numbers of migrants and refugees?

Is there a growing intolerance towards the idea of asylum that is being encouraged or promoted within target countries as part of a political debate, which is becoming more hostile to the idea of asylum?

Is mainstream media coverage predominantly accurate or are 'alternative facts' being utilised to amplify an anti-asylum message? Is social media being used to dehumanise migration politics and say the unsayable?

Is misinformation creating a more intolerant environment at government level for debate around the issue of asylum and immigration generally?

How can a counter-narrative be promoted consistent with international obligations? Is it in our mutual interests to do so?

We are all excited by the opportunity to collaboratively discuss these issues in a domestic and international context across two sessions, and welcome contributions during both sessions from all legal professionals, regardless of geographical practice area.

Tuesday 1430 – 1545

Firewalls on the internet

Presented by the Communications Law Committee and the Human Rights Law Committee

We are experiencing the internet moving towards many different layers and away from the open internet. There are also many players from the governmental sector to the private sector who want to have control over the internet and various layers. How can we ensure the future development of internet services, individual rights of citizens and governmental interests together with globalisation?

The session will focus on technical and public policy issues, including privacy and other important viewpoints.

The session will also address to what extent global responses to such challenges would be necessary, discussing the international frameworks that are already available with respect to privacy and data protection, such as the Privacy Shield between the EU and US.

Wednesday 0930 – 1045

Preventing climate chaos: the latest judicial, legal and policy developments in achieving justice and human rights in an era of climate disruption

Presented by the Presidential Task Force on Climate Change Justice and Human Rights, the Energy, Environment, Natural Resources and Infrastructure Law Section (SEERIL), the Human Rights Law Committee, the IBA's Human Rights Institute, the Indigenous Peoples Committee and the Litigation Committee

This session will examine how the role of law, legal systems, lawyers and the judiciary are playing increasingly critical roles in the urgent societal response to global climate change.

The December 2015 Paris Agreement has been called 'historic'. However, despite its ambition to keep the global average temperature increase to below 2°C, greenhouse gas emissions continue to rise. As the United National Environment Programme Emissions Gap Report 2016 makes clear, countries' current pledges and 'nationally determined contributions' under the Paris Agreement still leave a significant deficit to achieving the 2°C target.

In October 2014, the IBA's ground-breaking report 'Achieving Justice and Human Rights in an Era of Climate Disruption' found that legal systems and institutions were inadequate and ill-equipped to deal with the nature and scale of the problem. The report provided over 50 recommendations to address legal systems' deficiencies and progress climate justice. Three years on from the release of the 2014 IBA report, this session will provide the opportunity for an updated discussion of important insights from a variety of perspectives, practices and various IBA committees, including Litigation, Human Rights Law, Indigenous Peoples and the Judges Forum, to explore the latest legal, judicial and policy developments.

The session will address:

- the challenges for implementing the Paris Agreement and its impact on multinational entities;
- the significance of the Paris Agreement's references to human rights and climate justice;
- the potential for human rights law to play a key role in addressing climate change and the Paris obligations;
- the legal obligations that will arise out of countries' efforts to achieve their 'nationally determined contributions' under Paris;
- the implications and the potential of recent innovative climate-related litigation on several continents; and
- how the courts are increasingly playing a role in addressing climate change, including the current and recent cases addressing parties' efforts to seek redress in the courts.

The session also will include a presentation of the reports and recommendations of two IBA Presidential Task Force on Climate Change Justice and Human Rights Working Groups: the Model Statute for Climate Change Remedies and the Legal Aspects of Climate Adaptation working groups.

Continued overleaf

Wednesday 0930 – 1230

Citizens of the world: a review of which countries do/don't permit dual citizenship

Presented by the Immigration and Nationality Law Committee and the Human Rights Law Committee

Trends and developments in dual citizenship: which countries allow it and which don't?

Wednesday 1430 – 1730

Environmental and health challenges in developing countries: legal frameworks and responses

Presented by the Environment, Health and Safety Law Committee, the Human Rights Law Committee and the Water Law Committee

As the economies of developing countries grow and populations increasingly shift from rural to urban environments, significant environmental and health issues arise for the populations of these nations as well. From increased air pollution and access to clean water, to the harmful effects of climate change and resource development, there are challenging issues and doubts regarding whether the legal frameworks in these nations can develop as well as protect the population from these growing environmental and health challenges at times when countries prioritise economic growth over environmental considerations. This panel will discuss the leading environmental and health challenges in developing nations, where there are fundamental weaknesses in legal frameworks or enforcement mechanisms, and the lessons learned from around the world to implement legal protections for the health, safety and wellbeing of individuals to a clean environment.

Wednesday 1430 – 1730

Liability of the UN and other international organisations to individuals

Presented by the Human Rights Law Committee, the International Organisations Subcommittee and the War Crimes Committee

The protection and enforcement of human rights is one of the three pillars of the United Nations (UN). Yet, there have been instances in which human rights violations have occurred under the watch or by direct perpetration of the UN. From allegations of sexual abuse by peacekeepers in the Central African Republic and the alleged UN mishandling of Syrian sieges, including Madaya, to the UN's role in the Haiti cholera epidemic and more, this panel will explore the liability of the UN (and other international organisations) for human rights abuses, as well as whether and how the UN is moving to fill gaps in accountability and hold itself accountable for its direct or indirect responsibility in situations of grave abuse.

All programme information is correct at time of print.

To find out more about the conference venue, sessions and social programme, and to register, visit **www.ibanet.org/Conferences/Sydney2017.aspx**.

Further information on accommodation and excursions during the conference week can also be found at the above address.

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FREEDOM OF MOVEMENT

'Rights without borders' – the role of human rights and freedom of movement, migration/immigration and the refugee crisis

Summary

Despite the progress made to address freedom of movement, migration/immigration and the refugee crisis, regrettably, these areas of law have not been of core interest in the international arena and violation of the rights and legal guarantees of refugees under international and national law has not attracted robust litigation around the world. There are undoubtedly policies and legal instruments on these matters, but countries are adamant and somewhat slow to address these issues – perhaps owing to tough immigration laws, terrorism and financial constraints.

Rights without borders?

Human rights are rights inherent to all human beings, whatever their nationality, place of residence, sex, ethnic origin, race, religion, language or any other status. We are equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.[1] They're universal and the principle of universality of human rights is the cornerstone of international human rights law.[2] Customs and international laws have been ratified around the world; most countries have actually adopted and incorporated these laws in their Constitutions to form part of their law, for example, the Bill of Rights in the Constitutions of Kenya and Uganda. These actions thus create legal obligations on the states, as human rights entail both rights and obligations. In other words, states are obliged to protect individuals and groups against human rights abuses and take positive action to facilitate the enjoyment of basic human rights. It further places an obligation on the individuals to respect the human rights of others.

The Rome Statute in its preamble recognises the fact 'that all peoples are united by common bonds with cultures pierced in a shared heritage'. Furthermore, the preamble to the Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, begins with the words 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world', and ends with 'The General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations.'

The above therefore places an obligation upon the national and international community to serve their universal obligations effectively, demonstrating recognition and observance among all peoples.

In a nutshell, human rights are rights that accrue to a person by virtue of being a human being, often expressed and guaranteed by law, treaties, customary international law, general principles and other sources of international law. The foregoing thus inculcates a sense of togetherness and makes a moderately fragile

attempt in understanding 'rights without borders'. Although devoid of much, this could be the link between these laws.

Freedom of movement: migration/ immigration

The right to freedom of movement is a human right concept encompassing:

- the right of persons to travel from place to place within the territory of a country; and
- the right to leave the country and return to it.

The right is enshrined in Article 13 of the Universal Declaration of Human Rights and Article 12 of the International Covenant on Civil and Political Rights. The ingredient in both and catchphrase is 'everyone lawfully within' the territory of a state has a right to liberty or movement and a right to choose their place of residence. Restrictions are subject to the law.

The growth in labour market opportunities around the world has meant that more people have made use of their right to freedom of movement. However, there is a disparity between the negative public perceptions of the effects of migration and impressions given by studies and research, and questions on how cost effective the same would be have arisen. It is the author's humble opinion that the above should be reconciled with each country's stringent migration/immigration laws.

The refugee crisis

Does the right to freedom of movement accrue to refugees? And do immigration laws apply to refugees and asylum seekers?

Article 14 of the Universal Declaration of Human Rights 1948 recognises the rights of persons to seek asylum from persecution from other countries. Thus premised on this Article, the 1951 United Nations Convention relating to the status of refugees was adopted,[3] which is the centrepiece of international refugee protection today.

In 1967, there was an amendment to it in the form of a protocol.[4] Thus, one is justified in saying that the progressive development of international human rights law greatly influenced the development of refugee law.

According to Sergio Pecantia and Tim Wallace, over 60 million people are displaced around the world because of conflict and persecution; the largest number recorded by the United Nations. For example, nearly half of Syria's entire population has been displaced since the conflict began.[5] Also, conflicts in Somalia, Sudan, the Democratic Republic of Congo and South Sudan are some of the top contributors. They conclude their article by acknowledging the fact that once refugees flee their own countries, most wind up with their immediate neighbours – often some of the world's poorer nations. A case in point is Kenya/Somalia and Uganda/ South Sudan.

Contemporary issues around the globe

European crisis: the case of Greece

Internationally, taking Greece as an example, reports by the UN indicate that the country is facing the biggest movement of migrants and refugees since 1945.[6] This is attributed to its geographical location as most immigrants would want to transit through Greece to Northern Europe. Almost 30,000 people are stuck in open reception facilities or unofficial camps throughout the Greek mainland. Moreover, with the European Union/Turkey deal being implemented, migrants arriving on the island after 20 March 2016 have either to apply for asylum or be returned to Turkey. It is absurd that the Greek government has increased the use of detention of persons irregularly entering the Greek territory. The camps are overcrowded and insecure. The report concludes that the EU and its Member States have not developed a long-term solution on migration and mobility and thus seem reactive rather than proactive.[7]

Dadaab and Kakuma camps in Kenya

Kenya has been a home to refugees and asylum seekers since the early 1960s. There are two major refugee camps in Kenya. One is Dadaab,[8] a semi-arid town in Garissa County, Kenya. It is the site of a UN Refugee Agency (UNHCR) base hosting 245,126 refugees in five camps as of April 2017, making it the second largest camp in the world. There is also Kakuma Camp situated in Turkana County, northeast of Kenya.

A report commissioned by the Refugee Consortium of Kenya with financial and technical support from the Great Lakes Programme of the Danish Refugee Council released in October 2015 indicates that there are currently over half a million refugees in Kenya with a majority of these refugees and asylum seekers residing in camps and about 10.5 per cent residing in urban areas.

The current turn of events in the country

has seen a government initiative to close the camps. This began on 6 May 2016 when Principle Secretary for the Ministry of Foreign Affairs, Karanja Kibicho, issued a directive by way of a press release entitled 'Government statement on refugees and on closure of Dadaab and Kakuma', which stated:

> 'Owing to national security, the hosting of refugees had come to an end and the department of refugee affairs disbanded.'

As such, he announced that the government was working on mechanisms for closure of Kakuma and Dadaab camps within the shortest time possible.

Premised on that, the government lodged a petition in the High Court[9] seeking, among other measures, a court order for the closure of the refugee camps. However, Justice Mativo, in dismissing the petition, ruled that the Interior Cabinet Secretary Joseph Nkaissery and Karanja Kibicho acted beyond their powers to close the refugee camps. Further, the act was arbitrarily discriminatory and the government should adopt mechanisms that would ensure the Department of Refugee Affairs has enough power to regulate the movement of refugees within the camps.

No sooner had the court given its ruling than the government, through its spokesperson, said that it would appeal the decision rendered. It is worthy of note that no formal appeal has been filed by the state to date, even after the lapse of the 30 days window period within which an appeal can be lodged save for the notice of appeal currently in the court.

This has brought much attention and international outcry against Kenya to uphold its obligations under international law, international and regional conventions and the Refugee Act.[10]

The Refugee Act, Act No 13 of 2006, among its many provisions, provides in section 16 the right to:

- freedom of movement; limited to the refugee camp designated for the refugees subject to the regulations that apply in Kenya;
- remain in Kenya until a final decision has been made, which includes the right not to be arrested as an illegal immigrant.

Kenya has adopted an encampment policy since 1990. Refugees in Kenya have the right to freedom of movement in accordance with the laws that apply to refugees in Kenya. They also have a right to access work permits. However, the continued emphasis on encampment and its strict enforcement poses a serious obstacle to accessing the required documentation, ultimately denying refugees the right to work legally in the country.

It is certainly frightening to contemplate the plight of these refugees; and it is unfortunate that the government is closing down the camps.

Ben Rawlence, in his article 'The other refugee crisis', had this to say: 'At first, I was blown away by the fact of its existence: How could this place still be here? And how could the world allow all these people to stay in this baking hot limbo, unable to work and unable to leave, to spend their whole lives in an open prison?' His conclusion stated: 'But five years later, after following residents through their daily lives and listening to their hopes and fears, I have come to a very different realization: Dadaab is not an anachronism, or a hangover from a former world order. It is the future.'[11]

Bidi Bidi camp in Uganda

A recent report stated that Bidi Bidi camp in Uganda has become the world's largest camp and is at breaking point. It is a home to many people escaping conflict and famine in South Sudan. This is attributed to the compassionate refugee policy in Uganda. In March 2017, it was estimated that over 2,800 people arrived in Uganda every day from South Sudan. Uganda was stuck in administrative backlog and lack of funding. It has since continued to maintain open borders.

Conclusion

Human rights can be used to analyse policies and legal interventions with regard to migration/immigration and refugee law, and also track their implementation.

As revealed by this article, the world has not yet worked out a way of how best it can take care of these crises and this renders those caught up in the refugee crisis economically and socially dependent with no means of survival.

Feargal O'Connell, Regional Director of the aid group Concern, has stated that 'given the severity of the humanitarian crisis, many refugees arrive in Uganda and other countries in desperate need of assistance. And these crises always impact the highly vulnerable members of the population.'

It is worthy of note that Somalia is now in the midst of its worst drought in decades –

there are places where people are literally starving to death, and some are even returning to Dadaab in desperation. No one deserves to be 'caught between the devil and the deep blue sea'. The situation is further worsened by the United States' travel ban barring citizens of seven Muslim-majority countries, including Somalia, leaving many in limbo.

What's needed is a durable peace so all refugees feel comfortable enough to return home and, in the short term, funding for the countries hosting refugees.

Notes

1 See www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx accessed 7 June 2017.
2 *Ibid* at i.
3 The Convention entered into force on 22 April 1954.
4 The 1967 protocol removed the geographic and temporal limits of the 1951 Convention.
5 Sergio Peçanha and Tim Wallace, 'The Flights of Refugees Around the Globe' *The New York Times* (21 June 2015) www.nytimes.com/interactive/2015/06/21/world/map-flow-desperate-migration-refugee-crisis.html?_r=0 accessed 8 June 2017.
6 See www.ohchr.org/EN/NewsEvents/Pages accessed 22 August 2017.
7 This author shares in the conclusion made in the report.
8 See https://en.wikipedia.org/wiki/Dadaab accessed 7 June 2017.
9 Petition No 227/2016.
10 Act Number 13 of 2006, Laws of Kenya.
11 Ben Rawlence, 'The Other Refugee Crisis' *The New York Times* (9 October 2015) www.nytimes.com/2015/10/10/opinion/the-other-refugee-crisis.html?_r=0 accessed 18 July 2017.

Migration and piracy as new challenges to international law

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Summary

This article deals with the lack of clear definitions and policy of some modern threats such as piracy and migration in the international legal arsenal. It explores some causes of the migratory crisis, mainly due to an unsuccessful North-South cooperation and tries to propose solutions based on a multidisciplinary approach that takes into account different aspects such as socio-economic, historical, political or cultural. In this article, the international regulation of the protection of human life at sea is explored as well as the progress made by the African Union and West African countries in fighting maritime piracy in the Gulf of Guinea.

Introduction

The modern world is full of new challenges that sometimes go beyond established legal regulations. In fact, the history of science in general and law, in particular, is gradual and laws regulating relations between people, governments and organisations also evolve according to events. International law itself has evolved incredibly since its origins but is still facing new threats such as modern piracy, terrorism, human trafficking and migration-related issues. It is well known that relations between states and organisations are regulated by customs, principles of law and treaties, the latter having been adopted for the most part after the Second World War, and are encountering new threats as the sectors of activity they regulate are subject to tremendous changes in the 21st century. This situation highlights that only complex legal solutions involving a multidisciplinary approach taking into account socio-economic, historical, political or cultural aspects can solve modern challenges.

Risked migration on Mediterranean routes

As mentioned above, one of the modern threats facing contemporary societies is the issue of death at sea when thousands of migrants cross the Mediterranean Sea and unfortunately lose their lives. This situation is not honourable for our democracies and doesn't reflect our real technological evolution. Moreover, it is an offence to the right to life, according to Article 3 of the Universal Declaration of Human Rights.[1] Risked and illegal migration causing casualties represents a real challenge for European and African governments as death records are beaten every year. In fact, several legal instruments regulate the protection of life and property at sea. Among them, we can mention the International Convention for the Safety of Life at Sea (SOLAS) 1974, the International Convention on Maritime Search and Rescue (SAR) 1979 and the

United Nations Convention on the Law of the Sea 1982. Unfortunately, in these treaties, it is impossible to place responsibilities in the perilous crossing of the Mediterranean as this phenomenon is relatively modern. According to the United Nations Department of Economic and Social Affairs, Population Division, nearly two-thirds of all international migrants live in Europe (76 million).[2] This situation represents a real challenge as casualties at sea beat all records as, according to the International Organization for Migration, 3,283 lives were been lost in 2014, 3,784 lives in 2015 and at least 5,143 in 2016.[3] This situation has led to the creation of the European Border and Coast Guard Agency, a new coordinating organ for the Schengen zone, which replaced Frontex, the European Union agency in charge of managing the cooperation between national border guards security. Compared to precedent years, the death toll this year is limited to 1,808 so far, as of June 2017, thanks to a complex policy involving more actors such as non-governmental organisations, international organisations, rescue committees and volunteers, a better international cooperation between coastal governments (EU-Turkey, Italy-Libya), structural changes of leading agencies and technological tools used in order to save lives and fight against smugglers. Modern challenges and their consequences prompt us to improve our ideology, amend our treaties, seek multidisciplinary solutions that take into account many aspects of our society and, lastly, encourage us to improve the cooperation and development process in countries undergoing deep crises. Helping Libya secure its waters by training the Libyan coast guard and navy, together with the EU Naval Force, will help to curb the death toll in the Mediterranean.[4]

Modern piracy in the Gulf of Guinea

Another well-known modern issue undermining the evolution of developing countries, especially in the Gulf of Guinea, is piracy. The author dealt with this problem in a publication[5] dating from 2015 and, since that time, the situation has apparently become worse. Piracy in the Gulf of Guinea interferes with the normal operation of trade and maritime transport, itineraries that pass through the sub-region. The threat of maritime piracy entails not only an increase in the cost of the safety of people and goods carried but also the potential to bring the case to an environmental catastrophe. Sea pirates captured ships with chemicals, oil or nuclear waste, and this, of course, is a major environmental threat to the whole sub-region's marine life and several transnational watercourses. This situation jeopardises not only the environment but also the economies of the countries concerned, as many foreign companies ceased business relations with their partners in the Gulf of Guinea to avoid attacks or ransom. Indeed, the modus operandi of pirates has changed in the course of the years as they passed from the hijacking of ships and armed robbery to kidnapping, a lucrative activity as they receive ransoms before releasing their hostages. This makes West African coasts one of the most dangerous to navigate in the world, if not the most dangerous. This modern issue in that region with limited economic means definitely undermines states' credibility, maritime security, business activities and development as this fast-growing area of the world evolves, thanks to exports and various port activities allowing it to have a high rate of growth.

Legal international treaties have been unable to solve this modern issue as piracy is most of the time qualified as sea robbery and maritime piracy at sea as banditry or armed robbery at sea. In some countries, maritime piracy in the port is often classified as theft. The UN Convention on the Law of the Sea of 1982, in its Articles 100 and 108, doesn't remove completely all the questions and the lack of clear definition allows attackers to escape condemnation or deserved punishment.

As a complex solution to this issue, the African Union has adopted the 2050 Africa's Integrated Maritime Strategy, a framework that has been in force since January 2014 to improve African Maritime capacity and to ensure its sustainability. Additionally, it adopted a binding charter on maritime security and safety in Lomé during a special session built on the results of the summits on Piracy held in Yaoundé (June 2013) and the Seychelles (February 2015).[6] Mostly affected by the detrimental effects of piracy, Nigeria, in addition to international treaties, has decided to equip itself with an Executive Bill, a domestic regulation added to its legal arsenal in order to fight this modern issue and target a record of being 100 per cent piracy free in 2017.[7]

In conclusion, it is important to emphasise that complex problems

sometimes require complex solutions that encompass the various aspects of our societies, thereby enhancing our ability to cope with new challenges. It is unnecessary to point out that unemployment, idleness of youth, the lack of integration and adequate policies to cope with contemporary issues reinforce crime and obviously favour threats such as piracy, terrorism, illegal immigration and death at sea. International treaties are certainly the way to regulate relations between nations and individuals but, as long as the inequalities persist and as long as the cooperation between North-South and South-South does not improve, our societies will, unfortunately, continue to face more extraordinary challenges, thus putting in doubt the immense achievements of our civilisation.

Notes

1 See www.un.org/en/universal-declaration-human-rights accessed 14 June 2017.
2 United Nations, Department of Economic and Social Affairs, Population Division (2016). International Migration Report 2015: Highlights, p 5 (ST/ESA/SER.A/375).
3 See https://missingmigrants.iom.int/mediterranean accessed 14 June 2017.
4 See https://eeas.europa.eu/headquarters/headquarters-homepage_en/19163/EU-Libya%20relations,%20factsheet accessed 14 June 2017.
5 Mensah C Marius, 'Piracy as a New Threat for West African Sustainable Economic Development', Africa and International Law, Proceedings of the Roundtable Discussion, Blischenko Congress, 11 April 2015 chair of International Law of the Peoples' Friendship University, of Russia.
6 See www.african-union-togo2015.com/en/accueil accessed 14 June 2017.
7 Michael Cleary, 'Nigeria: NIMASA targets 100% piracy free 2017', (February 2017) *OPS Maritime Security*, http://maritime-security.opsglobalriskmanagement.com/post/nigeria-nimasa-targets-100-piracy-free-2017 accessed 14 June 2017.

Expediency in exchange for rights: the necessity for legal and procedural safeguards at all stages of the Dutch asylum procedure

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Summary

In the last few years, the Dutch asylum system has seen adjustments to its procedures that favour expediency over the legal safeguards guaranteed to asylum seekers through the European Procedures Directive. This article looks at the identification and registration phase and questions the weight put on the 'front-end' of the Dutch asylum procedure without the corresponding legal and procedural safeguards.

Introduction

The European 'refugee crisis' of the last few years has caused Member States to explore new measures aimed at expediting various aspects of the asylum procedure. The Netherlands has been no stranger to the influx of asylum seekers and has also sought to adjust its practice accordingly. One such trend can be seen in the implementation of a 16-page registration form for Syrian and Eritrean asylum seekers that apply for asylum in the Dutch village of Ter Apel.[1] Alongside the registration form that has been in place since November 2014, a registration interview takes place during the identification and registration phase. This interview is conducted with all Ter Apel applicants irrespective of their nationality. The application centre in Ter Apel is for asylum seekers arriving by land, meaning that all asylum seekers that irregularly migrated via the Mediterranean Sea and eventually reached the Netherlands are required to register at Ter Apel.

The Netherlands is a member of the

European Union and, as such, its national laws and policy changes must conform to European law. The (recast) Procedures Directive[2] specifically sets out a minimum standard of rights and protections for asylum procedures by which all Member States are forced to abide. Both the registration form and interview take place *before* the official asylum procedure begins, which calls into question whether the asylum seeker is safeguarded by the rights and protections afforded him in the official asylum procedure, namely the right to legal information and legal assistance in all stages of the procedure.[3] The question then arises whether, given the weight of the information that asylum seekers provide the Dutch authorities during the identification and registration stage (I&R)[4] at Ter Apel, does a lack of access to legal and procedural information, counselling and advice prior to this stage constitute a breach of the protections set out in the Procedures Directive?

Given the current political climate in which expediency tends to trump due process when it comes to asylum seekers, this article seeks to uncover whether the I&R stage of the asylum procedure breaches European law. The author will argue that, because I&R is not formally recognised as part of the asylum procedure, the rights and securities guaranteed by the Procedures Directive are circumvented by the Dutch authorities. This is particularly unsettling when understanding the gravity of the information that asylum seekers are required to provide at this stage.

To begin, this article will provide a legal framework within which asylum law operates in the Netherlands. Next, the General Dutch Asylum Procedure will be outlined, with specific attention to the I&R stage. I&R will then be evaluated within the context of Dutch and European law. The significance of the information that is gathered in the I&R stage will then be established on the basis of several (theoretical) consequences of omissions or oversights on the part of the asylum seeker in this stage. Finally, several recent cases that incorporate information gathered in the I&R stage will be highlighted to establish the need for legal and procedural information and/or legal aid prior to the I&R stage.

Legal framework

The most important sources of Netherlands' asylum law can be found in the Aliens Act 2000, Aliens Decree 2000 and the Aliens Circular 2000. An asylum application in the Netherlands is accepted on the grounds[5] that an asylum seeker is either:

- a refugee in the sense of the 1951 Refugee Convention;[6] or
- a refugee that has shown that there are substantial grounds for believing that they are at risk of being subjected to real harm in the country to which they would be expelled.[7]

The nuances of who ultimately has a right to asylum fall outside the scope of this article. The focus of this article is the procedure leading up to the acquisition of the asylum status and the rights and protections guaranteed by the Procedures Directive for all asylum seekers.

The Common European Asylum System, of which the Procedures Directive is a part, 'is a constituent part of the European Union's objective of establishing progressively an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Union'.[8] The Procedures Directive itself aims to create a minimum standard of procedural rights and protections so that asylum seekers are equally treated (at least at a minimum level) regardless of where in Europe they apply for asylum.[9] As the Netherlands is a Member State of the EU, it is required to implement the provisions of the Directive into Dutch law within two years of its publication.[10] Regardless of whether or not a Member State succeeds in this endeavour, the Directive is legally binding and has a direct effect in all Member States.[11]

The two provisions that bear the most relevance to the question of whether I&R is carried out in accordance with the Procedures Directive are Articles 19, 21 and 22 of the Procedures Directive.

Article 19 states that, in procedures of first instance, 'Member States shall ensure that, on request, applicants are provided with legal and procedural information free of charge, including, at least, information on the procedure in the light of the applicant's particular circumstances'. Furthermore, the provision of legal and procedural information shall be provided free of charge and 'shall be subject to the conditions laid down in Article 21'.

The most relevant aspects of Article 21 dictate that this legal and procedural information may be provided by non-governmental organisations (NGOs) and that the information be granted 'through the services provided by legal advisers or other counsellors specifically designated by national law to assist and represent applicants'.

Article 22 states that applicants have a right to legal assistance at all stages of the

procedure (at their own cost) and that this assistance can, too, be provided by NGOs.

The Dutch asylum procedure[12]

Asylum seekers entering the Netherlands by land must identify and register for asylum in Ter Apel.[13] The I&R stage has a duration of three days. Following I&R, asylum seekers are given a rest and preparation period of at least six days,[14] the idea behind which is to rest from the undergone journey as well as to prepare for the upcoming asylum procedure. In this time, the asylum seeker will also be medically examined,[15] given counselling by the Dutch Council for Refugees on their rights and obligations during the asylum procedure and will meet their assigned lawyer for the first time.

With the increase of asylum applications in recent years, the period between I&R and the start of the official asylum procedure has been greatly extended to better resemble a waiting period than a formal preparation period. In a letter dated 26 September 2016, the Minister of Security and Justice stated that, until that point, asylum seekers could expect to wait at least seven months before their applications would begin to be processed. He hoped that, by October 2016, the wait time would be reduced to eight weeks.[16]

The general asylum procedure commences shortly thereafter and comprises eight consecutive days. On the first day, the first interview takes place.[17] This interview is primarily focused on the identity, nationality, family relations and travel route of the asylum seeker. Although rarely the case, the lawyer may be present during this interview.[18] The Immigration and Naturalisation Service (IND) writes a report of the first interview and, on day two, the lawyer discusses the report with the asylum seeker, records any corrections and additions that must be made to the report and prepares the applicant for the detailed interview.[19]

The detailed interview takes place on the third day and is focused on the motives of the applicant to seek asylum. The applicant and his or her lawyer receive a report of the detailed interview and, on day four, they can prepare and submit any corrections and additions.[20] On this day, the IND decides if more research and questioning are necessary to determine the outcome of the asylum decision. If so, the applicant is referred to the extended asylum procedure. If the IND intends to reject the application, they must provide a written declaration with explanation of their intention to do so on the fifth or sixth day.[21] In such a case, the asylum seeker will have the opportunity to respond to the intention of the IND with the help of his or her lawyer by the end of the sixth day.[22] The IND is required to make a formal decision by the eighth day.[23]

If, however, the asylum seeker originates from a country deemed 'safe',[24] a different procedure will be applied. The same applies for applicants that fall within the scope of the Dublin Regulation as another country is deemed responsible for their asylum. Both of these procedures can be considered 'sped-up' procedures that are aimed at issuing decisions as quickly as possible.[25] A slightly different procedure with different timelines is applied to underage asylum seekers who have arrived in the Netherlands alone. Asylum seekers submitting a new application after asylum has been denied follow a different procedure as well.

The I&R stage

Asylum seekers arriving at the application centre in Ter Apel must register themselves and formally express their interest in applying for asylum. Eritrean and Syrian asylum seekers are then given a 16-page registration form to fill in.[26] This form was introduced on 3 November 2014 to cope with the rising number of applicants[27] and is offered in Arabic and Tigrinya. After returning their filled-in forms – without the help of a translator – to a host in the waiting room,[28] they are summoned by the Aliens Police. The Aliens Police[29] proceed to search the applicant (their person and baggage) and their telephones are taken into custody. With the help of a translator, personal details of the asylum seeker are then registered with an agent of the Aliens Police, such as the identity, travel route and family members of the applicant.[30] Fingerprints are subsequently taken and the Aliens Police use the accumulated information to establish whether the applicant comes from a safe country or whether another Member State is responsible for their asylum application on the basis of the Dublin Regulation.[31]

On the second day, a tuberculosis test is done and the IND takes the case over from the Aliens Police. They conduct their own research in EU-VIS to ascertain whether the applicant already has a visa elsewhere in Europe.

On day three, the registration interview

takes place. Based on the information gathered on the previous days, the IND has determined whether this interview will be a 'Dublin' interview, a 'safe country' interview or a 'normal' registration interview. The translated data from the filled-out form from day one has been inserted into the applicant's file, and the IND officer works from this information. The applicant is then questioned regarding their identity, nationality, religion, family, travel route, descriptive details about their neighbourhood of origin, work experience, military service, etc. The questions are essentially identical (although sometimes more extensive) to the questions in the registration form. The IND officer decides whether he or she repeats a question that has already been answered in the written form and/or asks supplemental/clarifying questions.[32]

Legal application and analysis of the current I&R stage

It should be noted that the I&R stage of the asylum procedure is not accounted for in Dutch law. There is no specific mention of a registration stage in the Procedures Directive or other Directives regarding asylum either. It was indeed difficult to obtain detailed information about this stage because, in official brochures and government literature, it is not considered to be part of the asylum procedure at all. For example, on the Government of the Netherlands website, the stage is separated into two parts: registration and application. The registration stage is the stage in which 'personal information' is registered, such as name, date of birth and nationality by the Aliens Police and fingerprints are taken. The website states that, in the application stage, a conversation will take place with the IND about identity, nationality and travel route.[33] On a different page of the Government of the Netherlands website, there is simply mention of 'identification and registration' without any mention of an interview.[34] Furthermore, there is no mention of the registration form in any of the accessible government literature.

Nevertheless, the information that is provided in this stage by the asylum seeker to the authorities is used for the rest of the asylum procedure, eventual family reunification procedures and, in fact, the rest of the applicant's life on European soil.

At the present time, there is no legal assistance provided prior to the I&R stage whatsoever; no lawyer or legal aid representatives are present while applicants arrive and fill in their 16-page registration form, no legal or procedural information is provided before the applicant speaks to the Aliens Police, no legal or procedural information is provided before the registration interview is conducted and no lawyer or legal aid representative is present during the interview.[35] Other than a brief mention in a brochure about the Dublin Regulation and a brochure for applicants that come from 'safe' countries, there is not even any written information given to asylum seekers about the importance of the information they are about to be asked to convey.

Although not the focus of this article, there is, furthermore, no medical assessment provided prior to the registration interview. This is important to note because of the psychological or intelligence indications that can be detected during such a medical examination.[36] These factors determine whether a specialised type of interview is required for the applicant and typically takes place during the rest and preparation period. However, given the significance of the information that is provided at this stage, such an examination prior to a registration interview could be crucial for an adequate decision.

In short, the information that the asylum seeker provides in this stage is of utmost importance, but I&R is not protected by any of the guarantees set out in the Procedures Directive.

Indeed, those intimately acquainted with the Dutch asylum procedure have made note of these developments with scepticism. In her article about the recent acceleration, extension and simplification of Dutch asylum procedures, Marcelle Reneman discusses (among other things) that the right to information of the asylum seeker is paramount.[37] She accurately notes that, if an asylum seeker does not understand (the importance of) a particular question, they may answer in a way that poses problems for them in future aspects of their procedure. Furthermore, a screening for war crimes and national security takes place in the I&R stage.[38] Anything stated or noted relating to these topics in any way during I&R stays on record, regardless of which procedure is ultimately chosen for the asylum seeker.[39] Reneman also argues that, with regard to legal and procedural information prior to the first stage of the

asylum procedure, she cannot imagine how a brochure or information packet could satisfy the requirements of Article 19 of the Procedures Directive. Amsterdam asylum lawyer Marq Wijngaarden agrees that 'information on the procedure in the light of the applicant's personal circumstance' cannot mean anything other than individualised legal information, per applicant.[40] The IND does not fulfil this requirement in any sense. There are no brochures regarding the importance of the information that is provided at this stage, there is no collective legal or procedural information given and there is certainly no personalised legal advice prior to the I&R stage. The Dutch Council for Refugees also warns of this discrepancy between the policy and practice in the I&R stage, referring to Wijngaarden's letter.[41]

Consequences of information given in the I&R stage

To the average Western onlooker of the asylum procedure, it may seem that the personal information requested in this stage is basic and straightforward. Here in the West, we do not even blink when asked to provide our birth dates, nationalities or professions to different government authorities. However, as noted by Wijngaarden, after the long, tiring and often dangerous journey that asylum seekers make before applying for asylum in the Netherlands, it is inevitable that mistakes, oversights and omissions will be made in the forms and interviews of the applicants.[42] Moreover, we cannot begin to presume all the different reasons why an applicant might purposely give (or not give) a particular answer to a particular question. While applicants have been told that they must tell the truth, they have *not* been told how the information will be used, nor that it will be used for all future procedures. They have also not been told all the different ways in which one can answer a question.

In practice, the first interview repeats many questions and themes that have already been covered in the registration interview, yet this interview takes place *after* legal and procedural information has been given and *after* specific legal advice has been given to the asylum seeker based on their own situation. Although the opportunity is given to the asylum seeker to correct or add to the information they provided in their registration interview, discrepancies in answers can call into question the credibility of the applicant. Credibility is, in turn, one of the most crucial elements of the IND's assessment of asylum requests.[43] Corrections and additions would, of course, look especially dubious in cases in which lengthy periods have passed between the registration interview and the first interview, as has been the case in the last year.

When looking at the registration form (which can serve as a reference point for the questions asked in the registration interview as well), one can imagine different consequences that may arise from incorrect or incomplete answers. Listing too many languages might call into question your country of origin. Saying you are single because you are engaged, but not married, can cause problems for eventual family reunification. Saying that you worked for the government at some point can raise questions about potential war crimes. And the list goes on. The point is, when one has not been told why the specific information provided in this stage is important for one's case nor to what end it will be used in the future, any number of mistakes or omissions could arise. Although they can theoretically be corrected, the credibility of the asylum seeker will always remain at stake.

A final category of consequences of inadequate legal assistance prior to the I&R stage are *future* ramifications for those who make mistakes, or omit details (intentionally or unintentionally) and go undetected. These individuals must live with the consequences of these inaccuracies for the rest of their lives while residing in the Netherlands. Withdrawal or non-renewal of the residence permit can result from lying during one's asylum procedure,[44] depending on the nature of the incorrect information that has been given. As such, it is in the interest of those who are not caught lying during the procedure to continue lying afterwards. A case comes to mind of an asylum seeker (Syrian, 16) that I personally know who lied about his age when he arrived in the Netherlands because he wanted to get married. He thought that one must be 18 or older to marry. However, he never did marry and now he is living as a 16-year-old in the Netherlands without the comprehensive set of rights that minors enjoy. Had he had access to legal assistance before the I&R stage and had he been

advised to tell the truth, the situation might have ended differently.

Case law

Given the myriad cases in which the IND has used information provided in the registration form and/or the registration interview as a ground for refusal of the asylum application, it is clear that this information can be used against asylum seekers at one phase or another in the asylum procedure or other related procedures. This section offers a small handful of recent Dutch cases that highlight the different ways in which the information gathered during I&R can be used in asylum procedures. In some of these examples, later rulings on the decision rectified unjustified dependency on the information provided in that stage. The aim of this section is thus to demonstrate the need for legal and procedural information prior to the I&R stage, regardless of judicial outcome.

In a case of the District Court of The Hague,[45] the religion of an Iraqi asylum seeker was called into question. He had applied for asylum based on the fact that he was no longer a practising Muslim (apostate), whose religious status would not be accepted in Iraq. He had, however, during his registration interview, answered the question of his religion with 'Islam'. The IND found this answer to clash with his asylum motives and rejected his asylum request based on – among others – this ground. There are, however, many reasons why this applicant may have responded in this way during his registration interview. One plausible reason might be that many view their religion as something that they inherit from their family, regardless of their personal viewpoints. Regardless of the reason behind this discrepancy, the fact that weight was put on his original answer before he had access to legal information or aid is highly questionable in light of the protections that are supposed to be offered during an asylum procedure.

Another relevant case is that of the District Court of Utrecht,[46] in which an asylum seeker tried to halt his Dublin transfer on the basis of his wife's residence in the Netherlands. The IND argued – and the District Court later agreed – that his relationship did not constitute one that is protected by the Dublin Regulation.[47] The IND and the Court substantiated their claim based on detailed (and sometimes contradictory) information given by the asylum seeker during his registration interview. Regardless of whether or not the applicant's claim was legitimate, the fact that final decisions were made based on the registration interview, but before the applicant had access to legal assistance, can be considered problematic.

With specific regard to the registration form, a promising ruling was made by the District Court of Amsterdam in 2015.[48] An asylum seeker had declared on his form that he was born in Sudan, but in his later interviews stated that he was born in Eritrea and moved to Sudan when he was two years old. The IND tried to reject his application because of the discrepancy, calling his credibility into question. The Court, however, ruled that, seeing as the registration form has no legal basis and does not hold the same guarantees and protections as the later stages of the asylum procedure, the information contained within it should not be overvalued.

However, shortly after this ruling, an opposing ruling was made by the District Court of Roermond.[49] In this case, the birth year of the applicant was written as 1993 on her registration form. This birth year was repeated during her registration interview. In her first interview, she stated, however, that her birth year was 1997, and the asylum registration system in Italy showed that she listed her birth year at 1996, when passing through. Ultimately, the District Court ruled that, because she had listed many different birth years, the IND was permitted to assume the accuracy of the birth year listed on her registration form.

These two contradictory rulings regarding the registration form suggest that the verdict remains unclear as to whether information provided in this stage can be given the same weight as later stages of the asylum procedure, once the asylum seeker has been provided with more legal and procedural information.

Finally, a very promising case regarding the question of legal and procedural information prior to the I&R stage can be found in the recent ruling of the District Court of Middelburg.[50] An Afghani man was told during I&R that he needed to support his asylum account with verifying documents. When he did not fulfil this obligation, the IND rejected his application instead of referring it to the extended asylum procedure. According to the Court, the IND rejected his application too quickly. Although the IND had notified him of this obligation, the Court asserted that the applicant had no knowledge of the doubt of his identity and nationality and had no legal assistance at this stage that could have guided

him in this regard. The importance placed on the lack of legal assistance in this stage could prove useful in future rulings.

Conclusion

Owing to the global developments in migration and the subsequent developments in asylum policy in the Netherlands, many adjustments have been made to the existing procedures. The result has been that much weight has been put on the front end of the asylum procedure, but without the corresponding guarantees and protections. Despite the importance of the personal information provided by asylum seekers at this stage, the I&R stage remains outside the formal purview of the law, as though the information accumulated at this stage is not integral for the processing of the asylum claim.

It is understandable that efficiency concerns and the security-related desire to identify asylum seekers quickly have led to the adoption of new measures.[51] These measures must not, however, come at the cost of the asylum seeker and the rights and protections they enjoy through the Procedures Directive. If the policy and sequence of information gathering remain the same as they are now, the Dutch government must take responsibility and ensure that the legal and procedural information offered to asylum seekers is comprehensive and personalised, as is required by the Procedures Directive.

As a bare minimum, the government could commission the Dutch Council for Refugees to provide small-scale information sessions to those that have just arrived at Ter Apel. Through such a small improvement, applicants would at least have a better grasp of the significance of the I&R stage and the way in which the information they provide will be used in the future.

However, it can also be argued that nothing less than a personal meeting with an asylum lawyer before the asylum seeker speaks a single word or fills out any form could satisfy the requirements of the Protections Directive. Given the fact that increasing emphasis is being put on the front end, the most practical – but, more importantly, most *just* – solution would be to bump up the rest and preparation period to the moment the applicant steps foot in Ter Apel. In this way, the asylum seeker would receive the adequate personalised legal and procedural information that he or she deserves and that is guaranteed by European law.

Notes

* The author is studying for a Masters in the International Migration & Refugee Law programme at the Vrije Universiteit in Amsterdam. This article has not been written within the author's capacity as a legal adviser at the Dutch Council for Refugees. As such, the opinions expressed do not necessarily reflect the opinions of the Dutch Council for Refugees.

1 Aliens Circular 2000 C1/2.1.

2 Council Directive 2013/32/EU of 29 June 2013 on the common procedures for granting and withdrawing international protection (recast) (from hereon in 'Procedures Directive').

3 Article 19 in conjunction with Art 22 of the Procedures Directive.

4 In recent government literature, this stage has often been referred to as '*Identificatie & Registratie*' (I&R). However, in other government and non-profit websites and brochures, the name varies greatly. This is likely to be a result of the fact that it is not formally regulated.

5 Article 29 of the Aliens Act 2000.

6 Article 1 of the Convention defines a refugee as 'a person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it'.

7 This second ground is commonly referred to as 'subsidiary protection'. Syrian applicants fleeing from the current conflict fall under this ground, for example.

8 Preamble (2) of the Procedures Directive.

9 M Reneman, 'Herziene Procedurerichtlijn: introductie' *Verblijfblog* (30 June 2015), http://verblijfblog.nl/?p=956 accessed 22 August 2017.

10 The deadline for the implementation of the Recast Procedures Directive by all Member States was 20 July 2015.

11 Article 288 of the Treaty of the Functioning of the European Union. See also *Francovich v Italy* (Case C-6/90) ECJ (19 November 1991) .

12 The information outlined in this section has been accumulated through brochures and websites created by the Immigration and Naturalisation Service, the Government of the Netherlands and the Dutch Council for Refugees. These sources provide nearly identical information that pertains to the current, standard procedure in the Netherlands as of June 2017. It also coincides with information gathered by the author at the time of her visit to Ter Apel in December 2016. When a particular aspect of the procedure is incorporated into Dutch law, the legal provision has been noted.

13 The three-day I&R stage will be outlined in detail in the following section.

14 Aliens Decree 2000 3.109.1.

15 The goal of the medical examination in this stage of the procedure is to determine whether there are physical or psychological factors or circumstances that the Immigration and Naturalisation Service must take into account.

16 Letter from the Minister of Justice and Security to the Chairman of the Second Chamber of Parliament, 26 September 2016, *Antwoorden Kamervragen over 300 medewerkers IND weg.*

17 Aliens Decree 2000 3.112.

18 Dutch Council for Refugees, 'Introductie VWN – De

Algemene Asielprocedure', last updated 17 November 2016. Available at www.vluchtweb.nl accessed 22 August 2017.
19 Aliens Decree 2000 3.113.
20 Aliens Decree 2000 3.113.5.
21 Aliens Decree 3.114.1.
22 Aliens Decree 3.114.2.
23 Aliens Decree 3.114.6. Sometimes, at this stage, the IND decides to refer the applicant to the extended asylum procedure after all.
24 Article 36 of the Procedures Directive.
25 For a detailed account of the legal issues with the new sped-up procedures, see M Reneman, 'Spanning met het Europees Recht' *A&MR* 2016, Nr 6/7, pp 264–274.
26 At the time of introduction, this form was only used for Syrian applicants. It has since been implemented for Eritrean asylum procedures as well. A Dutch/Arabic version of the form is on file with the author.
27 'Signalering AC relevante zaken Nr 27', 6 November 2014. This is a legal newsletter circulated internally at the Dutch Council for Refugees to notify staff of developments that are relevant to legal aid at the Application Centres. Available at www.vluchtweb.nl accessed 22 August 2017.
28 *Ibid.*
29 In some places, there is specific reference to the AVIM, the Afdeling Vreemdelingen Identiteit en Mensenhandel (the Department of Aliens Identity and Human Trafficking).
30 Immigration and Naturalisation Service (brochure), 'Before your asylum procedure begins', August 2015, http://bit.ly/2jP77tD.
31 Dutch Council for Refugees, 'Introductie VWN – De Algemene Asielprocedure', last updated 17 November 2016. Available at www.vluchtweb.nl accessed 22 August 2017. This information was also confirmed by the Aliens Police agents with whom the author spoke during her visit to Ter Apel.
32 This information was witnessed during two registration interviews that were attended by the author and confirmed by the IND officers when questioned about this practice.
33 Government of the Netherlands, 'Asielbeleid: Hoe verloopt het aanvragen van asiel?' www.rijksoverheid.nl/onderwerpen/asielbeleid/vraag-en-antwoord/procedure-asielzoeker accessed 26 December 2016. .
34 Government of the Netherlands, 'Asielbeleid: Behandeling Asielaanvragen', accessed 26 December 2016. Available at www.rijksoverheid.nl/onderwerpen/asielbeleid/inhoud/procedure-behandeling-asielzoekers.
35 A lawyer or legal representative *may* be present at the interview but, at this stage of the procedure, there has been no lawyer appointed to the case. For this reason, they are not present.
36 This examination takes place during the rest and preparation period.
37 Although her discussion focuses on the right to information during an accelerated procedure, this author would argue that it is applicable for all asylum procedures.
38 Staatscourant 2016 Nr 10582, 2 March 2016.
39 Reneman, *A&MR*, p 270.
40 Letter from Marq Wijngaarden, asylum lawyer at Prakken D'Oliviera, to the Dutch Council for Refugees, dated 6 October 2014, on file with author.
41 See n 27, above.
42 Letter from Marq Wijngaarden.
43 Credibility of the asylum seeker and their account is present in every report. On 3 May 2016, the Advisory Committee on Migration Affairs released advice regarding the 'Assessment of the credibility of the asylum request'. The response to this advice can be found in *Kamerstukken II* 2016/17, Nr 2269.
44 Article 16, paragraph 1i of the Aliens Act 2000.
45 District Court of Den Haag 25 August 2016, AWB 16/16885.
46 District Court of Utrecht 29 September 2016, AWB 16/20224 and AWB 16/20226.
47 Article 2g of the Council Regulation No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).
48 District Court of Amsterdam 23 November 2015, AWB 15/19072.
49 District Court of Roermond 16 December 2016, AWB 15/20715.
50 District Court of Middelburg 4 August 2016, NL16.1706.
51 For a detailed account on the links between I&R and national security, see: *Kamerstukken II* 2016–17, 19 637, Nr 2272. In this letter, the Minister of Security & Justice outlines to the Second Chamber of Parliament that the I&R stage is an important link between national security and immigration. Since 2015, there has been an emphasis in I&R on spotting early signals of terrorism and criminality.

RIGHT TO INFORMATION

User ownership in internet governance – a human rights perspective

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Summary

Recent activity considering the conversion of social media platforms, such as Twitter, to a cooperative business form are reminiscent of early labour movement activity that asserted a right to collective action.

Introduction

There is a tendency to see internet regulation as *sui generis*. Its advent is still recent enough for us to marvel at how it has put information about virtually everything literally at our fingertips; how it allows us to find people anywhere who share our interests, if not our views.

Offsetting this celebration is the worrying fear that others might use – and the occasional awareness that others are using – this power in ways that threaten our personal interests and our historical values. The order of magnitude of the information – raw and aggregated, small data and big – worries us that our safeguards are no longer fit for purpose. The random misuse of data by a sole actor is disconcerting, but doesn't fuel the dystopian fears of systemic infringement.

This concern is sharp around the reach of government surveillance and corporate use of big data. When government is itself the worrying actor, the issue is confounded by the competing public interests – such as security – that are pitted against our individual rights.

In a period increasingly described as populist, it is easy to believe that old ideologies are wholly discredited and have nothing to teach us that all the rules are being rewritten. While much is changing, the new iterations are natural descendants from our shared human experience.

A century ago, after two decades of isolated incidences and experimentation, conditions erupted in the Labour Movement. It was notable as being consciously international, drawing inspiration from the acts of individuals in other nations with whom they felt solidarity in what they saw as exploitation by an international elite. Their language may sound quaint in retrospect, but the frustrations are clear and recognisable even today.

Political themes emerged to make sense of the disorder, such as the anarchists' famous 'property is theft' and Marx's characterisation of history as class struggles. A growing sense that the system had become unjust coloured the times, along with the notion that a few people controlled more than could be tolerated.

The development of the concept and rights of labour, and similar core human concepts, is a useful review, despite the many specific and contextual differences, because it can signal a path for shared struggles today. The idea of labour eventually drew people together – on one side or the other – in a story that played out in violence and execution – because it eventually was so much more than a business transaction.

There is wide appreciation today that the internet is more than a transactional business platform. Its social dimension is well documented and personally experienced by virtually every individual with access to basic technology infrastructure. Access to information – gaining it, controlling it, preventing it – is a pivot point for justice.

The infrastructures of the 19th century were the factories and machines that symbolised the industrialists who disrupted the artisan's world. A middle class grew amid this disruption, but ultimately not fast enough to offset the accumulation of despair among those displaced at the end of the chain. The machines leveraged manpower but left the men behind. Eventually, the exercise of collective action became a balancing force.

The infrastructure most spoken of today is internet-related – social media and

platforms. While this infrastructure, as was that of the past, is highly leverageable, its value grows rather than decreases by the number of people it attracts. The more individuals the factories engaged, the lower the profits; the more individuals who come to a 'sharing' platform, the greater the platform's value. This has implications over time on our shared sense of justice and of how benefits should be apportioned.

Another factor affecting this shared sense is the degree of dominance the model asserts in our daily lives. Eventually, the admired early machines and model factories became the dominant model and, at that scale, they were dirty and dehumanising, impelling a counteraction to balance the scales. As long as there are practical options for livelihoods and sustenance, for commercial transactions and social encounters, inequitable models can coexist with minimal general concern.

One antidote to perceived and real 'big abuse' is to encourage collective action – user engagement in internet governance. The more channels for the voice of ordinary citizens, the greater their influence and the lower the level of free-floating anxiety.

At this year's annual stockholders' meeting of Twitter, a stockholder's proposal was presented to undertake a study to examine the conversion of Twitter to a cooperative or similar business structure, one with 'broad-based ownership and accountability mechanisms'. The proposal did not pass, but received enough votes to allow its reintroduction in the future. Without delving into the merits or specificities of the Twitter proposal, the feasibility of user ownership of internet 'utilities' such as Twitter deserves some attention.

There may be distinct marketing advantages for the Twitter brand to be owned by its users. How the current shareholders would receive value through a transition to such a model would need to be assessed, but there are good examples of cooperative conversions to examine. Ace Hardware is one strong brand that converted to a cooperative owned by local stores.

The 'purest' model of cooperative ownership would have each user-owner providing an equal capital contribution and each receiving an equal vote. An alternative would allow for a portion of shares to be held by non-voting investors who would receive dividends for their investment. A further variation envisions favourably-termed government investment, such as that used to establish the rural electric cooperatives a century ago, cooperatives that still today power 75 per cent of the land mass of the United States.

Twitter's users differ from the workers of a century ago in that they are not attempting to gain a livelihood through the platform. Uber's drivers often are, and they present a more troubling comparison, as the equities in today's 'sharing economy' have yet to evolve.

No one is forcing anyone to work for Uber, of course, or, more correctly, to sign up to be a driver, since Uber does not accept that drivers work for them. Similar arguments were common a century ago: no one required factory workers to work at the factory. Eventually, however, the factories became so dominant and the conditions were perceived to be so intolerable that the public acceptance shifted.

By contrast, there is something in business models that are owned by their users, by those most vested in their services, that incline them towards a long-term perspective and sustainability. The Green Bay Packers has built a lasting franchise through community ownership. The Associated Press is a global, not-for-profit news cooperative. SWIFT, the leading provider of secure financial messaging services, is a global cooperative.

When power becomes concentrated in a few people in ways that are widely deemed to be inappropriate, collective action has arisen as a correction. The need to engage evolves over time, first in protest and later in systemic change. The action can be on behalf of the people, typically through government action – regulatory or judicial – or it can be by the people themselves.

Governments have seldom been at the forefront of systemic change, however. They enforce the laws that have developed in response to practical problems. They try to address the unintended consequences of prior actions or societal evolution. Sometimes, they end up cast as part of the problem, in league with those benefiting most from the current structures, who are seen as exerting undue influence on policy and the command of policing resources.

The right to collective action was inconceivable until it wasn't. Even then, it took reformers, progressive politicians and enlightened business leaders to strengthen the concept to the point where it ensured true negotiation. The overall impact of this doctrine on societal growth and welfare over time has been tremendous.

Is the right to tweet only for presidents?

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Summary

The age of information technology offers a unique environment for human rights. On one hand, the ease of communication afforded by the internet allows for the easy and efficient promotion of ideals and exposure of abuse. On the other hand, owing to the increasing use of the internet as an activist medium, governments are actively taking measures to monitor and limit the usage of the internet by their citizens. In such a volatile climate, the protection of technology-related human rights is of extreme importance.

Introduction

The advent of the internet and the recent proliferation of social media platforms changed the dynamic of information communication allowing for the active participation of citizens in information production and dissemination. Social media sites in particular give access to 'casual' reading, while blog sites can provide a deeper, more substantive pool of knowledge. In this vein, the internet has become an exceptionally important tool in the promotion of human rights by giving a voice to the previously voiceless, and the exposure of abuses or denial of rights. By way of blog post, tweet or share, one can gather myriad perspectives on events, issues and groups. Likewise, one can expose problems at the click of a button. As approximately half of the global population have internet access[1] – predominately based in the developed world but also encompassing 940 million users in what the United Nations terms 'least developed countries' – no longer can we shut our eyes, nor can governments plead ignorance or easily hide their actions.

The prevalence of the internet in everyday life has led to discussions of the importance of rights on the internet. This importance has been underlined by the UN demonstrating a clear commitment to the protection of rights on the internet, passing a consensus resolution in 2012[2] on their promotion, protection and enjoyment. The resolution affirms that individuals are afforded the same rights online that they would enjoy offline. However, the main point of discussion in terms of internet rights tends to focus on the right to freedom of expression or opinion. This can be seen by Article 19 of the Universal Declaration of Human Rights[3] and the International Covenant on Civil and Political Rights.[4] While these provide an express right to say things, there is not a clearly defined right to access the forum in which to say them. The importance of access to forum, in this case the internet, may be becoming more important than the right to expression.

In response to the increasing use of the internet as a tool of social and political activism, governments are taking steps to restrict or monitor their citizens' internet usage. As shown by recent events such as the US National Security Agency monitoring of citizen internet usage and the Australian metadata laws, strict internet laws are no longer the sole domain of authoritarian governments or dictatorships. While these events were not a direct denial of internet access, the question remains as to whether laws preventing internet access – to either certain websites or a blanket ban – could be a reality in the near future, particularly in the current tumultuous political climate. With this in mind, it may be the appropriate time for the right to internet access to be brought to the forefront of human rights discussions.

It is arguable that, under Article 19 of the Universal Declaration of Human Rights, an implied right to internet access exists under the umbrella of freedom of expression 'through any media'. The cases of *Yildirim*,[5] *Cengiz*[6] and *Kalda*[7] support this assertion, with the European Court of Human Rights finding that governments cannot restrict freedom of expression by blocking access to webpages – a personal blog, YouTube and websites contacting legal advice for prisoners respectively. However, these cases did not directly deal with the physical act of accessing the internet, leaving the status of the right as unresolved. In any case, as it has been made

quite clear that preventing an individual from receiving or sending information is a breach of human rights, the next possible avenue of government intervention may be to cut it off at the source. In anticipation of this, the need for an express right of internet access becomes a necessity.

An example of the need for internet access is highlighted by Aladdin Sisalem – colloquially known as 'The Last Man on Manus Island'. Arriving in late 2001, Sisalem, along with 120 other asylum seekers, was detained on Manus Island due to the Australian government's Pacific Solution. While the other asylum seekers were later resettled in New Zealand, Sisalem was left as the sole resident of the Manus Island detention centre, with only his guards and a cat as his company. Sisalem was restricted to two phone calls a month but was otherwise granted free access to the internet, which allowed him to connect with the outside and tell his story: 'The Internet is the only window I can look out from this detention centre. So, I spend all my day inside the room. Finding research for information, trying to find help outside, that's all that I can do here.'[8]

Without the ability to communicate with the outside world, there is no telling how much longer Sisalem would have remained on Manus Island, or where he could have ended up. The internet provided him the means to communicate his situation and expose the denial of his fundamental rights. This begs the question: how many other Aladdin Sisalems exist in this world without the means to be heard?

Freedom of expression has been described as an essential enabler of other rights by UN Special Rapporteur Frank La Rue in his 2011 report: 'By acting as a catalyst for individuals to exercise their right to freedom of opinion and expression, the Internet also facilitates the realisation of a range of other human rights.'[9] With this emphasis placed upon the right to express an opinion, should it not follow that the right to the means to exercise this right should be just as, if not more, important?

Notes

1 'Internet used by 3.2 billion people in 2015' *BBC News* (online) (26 May 2015), www.bbc.com/news/technology-32884867 accessed 22 August 2017.
2 United Nations Human Rights Council, 'The promotion, protection and enjoyment of human rights on the Internet, 20th Session', (5 July 2012) UN Doc A/HRC/20/8.
3 Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, (10 December 1948) UN Doc A/810.
4 International Covenant on Civil and Political Rights, GA Res 2200A (XXI), 21 UN GAOR Supp (No 16) at 52, UN Doc A/6316 (1966); 999 UNTS 171; 6 ILM 368 (1967).
5 *S Ahmet Yildrim v Turkey* App No 3111/10 [2012] ECHR 2074.
6 *Cengiz and Others v Turkey* App No 48226/10 and 14027/11 (ECHR 1 Demeber 2016).
7 *Kalda v Estonia* App No 17429/10 (ECHR 19 January 2016) ECHR.
8 Olivia Rousset, 'Last Man on Manus Island', *SBS* (online), (31 March 2004, updated 23 August 2013) www.sbs.com.au/news/article/2004/03/31/last-man-manus-island-0 accessed 22 August 2017.
9 Frank La Rue, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc A/HRC/17/27.

UN AND INTERNATIONAL ORGANISATION LIABILITY

The UN's liability for civilian harms: lessons from cholera in Haiti

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Summary

The United Nations enjoys broad immunity from suit, but has well-established legal obligations to compensate civilians harmed by its tortious conduct. Yet, it took years of advocacy – from the streets of Port-au-Prince to legal action in New York – to persuade the UN to redress harms it caused by recklessly introducing cholera to Haiti. Recently, the UN has recognised a moral, but not legal, duty to victims. This gap between the UN's liability on paper and its practice violates victims' right to a remedy, and undermines the UN's own credibility in promoting the rule of law and human rights.

Introduction

A number of widely publicised scandals have recently revealed failures by the UN to remedy civilians harmed by its peacekeeping operations. In particular, the UN's response to its reckless introduction of a massive cholera outbreak in Haiti has exposed a stark divide between the scope of the organisation's liability on paper and its compliance in practice. This accountability gap denies victims of UN harms the remedies they are entitled to under human rights law and the UN's legal frameworks, and undermines the UN's own moral standing as a promoter of rule of law. As the UN devises a new approach to cholera in Haiti, it still has an opportunity to rectify this – but doing so will require providing victims with justice, not charity.

The UN's responsibility for cholera in Haiti

Cholera erupted in Haiti in October 2010 for the first time in Haiti's history.[1] The outbreak was quickly traced to a UN peacekeeping base, which had just received a new deployment of peacekeepers from Nepal. Following UN protocol, the peacekeepers were not screened for cholera prior to deployment, despite cholera being endemic in Nepal.[2]

A panel of experts appointed by the UN found that the UN base recklessly managed its waste, creating a high risk of environmental contamination.[3] Broken pipes discharged wastewater from the base directly into a nearby tributary, and untreated human waste was dumped in uncovered pits that often overflowed into the adjacent waterway.[4] Cholera-contaminated waste entered the tributary, which feeds into Haiti's largest river that tens of thousands rely on for drinking, bathing and farming. From there, the disease spread like wildfire across the entire country.

Cholera is easily preventable with clean water and treatable through rehydration interventions. Yet, faced with severe under-resourcing, the Haitian health system and humanitarian actors scrambled to respond. At the height of the epidemic, cholera was infecting one person every minute.[5] Families watched their loved ones succumb to the disease and die within hours. Over the past seven years, at least 9,600 people have died and over 800,000 have been sickened.[6] While the infection rate has dropped significantly in recent years, the epidemic continues to date.

UN's liability for tortious conduct

The tortious conduct that resulted in the outbreak of cholera in Haiti squarely engages the UN's liability to individuals. Under the Convention on Privileges and Immunities of the United Nations (CPIUN), the UN is obligated to 'provide for appropriate modes of settlement' of private law claims against it.[7] Such claims are defined to include third-party claims for personal injury, illness or death attributable to peacekeeping operations.[8] The Status of

Forces Agreements between the UN and peacekeeping host countries, including Haiti, requires that claims not amicably settled through the UN's internal claims processes be decided by an independent standing claims commission.[9] In the context of the UN's broad immunity from national courts, these requirements safeguard civilians' ability to access remedies, a fundamental human right recognised in major human rights instruments.[10]

Despite these legal obligations and the overwhelming evidence establishing responsibility, the UN refused to address claims filed by cholera victims. In November 2011, Haitian human rights organisation *Bureau des Avocats Internationaux* (BAI) and its US partner, the Institute for Justice & Democracy in Haiti (IJDH), filed claims on behalf of 5,000 victims seeking remedies consisting of:

1. investments in water and sanitation infrastructure to combat the epidemic;
2. just compensation; and
3. a public apology.[11]

After 13 months, the UN summarily dismissed the claims as 'not receivable' because 'consideration of these claims would necessarily include a review of political and policy matters'.[12] The UN refused to provide further explanation, and denied the claimants' request for referral to a claims commission on the circular grounds that such referrals are unmerited for claims that are not receivable.[13]

Legal commentators, including the UN's own former lawyers, have widely rejected this response as arbitrary and non-compliant with its legal obligations. For example, Bruce Rashkow, former Director of the UN's General Legal Division, commented that, 'as the head of the UN legal office that routinely handled claims against the Organization for some ten years, I did not recall any previous instance where such a formulation was utilized in regard to such claims'.[14]

The UN's response also revealed a serious accountability gap with global implications. A team of legal scholars at Yale University found that the UN has never established the requisite claims commission, despite having signed some 32 agreements mandating it.[15] There is, therefore, no body with jurisdiction to review unilateral decisions by the UN to reject claims in the peacekeeping context. The BAI and IJDH challenged the UN's denial of remedies in US federal court, arguing that its refusal to receive the claims placed it in breach of the agreements that grant it immunity. But the court sided with the UN, holding that immunity is absolute and unaffected by any purported breach of the organisation's reciprocal duties.[16] Thus, victims were left without any formal channel to seek remedies.

This outcome spurred global outcry and deeply undermined the UN's credibility, in Haiti and beyond. Media outlets around the world criticised the response with headlines like 'UN hypocrisy in Haiti', 'Double standards', and 'In Haiti, the UN's behavior is a far cry from being the conscience of the world'.[17] The UN spokesperson in Haiti reported that she 'can't mention the [M]ission without someone asking her about cholera or the cases of abuse', and noted that 'it is the opposite of why we are here, to defend the highest values and ideals and this is killing our credibility worldwide'.[18]

The wide-ranging criticisms culminated in a report by the UN Special Rapporteur on Extreme Poverty & Human Rights, Philip Alston, where he summarised the situation as follows:

> 'The legal position of the United Nations to date has involved denial of legal responsibility for the outbreak, rejection of all claims for compensation, a refusal to establish the procedure required to resolve such private law matters, and entirely unjustified suggestions that the Organization's absolute immunity from suit would be jeopardized by adopting a different approach. The existing approach is morally unconscionable, legally indefensible and politically self-defeating. It is also entirely unnecessary.'[19]

The report was sent to the UN Secretariat, and leaked to the media in August 2016. In the context of intense and mounting pressure, it constituted the final admonition that finally spurred the UN to change course.

The UN's new approach

On 1 December 2016, the Secretary-General presented a public apology to the Haitian people at the General Assembly. In Haiti, victims gathered to watch a livestream, breaking into spontaneous applause in response. The Secretary-General also launched a 'New UN Approach to Cholera in Haiti', a $400m plan to (1) intensify efforts to treat, control and eradicate cholera; and (2) deliver 'a package of material assistance and support to those Haitians most directly affected by cholera, centered on the victims and their

families and communities'.[20] The latter is intended to signify a 'concrete and sincere expression of the Organization's regret'.[21]

This response was a historic breakthrough in the struggle for justice for victims, and marked a major shift in the UN's position. Significantly, however, the UN's new response was carefully framed outside the context of its legal responsibilities. The Secretary-General's apology stopped short of acknowledging legal responsibility or even explicit factual responsibility for having introduced cholera, instead stating that the UN 'simply did not do enough with regard to the cholera outbreak and its spread in Haiti' and was 'profoundly sorry for [its] role'.[22] Similarly, the UN's report on the New Approach, while acknowledging that the cholera crisis had become a 'stain on the Organization's reputation', used the language of 'moral duty'.[23] UN representatives stressed that the organisation's legal position had not changed.

The UN's elision was criticised by many observers, including Philip Alston who, in an open letter to the Deputy Secretary-General, noted:

> '[A] crucial element is missing… The package needs to be rooted in a legal framework that enables the United Nations to respect its obligations in this case, to act in accordance with the rule of law, to demonstrate that it is prepared to be held accountable, and to emerge from the shame of its previous policy on Haiti with both credit and credibility.'

Limitations of the non-liability approach

In the six months since the launch of the New Approach, several repercussions of the UN's ambiguous position have emerged: a lack of basis for ensuring adequate funding of the New Approach, and a slide towards a charity-based model that fails to respect victims' right to a remedy and reparation. As a result, the UN continues to be subject to criticisms that it is disregarding its obligations to victims.

Funding

In order to finance the New Approach, the UN established a voluntary trust fund and has asked for donations from Member States. To date, only three per cent of the $400m needed has been raised.[24] Most recently, a proposal to redirect $40.5m left over in the Haiti peacekeeping mission budget has been met with resistance by large donor countries.[25] Ironically, given the causes of the outbreak, countries opposed reportedly argue that the cholera response is not relevant to peacekeeping.

This funding quagmire could be avoided if the UN admitted legal liability. The General Assembly is under a legal obligation to pay for the organisation's liabilities through its operational budget, and thus Member States would have to contribute to the New Approach in accordance with their assessed contributions to the budget at large, as a matter of course.[26] This would remove the optional and unpredictable nature of funding, and lessen political influence by large donors who resist alternative funding options that would result in a larger burden on their governments.

By contrast, the current situation has seriously undermined the UN's ability to respond to the ongoing cholera epidemic, let alone implement the remedial elements of the New Approach. In May 2017, the Secretary-General warned that hard-earned progress in controlling the epidemic would reverse unless the UN secured additional funds immediately.[27] Because of the dire need to put resources towards the humanitarian response, the funding shortfall threatens to doom the promised victim assistance package in particular. The UN has repeatedly stated that, in the absence of full funding, cholera control will be prioritised over remedies.

Substituting charity for justice

Under the UN's third-party peacekeeping liability framework, the organisation is responsible for compensating individuals for economic loss, including medical and rehabilitation expenses, loss of earnings, loss of financial support, transport expenses, medical care, legal and burial expenses.[28] Consistently with this obligation, victims of cholera have for years sought compensation for the harms they have suffered. Such compensation would help remedy the devastating impacts of cholera. Victims speak of going into debt to pay for funerals or transport to get to medical care, of selling their land or livestock because of costs incurred from cholera and the loss of breadwinners, and of how cholera has deepened their poverty and left them vulnerable even years later.

When the UN announced the New Approach, it appeared to, at least in part, recognise the need for victim compensation.

The plan envisages two potential approaches to 'victim assistance': (1) community projects in those communities most affected by cholera; and/or (2) payments to the families of those who died of cholera. In October 2016, the UN Special Adviser to the Secretary-General for the cholera response stated that a mixed approach could be contemplated, where half of the $200m sought for remedial assistance 'could be spent on communities, with the remaining $100 million paid to families of victims… allow[ing] for payments of some $10,000 per family'.[29] Defending the UN's refusal to formally accept legal liability, the Deputy Secretary-General noted that the UN hoped the New Approach 'will in practice be the same as models some of the lawyers are suggesting'.[30]

Haitian cholera victims have responded to this proposal by expressing a preference for individual compensation over community projects, emphasising the devastating economic consequences of cholera on their households and the need for modest but direct financial assistance to help them get back on their feet.[31] They also express deep scepticism that community projects can adequately redress their harms, especially against the history of weak aid accountability in Haiti, and the inability of geographically centralised projects to benefit victims in remote areas, who were often most affected.

Despite this, the UN is increasingly abandoning individual compensation as an option. In his report to the General Assembly, outgoing Secretary-General Ban identified a number of concerns regarding the feasibility of individual compensation, including how to identify and verify victims, but committed to further assessing 'the individual approach', including through consultations with victims.[32] To date, no such consultations have taken place and there has been no further analysis of a way forward on compensation. Secretary-General Guterres has instead opted to move forward on piloting community projects, relegating victims to have a say only in what types of projects would benefit their communities.[33] Recent UN statements have failed to even mention compensation as an option.

Opting to substitute community projects for the compensation mandated in the UN's liability framework does not appear to be limited to Haiti. The UN also recently announced that, in defiance of recommendations issued by its Human Rights Advisory Panel set up to adjudicate human rights claims against the UN Mission in Kosovo (UNMIK), it would establish a similar voluntary trust fund to Haiti, which would fund community projects in affected communities.[34]

Conclusion

The UN's reluctance to admit legal liability has potentially far-reaching consequences for ensuring that victims of UN harms have access to effective remedies. As noted by Philip Alston, the UN's handling of the Haiti case at best establishes a problematic precedent that victims must rely on public pressure and shaming of the UN to secure remedies, rather than a predictable and accessible claims process.[35] It also undermines the moral legitimacy that the UN needs to be an effective promoter of the rule of law. As rule of law expert Jeremy Waldron admonished, 'UN officials should not be surprised if, as things progress along these lines, other countries become increasingly reluctant to accept lectures from its officials and agencies on the importance of the Rule of Law'.[36]

It is not too late for the UN to formally admit legal liability for cholera, and address victim compensation in this context. At a bare minimum, it must ensure that the New Approach fulfils victims' right to a remedy in practice, consistent with the UN's liability framework and human rights law. Anything else will spur continued criticism that the UN, even when finally trying to right its wrongs, still puts charity over justice, ignores victims' needs and rights, and disregards its own legal duties.

Notes

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Should international organisations like the UN be responsible to individuals within their custody as to human rights?

Executive summary

The United Nations is considered and meant to be at the forefront of the protection of the human rights of individuals. To this end, it has enacted guidelines, programmes and missions. The issue of human rights is of crucial importance in today's world and their protection is quickly developing across the globe; however, less has been said regarding human rights protection before international organisations. The purpose of this article is to explore this under-scrutinised aspect: the human rights treatment of individuals accused before the International Criminal Tribunal for the Former Yugoslavia (ICTY), where these subjects may suffer disparate treatment compared with accused persons under national jurisdictions.

Trials before national courts and human rights violations and available remedies

General overview

As we all are well aware, within national legal systems, the human rights of an accused or convicted person are well protected. Frameworks are in place in order to prevent or remedy any infringement, harm or violations due to lengthy trials, unfair pre-trial detentions, sentences based upon laws enacted after the commission of an act, *ne bis in idem* and so on. Persons who believe that their rights have been infringed have the possibility to appeal for protection before the competent national courts including, usually, constitutional courts and even beyond, to international institutions and courts, to redress the wrongs or violations suffered. For instance, if the state is party to an international convention on human rights that usually establishes a specific court for the matter, the detainee or convicted person may seek redress to that court. Among others, the main court is the European Court of Human Rights (ECtHR) created by the European Convention on Human Rights (ECHR).

The situation in Bosnia and Herzegovina

Insofar as our focus is on the ICTY, it is useful to take a closer examination of the system in place in Bosnia and Herzegovina (B&H), with a special emphasis on the issues arising from war crimes that date to the 1991–1995 war that the ICTY also covers.

Article 2 of the Constitution of the B&H (which is part of an international treaty) affirms that the provisions of the ECHR are an integral part of B&H law.[1]

During the period of the civil war in B&H (1991–1995), the relevant applicable law for war crimes was the 1976 Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY). This Code provided rather low sentences for aiders and abettors of war crimes, punishing them as if they committed the crime but the punishment could be reduced to a one-year sentence, while for a crime like torture the minimum sentence was five years. Maximum sentences for other crimes were 15 years, with 20 years being the most extreme, replacing the death penalty.

Subsequently, in 2003, the High Representative, an organ created by the Dayton Peace Agreement, imposed by way of Decision, a new Criminal Code for Bosnia and Herzegovina[2] in order for the law to be consistent with the ICTY Statute and to make the ICTY able to apply its Rule 11bis to return cases of certain accused to national courts.[3] This new code originally contained

provisions enshrining the principle of legality and non-retroactivity as embodied in Article 7 of the ECHR; however, it did not address the clause of Article 7(2) 'without prejudice' of the Convention and was therefore amended in 2004 with the introduction of Article 4a in order to remedy this. This new B&H code imposed by the High Representative envisaged harsher sanctions for war crimes; namely, aiders and abettors could be sentenced to a minimum of five years while the crime of torture was punishable with no less than ten years. The maximum sentence was raised to 45 years.

This new situation created confusion as some district courts in Bosnia retroactively applied the new 2003 code to war crime cases, therefore imposing higher sentences for the same crimes that were punishable more leniently if the 1976 Code applicable at the time of commission was to be used. On the other hand, other courts within B&H applied the previous 1976 Code, resulting in lower sentences for similar cases. Inevitably, harsher convictions under the new code raised issues of violation of human rights, in particular the non-retroactivity of the harsher criminal law; not only within the country itself[4] but also among the international community.[5]

In the subsequent years, various convicted persons appealed against their sentences,[6] approximately 30 in total, one of which was Abduladhim Maktouf. His complaints of violation of human rights based upon Article 7 ECHR (namely that the correct code to apply would have been the 1976 one, it being the applicable one at the time of commission and also being the lenient one) were rejected by B&H courts including the Constitutional Court. This last Court in its decision stated that Article 7 was not limited to prohibition of retroactivity, but more generally embodied that the existence of a criminal offence punishment can only be prescribed by law[7] and it 'holds that it is simply not possible to "eliminate" the more severe sanction under both earlier and later laws, and apply only other, more lenient, sanctions, so that the most serious crimes would in practice be left inadequately sanctioned'.[8] The Court affirmed that Article 7(1) of the Convention was limited to situations in which an individual was convicted for a criminal offence and that it does not prohibit retrospective application of laws and does not exclude the *ne bis in idem* principle. At paragraph 72, it relied on the ECtHR decision *Naletilic v Croatia*, where the applicant complained that, if convicted, he risked receiving a higher sentence if punished by the ICTY rather than by a Croatian authority. The European Court stated that 'even assuming Article 7 of the Convention to apply to the present case, the specific provision that could be applicable to it would be paragraph 2 rather than paragraph 1 of Article 7 of the Convention. This means that the second sentence of Article 7(1) of the Convention invoked by the applicant could not apply'.[9]

The Constitutional Court of B&H assumed the same position in its case of *Stupar and Others*,[10] where it relied on the amended Article 4a of the 2003 Criminal Code to legitimise the application of later laws. This latter decision was criticised by the Appellate Panel, which affirmed that Article 4a is only applicable if the more lenient law prevents the trial of an accused. However, both these B&H courts ruled that the 2003 code was more lenient because it did not foresee the death penalty, unlike the 1976 one.

Thus, in essence, the B&H position was to rely on part on the practices of the UN ICTY as affirming their treatment of detainees and convicted persons.

European Convention of Human Rights

Turning to examine the ECHR, Article 7 is of particular relevance:

'No punishment without law'

> '1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.'

The text is immediately clear in the first paragraph in prohibiting the imposition of heavier penalties than the ones applicable at the time of the offence. However, as briefly seen previously, the second paragraph had raised some discussion. A strict interpretation reads it as a way not to prevent the introduction of laws to punish perpetrators of war crimes during the Second World War,

while a broader one, embraced as seen by Constitutional Court of B&H, interprets it as an exception to paragraph 1, even if at the time of the offence there already was an applicable law. At the present time, the European Court has had the chance to rule on the issue of alleged violations of human rights for the retroactive application of laws. The already studied case of Maktouf reached the ECtHR and a decision was delivered in 2013.[11] The ECtHR ruled that these matters have to be addressed on a case-by-case basis and a general rule cannot be inferred. In the specific case, the ECtHR decided that the more lenient code for the accused was the 1976 one[12] and rejected the B&H argument that Article 7(2) provides an exception to the non-retroactivity rule, as it is clear from the preparatory works of the Convention[13] and finally that the sentences of the applicants were within the compass of both the 1976 and 2003 Codes and therefore the arguments that the actions could not be adequately punished is unfounded,[14] also considering that the same provision is contained in the Geneva Conventions and their Additional Protocols.

After this brief analysis of these judgments, some conclusions can be drawn. First, this being a case from B&H, it is clear that persons convicted by the B&H courts (including persons referred from the ICTY under Rule 11bis) enjoyed protections and were entitled to seek multiple redress and remedies to seek correction of violations of their human rights: both within the national system and also before the ECtHR, thus their rights appear to be have been adequately protected. Secondly, the European Court affirmed that, working on a case-by-case basis, the most lenient laws have to be applied to the accused, and that no heavier sentences can be applied than the ones established by the laws applicable at the time of the commission of the offence. Thus the B&H effort to enforce the new law and sentences imposed by the High Commissioner to be in line with the ICTY were deemed a violation of the ECHR.

The situation within the ICTY

The ICTY, as an ad hoc creation of the UN Security Council, has always been a peculiar legal environment. Very often, trials are rather lengthy (eg, the *Prlić* case – indictment issued in 2004 and in 2017, 13 years later, the appeal endures).[15] Also, it is useful to note that the structure and the organisation of this Tribunal is such that, once an accused is arrested, he is transferred to the Detention Unit (UNDU), where he is held in custody during the pre-trial stage and trial stage and upon conviction he is transferred to the country where he will serve his sentence. At the UNDU, healthcare rights issues sometimes arise[16] such that mandatory European medical board guidelines are deviated from and not followed.

Moreover, the ICTY has a longstanding record of sentences that depart from the 1976 SFRY Criminal Code provisions and other ECHR ones. Excluding acquittals and considering every conviction imposed by this Tribunal, including trial, appeal and retrial, a high number of 25 per cent of the total sentences result in sentences above 20 years of imprisonment. Just to mention some of the highest, Radovan Karadzic was sentenced to 40 years of imprisonment at trial stage, several accused (Tolimir, Popovic, Beara and Milan Lukic) received life sentences on appeal. It is just a matter of mathematics to see that these sentences are higher than the maximum provided by the then-1976 code of the SFRY, which was the only applicable law at the time in which the offences were committed.

This is even more alarming if we consider that the ICTY held numerous decisions stating that it had an obligation to respect the ECHR because no distinction can be drawn between people standing before this Tribunal and before national courts.[17] A similar position has been taken by the United Nations Secretary-General: 'it is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings.'[18] However, contradictorily, the ICTY also ruled that it is *free to deviate from existing human rights* because it is closer to a military tribunal, with limited due process rights.[19]

Issues arising from the ICTY

After comparing the rules applicable to states, including B&H, and the practice before the ICTY, it appears clear how the latter raises some issues regarding the legality of ICTY practices.

On more than one occasion has Judge Antonetti pointed out a peculiar problem of this Tribunal. While Article 65 of the Rules of Procedure and Evidence establishes that an accused, once arrested, should not be released except in some circumstances, it is general practice outside the ICTY jurisdiction to respect individual liberties of persons that are still considered innocent until proven

guilty, therefore not detaining them unless in exceptional circumstances; hence the opposite provision than the ICTY one. In one of his dissenting opinions on provisional release, he specifically cites Article 5 of the ECHR[20] and the deriving ECtHR decision remembering that provisional detention is an exceptional circumstance. The main reason for this is to ensure that the period of pre-trial detention does not exceed a reasonable time, quantified by Judge Antonetti as a maximum of five years; a period unfortunately often surpassed by the accused before the ICTY. To sustain his logical position, Judge Antonetti remembers that a Trial Chamber of this very Tribunal stated that the rule on provisional release must be interpreted in light of Article 15 of the International Covenant on Civil and Political Rights and the ECHR and its case law. Judge Antonetti seems therefore to suggest that the common practice of the ICTY departs from the accepted common practice of the international community.

The eminent M Cherif Bassiouni, instrumental in the work founding the UN ICTY, embraces this same position, describing how a detained accused has to be presumed innocent until proven guilty and be treated as such (implying therefore that he cannot be deprived of his liberty stemming from his innocent position).[21] Moreover, this author highlights other human rights concerns that arise from the organisation of the ICTY. In his book titled *The law of the International Criminal Tribunal of the former Yugoslavia*, among other things, he discusses the length of the sentences imposed: he clearly takes the position that it should follow the penalties as established by the law that was applicable at the time at which the offence was committed, therefore, he explicitly states that the ICTY should enforce convictions within the limits imposed by the 1976 Code of SFRY. He notes that Article 24 establishes a guideline for the Chamber to follow such a Code in order to satisfy the principle of legality (hence implying that, when it does not so, the Tribunal is breaching this principle) and that many countries shared this view with the Secretary-General when setting up this Tribunal.[22] Moreover, another linked concern is that nowhere in the Statute or the Rules of the Tribunal is there a provision that establishes the minimum and maximum sentences imposable upon convicted persons[23] and not even the aggravating circumstances are specified. This obviously opens the door to uncertainties and breaches of the rule of law before the ICTY. Finally, Article 101(A) of the Statute seems to authorise the Tribunal to exceed the maximum imposable sentence of 20 years provided by the 1976 SFRY Code, thus violating the prohibition of *ex post facto* laws, also known as retroactivity of the law, and for this reason he takes the strong position that this Article should be amended.[24]

Nevertheless, as already seen, it is quite common for the ICTY to impose sentences higher than the maximum provided by the applicable law of that time. The ICTY never felt bound by the ECHR or other Conventions forbidding the retroactivity of criminal law, and therefore never followed its guidance. The reason is easily explainable: the UN is an international organisation, not a party to these Treaties and not bound by them, even if it operates within countries that are party to them. Furthermore, as noted by the ECtHR in its *Maktouf* decision mentioned above, a body of the UN, surprisingly the Human Rights Committee, in its concluding observations on Bosnia and Herzegovina of 2012 (CCPR/BIH/CO/1), observed that war crimes committed during that civil war should not be brought under the *archaic* criminal code of SFRY, because it does not recognise *certain* offences as crimes against humanity (emphasis added).[25] It is quite puzzling that a UN body, a human rights one, suggests breaching the rule of law and proceeding with a retroactive application of a subsequent law. It has to be noted that it suggests doing so in order to harmonise jurisprudence on war crimes and because the 1976 code did not address certain offences, a situation in which it is already generally accepted to apply the subsequent law, as stated by the same ECtHR in that very judgment, among others; judgment that the Prosecutor of the ICTY defined as 'raising significant issues'.[26]

Unfortunately, there is one more aspect of the management of the accused by the ICTY that needs to be analysed; that is, the detention of prisoners. According to the UN Office of Drugs and Crimes (UNODC), foreign prisoners should be imprisoned in countries where they understand the language, their isolation should be prevented and if they do not understand the language, measures should be set in place in order to address the problem. This body recognises that foreigners are disadvantaged in criminal justice systems due to many reasons: language

barriers, isolation from families, legal assistance is usually lacking and they are usually not considered for home leave or parole. Their needs should be addressed by the local authorities in order to overcome these problems as much as possible and address others, such as religious needs, hygiene requirements and diets. The main reason that the UNODC Guidelines for Prisoners with Special Needs emphasises is that the language barrier is usually at the root of many other issues and it recommends that interpreters should be available to the accused.[27] However, in many cases before the ICTY, convicted persons are sent to spend their imprisonment in countries far from home, usually where they do not speak the language, and with difficulties in finding interpreters or learning the local language. Remarkably, despite reliance on these very same UN standards in seeking transfer from Estonian jail, Milan Lukic's request was denied by the UN Mechanism for International Criminal Tribunals (MICT).[28] Moreover, as these prisoners are in custody in third countries, usually the problem of which law to apply in order to release them arises. Another UNODC Handbook of Criminal Series addresses this issue: it states that the general principle is that the law governing enforcement of the sentence is the law of the administering state, thus meaning that it is the law of country in which the convicted spends his sentence that is applied in order to release him[29] or reduce his sentence.[30] This principle is contained in Article 21 of the Model Agreement and the same provision is established by Article 8 of the ECHR. However, there have been examples of persons convicted by the ICTY not being released by the administering state because of the opposition of the ICTY/MICT, which demands supremacy in these decisions, thus again potentially breaching the guidelines that the UN is supposed to uphold and protect human rights principles elsewhere in the world.

Conclusion

After this brief analysis of the situation, it is clear how, before the ICTY, accused persons may suffer disparate and less privileged treatment compared to other persons tried within national systems where stricter human rights principles are applied, principles usually recognised as customary international law and therefore binding for everyone. It is further clear how, due to the immunity of the UN, there is no mechanism in place for these persons in the custody of a UN organ like the ICTY to directly apply when they feel their human rights have been violated. We mentioned earlier the ICTY decisions wherein it has decided it is not bound by the ECtHR and can deviate from the ECHR, while *Maktouf* ruled that the state of B&H cannot do the same for similarly situated persons, including those referred from the ICTY. It has to be highlighted that the UN, the main international organisation, whose scope is, among other things, to be at the forefront of the protection of human rights of individuals, apparently applies lower standards and, in some cases, even permits deviations and breaches from human rights conventions of persons in its custody and standing trial before its own organ, the ICTY. Virtually no justification is given for this situation by the UN bodies and apparently no legal justification can be set in place for it. A mechanism should be set in place for persons convicted by the ICTY so that they can apply if their human rights are violated, in exactly the same way as the ECtHR functions within the European Union. In this way, and addressing all the other concerns raised in this brief article, real justice and genuine equal treatment for every human being can be assured.

Notes

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3 See n 1 above, at 276.
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6 See n 2 above, at 22.
7 Case AP-1785/06 *Maktouf*, Constitutional Court of Bosnia and Herzegovina, decision of 30 March 2007, at para 63.
8 *Ibid* at paras 68–69.
9 *Naletilić v Croatia*, Decision as to the admissibility of Application no 51891/99, 4 May 2000, at p 4.
10 Stupar and others (X-KR-05/24) Court of Bosnia and Herzegovina (First Instance Panel) 29 July 2008.
11 *Maktouf and Damjanovic v Bosnia and Herzegovina* [2013] ECHR para 703.
12 *Ibid* at para 69.

13 *Ibid* at para 72.
13 *Ibid* at para 74.
14 As is ongoing in the *Prosecutor v Mladic* case.
15 Case IT-04-74-T *Prlic et al* ICTY.
16 Case IT-01-47-PT *Prosecutor v Hadzihasanovic et al*, Decision granting provisional release to Enver Hadzihasanovic, 19 December 2001.
17 Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993) at para 106.
18 Case IT-94-1 *Prosecutor v Tadic*, Decision on the Prosecutor's motion requesting protective measures for victims and witnesses, 10 August 1995.
19 Case IT-04-74-T *Prosecutor v Prlic et al* Dissenting opinion of Presiding Judge Jean-Claude Antonetti concerning the decision on request for provisional release of the Accused Slobodan Praljak, 21 April 2011, p 3 et seq.
20 M Cherif Bassiouni, *The law of the International Criminal Tribunal of the former Yugoslavia* (Transnational Publishers Inc 1996), 713.
21 *Ibid* at 700.
22 Report, *Human rights provisions in conventional sources of international criminal law and their effects on international criminal justice*, European Commission for Democracy through Law (Venice Commission 2005I), 6.
23 See n 19 above, at 702.
24 *Maktouf and Damjanovic v Bosnia and Herzegovina* para 32.
25 Completion Strategy Report: Prosecutor Brammertz addressed the UN Security Council, Press Release 5 December 2013.
26 *Handbook on Prisoners with Special Needs*, (United Nations 2009) p 86.
27 Upon information and belief, another international organisation engaged in human rights has repeatedly petitioned the UN ICTY and MICT about this same problem in Estonian Jails, but to no avail.
28 *Handbook on the International Transfer of Sentenced Persons*, (United Nations 2012) p 51.
28 See n25 above, at p 90.

Granting immunities to international organisations and securing accountability for individuals – the role of headquarters agreements

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Summary

Headquarters agreements play an important role in the life of an international organisation, as they establish the rules that will govern the relations between the organisation, the host state and the host state's residents. Among other things, headquarters agreements provide international organisations with immunity from suit in local courts. Being immune, however, does not mean that the organisation can operate above the law, but many individuals may feel like they can, which stains the organisation's legitimacy. The issue of legitimacy can be solved, at least in part, with the inclusion of dispute resolution clauses in headquarters agreements.

Introduction

In March of this year, a regional court in Mogadishu, Somalia ruled against the International Committee of the Red Cross (ICRC) and in favour of a former ICRC staffer. According to newspaper accounts,[2] the staffer had brought suit against the ICRC on the ground that the organisation had wrongfully dismissed him pursuant to Somali employment law and harassed him during the process of the dismissal. The ICRC challenged the regional court's jurisdiction to hear the dispute, arguing that the headquarters agreement between the Federal Republic of Somalia and the ICRC immunised the organisation from legal process in Somali national courts. In response, the staffer contended that such an argument was a clear abuse of the headquarters agreement, which could not be used by the ICRC to avoid liability after breaching Somali law. The court

ruled that the dismissal of the staff member was illegal under Somali employment law and ordered the ICRC to reinstate the staffer. Newspaper accounts do not explain why the court found the ICRC's position unavailing.

At the heart of the ICRC dispute was whether the ICRC's headquarters agreement with Somalia could and should shield the ICRC from liability to individuals as imposed by Somali courts. Headquarters agreements – pacts entered into by international organisations (IOs) and states hosting their operations – are an essential element of how IOs conduct their work. This article will consider why IOs and host states enter into headquarters agreements; what are the main provisions of such agreements; and how IOs can still be held accountable for violations of law despite the immunities provided to them under headquarters agreements.

Why do IOs and host states enter into headquarters agreements?

An IO and a host state typically enter into a headquarters agreement when an IO first opens an office in the host country. The agreement lays down the rules governing the relations between the organisation, host state and host state's residents. The primary purpose of the headquarters agreement is to enable the organisation to 'fully and efficiently discharge its responsibilities and fulfil its purposes in the host country'.[3]

The idea of entering into headquarters agreements appears to have started with the so-called Basic Agreements, concluded by United Nations specialised agencies in the 1950s for the provision of technical assistance to developing countries. At that time, there was a need for the growing number of IOs to establish a more definite presence in developing countries and provide advice and services closer to the place where they were needed.[4]

A host state generally agrees to sign a headquarters agreement because it has an interest in establishing how the IO will operate in its territory, especially when the host state is not a member of the IO. Although the host state may be in need of the humanitarian or technical assistance provided by the IO, it nonetheless may have concerns about how such an organisation, with a distinct legal personality under international law, will operate in its sovereign territory. The rules of the game can be established in the headquarters agreements. These agreements are a tool to ensure that the IO will act according to principles of neutrality, independence and confidentiality, abstaining from taking sides in armed conflicts or other situations of violence, or in any controversies of political, racial, religious or ideological nature. Principles of neutrality and confidentiality serve IOs well when they attempt to resolve conflicts in a host country by using confidential dialogues to persuade disputing parties to abide by their obligations under international law.[5]

Headquarter agreements provide IOs privileges and immunities that are necessary for them to function independently and efficiently. Headquarters agreements generally grant IOs the legal capacity to enter into rental agreements and contracts of employment. The agreements also allow them independently to operate bank accounts, acquire and dispose of movable and immovable property, and apply their own internal law for internal administrative affairs. While it is generally agreed that, under customary international law, IOs should have the same sorts of privileges and immunities accorded to diplomats, there is no universal agreement about the precise nature of those rights.[6] As a result, IOs rely on the text of headquarters agreements to provide them and their officers all the necessary privileges and immunities. IOs can only obtain complete jurisdictional immunity through their headquarters agreements.[7]

How can IOs be held accountable for violations of the law despite the immunities provided by headquarters agreements?

Like any other natural or corporate person, during the course of its work, an IO may violate local law or international law. UN peacekeepers might violate international humanitarian law when mediating and pushing for a peaceful resolution of armed conflicts and other situations of violence; the International Monetary Fund might violate the economic, social and cultural rights of individuals residing in the states that borrow from it; and any number of IOs might violate international labour standards in their dealings with their own employees.[8]

The immunity conferred on an IO pursuant to a headquarters agreement does not typically exempt the organisation from complying with local or international law, unless such law is inconsistent with the IO's internal law. The IO still needs to

comply with legislation in force in the host country. Immunity generally only gives the IO procedural protection from legal process in local courts.[9] Accordingly, when violations to local or international laws occur, the aggrieved private party (or host state) cannot seek redress from local courts. Local courts have routinely upheld this immunity in labour disputes. For example, in *Weidner v International Telecommunications Satellite Organizations*, brought to Federal District Court of the District of Columbia, a suit by a discharged employee was dismissed on the basis of immunity.[10]

To resolve disputes with aggrieved parties, IOs typically turn to one of three options:

1. IOs will seek to negotiate with the aggrieved party. From the IO's perspective, negotiation is the preferred method for resolving disputes.
2. IOs will occasionally waive their immunity and allow the dispute to be heard in local courts. However, some have argued that relying on IOs to waive their jurisdictional immunity before submitting to judicial review undermines the legitimacy of IOs.[11] Neither the process of negotiation nor the ad hoc use of waivers provides aggrieved parties much predictability and confidence in an equitable outcome. Thus, the third and final approach is an increasingly popular avenue for redress.
3. IOs will seek to resolve disputes through arbitration or internal administrative tribunals. Some headquarters agreements contain such mechanisms for the settlement of disputes. For example, the headquarters agreement between the Organization of American States (OAS) and the United States provides for binding arbitration in the event that the OAS and a private party cannot agree on a mode of settlement of a dispute.[12]

In conclusion, headquarters agreements provide both IOs and host states with important tangible benefits. However, IOs, like the ICRC, occasionally have to combat the impression that headquarters agreements improperly shield them from liability. Such perceptions are problematic for IOs, who depend on their legitimacy to exist and function. As one commentator has noted, 'the perception that an IO is legitimate is… crucial to the organisation's ability to secure cooperation and support from its member States'.[13] Accordingly, to ensure that disputes with aggrieved parties are resolved in a predictable and equitable fashion, IOs would be wise to include dispute resolution clauses in their headquarters agreements.

Notes

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3 I P Enemo and C M Ogwezzy, 'The Necessity of Headquarters Agreement under the Law of International Organisations' (2015) 5(1) International Journal of Advanced Legal Studies and Governance 15, 18.
4 *Ibid*, at 20.
5 Els Debuf, 'Tools to do the job: The ICRC's legal status, privileges and immunities' (2016) 97 (897/898) International Review of the Red Cross 319, 339.
6 Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford 2010) 680.
7 See n 3 above, at 20.
8 Kristina Daugirdas 'Reputation and the Responsibility of International Organizations' (2015) 25(4) The European Journal of International Law 991, 992.
9 August Reinishe, *International Organisations before National Courts* (Cambridge University Press 2000) 13–14.
10 *Weidner v International Telecommunications Satellite Organizations* [1978] No 12328 (D C App).
11 Anastasia Telesetsky, 'Binding the UN: Compulsory Review of Disputes Involving UN International Responsibility' (2012) 21(1) Minnesota Journal of International Law 75, 86.
12 Headquarters Agreement between the Organization of American States and the United States, signed on 14 May 1992, Art 8(2).
13 See n 8 above, at 991.

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The liability of the United Nations and other international organisations to individuals

Summary

This article offers an examination into the liability of the United Nations and other international organisations to individuals in respect to a failure to protect individuals from human rights and other abuses and examines why liability should not rest with such organisations.

Introduction

The underlying point to this question is one of philosophical belief and anthropology. Let me explain that startling first sentence. Our world, whether we agree with it or not, is made up of a collection of nation states. It is the founding block of international relations. By and large, the nation state is the mechanism by which the world does business and by which people interact with each other.

Of course, there are a number of transnational organisations that group nation states together into various kinds of self-interested blocks: the European Union, in respect of political, legal and (to a varying extent) economic ties; the Organization of the Petroleum Exporting Countries (OPEC), the cartel of oil-producing countries that seeks to manage the price of their most valuable trading commodity; and the North American Free Trade Area (NAFTA) that seeks to create a zone of minimal trading barriers among its members.

Yet, in all the various transnational organisations, with perhaps the exception of the EU, the fundamental building block of international trade and relations remains the nation state.

Following the Second World War, the UN was founded as an attempt at a mechanism by which international disputes could be resolved and, in particular, wars avoided. It was given a mandate which, in part, was designed to correct the flaws that many saw in its forerunner, the League of Nations. It is claimed that the League of Nations conspicuously failed in its mandate of facilitating or maintaining peace as evidenced by the Second World War itself. I think this charge is unfair; that war's origins lay in the conspicuous unfairness of the Versailles Treaty. However, and regardless of the history, such was, effectively, the mandate of the UN.

My comments regarding philosophical beliefs and anthropology now need explaining. By development and history, humans are a tribal species. Humans tend to form groups where there is perceived mutual interest. In other words, I submit, a sustainable 'country' consists of nothing more than a group of people who consider themselves to be members of the same country.

A country that consists of people who don't view themselves as part of the same country will not subsist as an entity in the long term except by force. This has been seen in the countries of Eastern Europe; held together by the force of the former Soviet Union. Or many of the countries of Africa; created as a result of colonial powers drawing lines across the map irrespective of the people living in those areas. Civil wars and tribal conflicts followed.

So many problems that exist within and among nation states are problems that have arisen as the result of the creation of artificial nation states, wherein the people of those states held no loyalty to them. However, once those issues are resolved (and in many places this may take generations), the fundamental building block of world relations will remain the nation state.

Layered over this is the UN – an organisation whose function is to help facilitate peaceful interactions between nation states. In respect of human

rights (and therefore its responsibility to individuals), I suggest, it ought not to interfere in the internal functioning of a nation state unless some very high bars are met. They are twofold. The first is that human rights abuses are systematically taking place on a large scale within the respective country.

You will note a number of caveats in that sentence; 'systematically', 'large scale', 'human rights abuses' being the criteria. This is important because interfering in the internal affairs of a country, or interfering with the right of that country to determine its own way of organising itself, should be the last resort. If not, we facilitate a world operated on the basis of the imposition of the views of the strong over the weak. That is not a just or fair state of affairs.

Also, systematic and widespread violation of the human rights of the population is surely the point at which the international community finds it intolerable not to become involved. That affects the very notion of what it is to be a human and thus invokes my anthropological argument. To take the opposite extreme to support the point, it should not be possible to have a situation where a single person's rights have been violated, as determined by that nation's internal tribunal, and still give the international community a right to intervene in the country concerned. That would be entirely disproportionate.

The second of my high bars is that such intervention or action of any kind should be sanctioned by the expressed will of the UN and not by independent action on the part of another nation or group of nations.

This bar is important because, without it, we again experience the oppression of the weak nations by the strong ones without any philosophical or legal foundation for that interference as sanctioned by humanity generally.

Accordingly, the UN does not, and should not, act with some kind of inherent jurisdiction in the protection of human rights or other issues. It should act as the expressed will of the nation states of the world, as such, will is given voice and action through the UN.

For these reasons, it should always be, and remain, the case that the real liability of the failure to protect its citizens from oppression or harm should rest with the nation state concerned, and with the leaders of those nation states where international law makes them so liable. Anything else, for example, the imputation of liability onto the UN, sends us on a slippery slope towards the abdication of responsibility by those with whom it should rightly rest.

ROLE OF THE RULE OF LAW

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'We have nothing after they took our land':[1] globalisation and the prosecution of land-grabbing crimes in Cambodia

Summary

This article examines the issue of whether aspects of globalisation work together to preclude impunity for international crimes, by applying selected indices of globalisation to the case study of land-grabbing crimes in Cambodia, and the referral of these crimes to the International Criminal Court (ICC). The article finds that globalised law, communications technologies and migrant populations contributed to Cambodia being referred to the ICC, as well as to the body of evidence gathered to support the referral and potential prosecution at the ICC. At this stage, it is unclear what role Cambodia's memberships in international organisations, and relationships with other states, including states with embassies in Phnom Penh, will have on a potential prosecution at the ICC.

Introduction

In January 2012, 300 families in central Phnom Penh watched as their homes were demolished, their belongings still inside. The families had just been forcibly evicted by a group of mixed police forces that were assisting a private corporation given a lease over the land.[2] Police fired tear gas and live ammunition on the residents,[3] and community leaders were arrested and detained.[4] Importantly, these crimes happened in plain sight, in the era of video-enabled phones. The non-governmental organisation (NGO) The Cambodian League for the Protection and Defense of Human Rights (LICADHO)[5] subsequently uploaded a video of the scene, depicting police firing guns, throwing stones and using force against unarmed and outnumbered civilians.[6] A group of five police are filmed kicking an adolescent boy, before shields are raised to hide the attack from the camera.[7] After the demolition, the footage shows a man sitting on the remains of a house holding a baby. A woman searches through rubble for salvageable belongings.[8] These scenes are immortalised on YouTube, for the world to see.

This article evaluates the potential of globalisation to erode impunity for the perpetrators of international crimes by undertaking a case study on the role of selected factors of globalisation in contributing to the potential future prosecution at the ICC of land-grabbing offences perpetrated by the Cambodian government. Specifically, this article will respond to the question: how have factors of globalisation influenced the potential investigation and prosecution of the Cambodian government at the ICC for offences deriving from its land-grabbing practices?

The article argues that forces of globalisation culminate to prevent impunity for violations of international criminal law: as the world becomes more interconnected, it will be easier to hold international criminals accountable, at institutions such as the ICC. Specifically, this article's argument in regard to the Cambodian case study is that specific forces of globalisation culminate to preclude impunity of the Cambodian government for crimes deriving from its land-grabbing policies. This argument will be tested by applying four elements of globalisation to the Cambodian

case study and evaluating their effects on the potential investigation and prosecution of the Cambodian government for these crimes at the ICC. The four indices of globalisation for which the influence is evaluated are derived from two prominent globalisation indexes, the Maastricht and KOF Globalisation Indexes:

Index 1: Globalised law

'International Treaties' is an index under the KOF Index of Globalisation, and is a measure of whether states have ratified international treaties.[9]

Index 2: Freedom and transmission of information and evidence

'Cell phone/telephone' and 'internet' usage are indices under both the KOF Index of Globalisation and the Maastricht Globalisation Index.[10]

Index 3: Influence of foreign lawyers

'Migrants' and 'Tourism' are both indices under the Maastricht Globalisation Index.[11]

Index 4: Political pressure

'Membership in International Organisations' and 'embassies in country' are indices under both the KOF Index of Globalisation and the Maastricht Globalisation Index.[12]

In relation to each index, the following is hypothesised.

H1	The Cambodian 'ruling elite' can jurisdictionally be brought before the ICC by way of Cambodia's ratification of the international treaty that is the Rome Statute to the ICC.
H2	Victims, journalists and human rights activists having access to portable video, compatible mobile phones and internet access has ensured evidence of the crimes has been preserved, and information regarding the crimes disseminated, to support both the Global Diligence Communications, and potential ICC investigation and prosecution of the crimes.
H3	Crimes could be communicated to the ICC as a result of the presence of migrant international criminal lawyers in Cambodia, and the familiarity these lawyers built with the situation in Cambodia by way of being resident there.
H4	Political pressures from international organisations and states with embassies in the country prevented the crimes from going unnoticed, which contributed to the ICC Communication. Additionally, if the ICC's Office of the Prosecutor elects to open an official investigation, political pressures on Cambodia to comply with the court will be essential to the prosecution of these crimes going ahead and to arrests being carried out.

For the purposes of fluency, a number of key terms need to be defined for this article. Global Diligence is the legal firm that communicated the land-grabbing crimes perpetrated by the Cambodian government to the Office of the Prosecutor (OTP) at the ICC. 'Land grabbing' is a reference to the Cambodian government's practice of granting economic land concessions (ELCs) to private corporations. 'Land grabbing crimes' is a reference to the multiple crimes under the Rome Statute that stem from the practice of land-grabbing, including the crimes against humanity of forcible transfer, murder, unlawful imprisonment, persecution and other inhumane acts.[13] The Cambodian Peoples' Party (CPP) has been Cambodia's ruling party since 1979.[14] Hun Sen has been the Prime Minister of Cambodia since 1985.[15]

This article seeks to build on gaps in existing scholarship. While a number of scholars look at globalisation as a driving force of international human rights law ratification and compliance in general,[16] no existing literature looks directly at the issue of globalisation as enabling the prosecution of international crimes. In terms of literature addressing globalisation in Cambodia, Rehbein (2007) identifies the United Nations Transitional Authority for Cambodia of 1992 to 1993 and an independent press as key globalising factors in Cambodia, but also observes that inequality and patronage networks constrain globalisation in the state.[17] Arnold and Han Shih (2010) also look at the effects of economic globalisation on labour standards in the Cambodian garment industry, and find that globalisation can, in some instances, foster non-compliance with human rights norms.[18] This article will build on these existing studies, evaluating directly the propensity of forces of globalisation to assist the investigation and prosecution of international crimes, and will also provide a Cambodia-specific case study, which will add to the body of literature surrounding human rights compliance in the state.

The article is structured into three parts. The first part provides the reader with a background to the commission of land-grabbing offences in the Cambodian context, and to the referral of these crimes to the ICC. The second part contains the central analysis, where data is evaluated under each of the four selected indices. The third part evaluates the findings in the second part against the hypotheses.

Background: land-grabbing crimes in Cambodia

Since the early 2000s, an estimated 400,000 Cambodians have been forcibly evicted from their land under a state policy that sees ELCs issued to domestic and foreign companies, and the state assisting these companies to empty the land of its prior residents, often in a manner that sees undue force exercised against unarmed civilians.[19] A quarter of the state's 'arable' land has reportedly been granted under ELCs,[20] including to investors who have links to the ruling CPP.[21] These deals have been lucrative for members of the CPP,[22] yet see many poor Cambodians dispossessed.[23] While Prime Minister Hun Sen purported in May 2012 to 'suspend' the granting of ELCs,[24] as of 2014, more than 16 new ELCs had been granted,[25] and there had been a further 60,000 victims of forcible land grabs.[26]

Citizens who resist eviction have been subjected to state-led brutality and unlawful arrest.[27] In 2006, families in Sre Ambel resisted forcible eviction from their village and were shot at by local police.[28] In May 2012, a 13-year-old girl was shot and killed by state soldiers as they assisted a rubber company in evicting hundreds of families from her village of Broma in the Kratie Province.[29] In 2012, Chut Wutty, an environmentalist who spoke out against ELCs, was killed by police gunfire while protesting in the Cardamom Mountains.[30] In 2016, Dr Kem Ley, a well-known critic of the CPP's land-grabbing practices, was murdered in Phnom Penh, in circumstances dubbed to be of 'chilling similarity to political assassinations of years past'.[31]

These crimes in part occur because many Cambodians do not hold a title over the land that they live on. The Khmer Rouge regime of 1975 to 1979 eliminated private land title and, in the aftermath of the regime, many Cambodians settled wherever they could.[32] Under the new Cambodian Land Law of 2001, it is possible to apply for a title; however, for rural and poor Cambodians, this option is difficult and expensive.[33] Many ELCs are also granted in violation of the Land Law of 2001,[34] and state-led violence against civilians and arrests without warrant or charges are also in violation of domestic laws.[35] Prosecutors and judges have limited motivation to bring the powerful perpetrators of these crimes to justice.[36]

On 7 October 2014, a 'Communication' was filed requesting the OTP at the ICC open an investigation into the crimes perpetrated by the Cambodian 'ruling elite' through their land-grabbing practices.[37] The Communication was filed by Richard Rogers of Global Diligence,[38] representing the victims of land-grabbing crimes perpetrated by the Cambodian government since July 2002.[39] In July 2015, a Supplementary Brief was filed by Global Diligence, adding new evidence.[40] Only the Executive Summary of the initial Communication is publicly available, and the Supplementary Brief is not publically available.

Analysis

Index 1: Globalised law

'International Treaties' is an index under the KOF Index of Globalisation.[41] The relevant treaty here is the Rome Statute. Cambodia ratified the Rome Statute to the ICC on 11 March 2002.[42] This means that the ICC has jurisdiction over crimes in Cambodia committed under the Rome Statute since 1 July 2002, when the Rome Statute entered into force.[43] Cambodia's ratification of the Rome Statute provides the OTP at the ICC with the power not only to investigate crimes alleged to have been committed in Cambodia, but to also issue indictments against individuals believed to have committed the crimes.[44] Importantly, even if Cambodia later decides to withdraw from the ICC and Rome Statute, as a number of states have, the ICC is likely still to have jurisdiction over crimes committed between 1 July 2002 and the date of the state's hypothetical withdrawal.[45]

Index 2: Freedom and transmission of information and evidence

'Cell phone/telephone' and 'internet' usages are indices under the KOF and Maastricht Globalisation Indexes.[46]

It is clear that Cambodian NGOs and news organisations have collated video footage of the commission of crimes and then used the internet to publish this evidence both on their own websites, as well as on YouTube and other platforms. By watching the videos, it can be established that a lot of the footage has been recorded on portable mobile phones, and a number of videos show other persons filming crimes on their phones.[47]

The following are examples of publicly

available video evidence of land-grabbing crimes perpetrated by state police or army forces – as are identifiable by their uniforms:

1. A video uploaded to LICADHO's website and YouTube in February 2012 shows forced evictions in the Borei Keila settlement in Phnom Penh, and state forces violently attacking those resisting eviction.[48]
2. A video published by the *Phnom Penh Post* on YouTube in February 2014 depicts later forced evictions in Borei Keila.[49] The video opens on footage of a young man who has been beaten by state forces,[50] it then moves to a group of women who are being attacked by officers wielding metal bars.[51]
3. Videos uploaded by *KI Media*, *Khmer Media* and *VOA Khmer* contain footage of forced evictions in the Boeung Kak Lake area in Phnom Penh, including of state forces using force against unarmed residents.[52]
4. A video published by LICADHO in March 2010 shows state forces opening fire on farmers resisting evictions in the Anlong Samnor Community.[53]

The NGO LICADHO has a policy of collating video footage collected by both its staff as well as journalists, community activists and victims, and uploading these to its website and YouTube platform.[54] This video footage is heavily relied upon as a source of information in LICADHO's human rights reports and submissions.[55] Amnesty International cites LICADHO's material,[56] as do domestic NGOs such as ADHOC.[57] LICADHO's reports are also cited to by reports of the International Federation for Human Rights (FIDH),[58] with FIDH being the organisation that supported the Global Diligence Communication.[59]

The Global Diligence Communication affirms that it relies heavily on a 'decade' of evidence compiled by domestic NGOs,[60] and refers to domestic NGOs as its source of statistics. A 'Question and Answer Document' published by Global Diligence in conjunction with the FIDH contains stills of footage of crimes compiled by LICADHO, and also repeatedly refers to domestic 'NGOs' as its sources of data.[61]

Video footage of crimes has previously been accepted in international criminal trials as evidence. In the *Bemba* case at the ICC, for example, footage of Bemba speaking to his subordinates[62] was accepted as linkage evidence.[63] Video footage depicting crimes has also been admitted to evidence by the International Tribunal for the Former Yugoslavia.[64]

Index 3: influence of foreign lawyers

'Migrants' and 'Tourism' are indices under the Maastricht Globalisation Index.[65] Looking at the staff profiles on the Global Diligence website as well as staff LinkedIn profiles, all partners and counsel engaged by the firm either previously worked, or currently work, at the Extraordinary Chambers in the Courts of Cambodia (ECCC) in Phnom Penh.[66] Notably, many counsel were resident in Phnom Penh at the time of the high-profile land grabs in Central Phnom Penh of the Boeung Kak Lake and Borei Keila commune. This goes towards establishing the firm's connection with Cambodia, and their expertise in international criminal law, the ECCC being a hybrid international criminal tribunal.[67]

Index 4: Political pressure

'Membership in International Organisations' and 'embassies in country' are indices under both the KOF Index of Globalisation and the Maastricht Globalisation Index.[68]

There are a number of examples of international organisations, including UN organs, drawing attention to and condemning the land-grabbing crimes in Cambodia:

1. In 2005, a UN Special Rapporteur condemned the Cambodian government's commission of land-grabbing crimes.[69]
2. The World Bank put a lending freeze in place on Cambodia in 2011 in response to forced evictions in the Boeung Kak Lake area.[70]
3. The 2009 Universal Periodic Review for Cambodia condemned 'lawfully doubtful land concessions, land-grabbing and forced evictions'.[71]
4. In 2011, a UN Special Rapporteur condemned Cambodia's poor treatment of human rights defenders, including alleged killings and forced evictions.[72]
5. In 2014, the Office of the UN High Commissioner (OHCHR) condemned state land-grabbing, asserting there were 'an unabated number of alleged victims of land-grabbing or forced evictions'.[73]

The Communication filed by Global Diligence to the ICC references the above material, and observes the significance of publications of the OHCHR and other UN Special Rapporteurs in supporting and contributing to the Communication.[74]

Only limited evidence could be identified of states with embassies in Cambodia publicly condemning the land-grabbing crimes:

1. In September 2014, former US President Barack Obama condemned the killing of land activist Chut Wutty.[75]
2. In August 2015, the US Foreign Affairs Asia Pacific Subcommittee conducted a hearing regarding land rights in Southeast Asia.[76] Chairman Ed Royce observed: 'as the Cambodian economy has developed, many Cambodians have been displaced… The government has appropriated land and homes, sometimes forcibly'.[77]

There is no indication that the Obama statement contributed to the Global Diligence Communication, and the subcommittee hearing postdated the Communication being filed.[78]

Statements of CPP officials indicate that the prospect of an ICC investigation does not currently concern Cambodian leaders.[79] Importantly, the ICC does not have its own police force, so is inherently reliant on state cooperation to conduct arrests.[80] For this reason, the cooperation of investigated states, and states indicted persons travel to, is essential to the ICC carrying out its mandate, and political pressures are an important element in the ICC securing cooperation from states.[81] For example, there has been an indictment against former Sudanese general Omar Al-Bashir since 2009; however, due to a lack of political pressure for his arrest, he has travelled the world seemingly freely, including to Rome Statute signatory South Africa, and remains at large.[82]

Results

H1 √	The Cambodian 'ruling elite' can jurisdictionally be brought before the ICC by way of Cambodia's ratification of the international treaty that is the Rome Statute.
H2 √ **X**	Activists, victims and journalists filmed crimes on video-enabled phones. This video evidence, as collated by domestic NGOs such as LICADHO and disseminated on the internet, was used as evidence for a number of NGO reports on land-grabbing crimes, these being crucial evidence for the Communication Global Diligence submitted to the ICC. It is unclear what role such material will play in any trial that will go ahead. Trials in the past have admitted such video material to evidence.
H3 √	All lawyers engaged by Global Diligence were previously (or are currently) migrant international criminal lawyers working in Cambodia. These lawyers had the familiarity with Cambodia, and the expertise in international criminal law, to file the communication to the ICC.
H4 √ **X** **X**	The Global Diligence Communication observed that it is 'based' on evidence including material produced by United Nations organs, including the OHCHR and Special Rapporteurs. There is limited evidence of states with embassies in Cambodia publicly condemning the land-grabbing crimes, and of any such condemnation as contributing to the Communication. It is unclear what role political pressures will play in a potential investigation and prosecution at the ICC. In the past, political pressures being placed on investigated states have been essential to their compliance with the ICC.

Conclusion

The findings of this article indicate that aspects of globalisation are a potent force in eroding impunity for international crimes. In Cambodia, factors of globalisation have been essential to land-grabbing crimes being communicated to the ICC, and may be essential to the success of any case that goes ahead. The state's decision to ratify the Rome Statute means those who commit international crimes within its borders can now jurisdictionally be brought before the ICC. Video-enabled phones afford victims and observers the ability to film the commission of land-grabbing crimes, and the internet allows NGOs the capacity to collate and disseminate this information. Such evidence collated by NGOs assisted Global Diligence in compiling its communication, and will be valuable in any case at the ICC that is opened, with video evidence previously being accepted in international criminal trials. The presence of migrant international criminal lawyers in Cambodia, by way of their employment at the ECCC, meant that there were people in country with the recourse and expertise to refer these crimes to the ICC. Condemnations of the land-grabbing crimes by UN organs did support the Global Diligence Communication of the crimes to the ICC. However, to date it is unclear what influence the political pressures associated with globalisation, by way of membership in international organisations, and relationships with other states, will have on a potential prosecution of the Cambodian ruling elite at the ICC. In past cases at the ICC political pressures have been essential to compelling states to act on indictments.

Notes

1 As quoted in Chris Arsenault, 'Landless Cambodian farmers look to International Criminal Court for Justice' *Reuters* (22 November 2016), www.reuters.com/article/us-icc-cambodia-landrights-idUSKBN13H1J9 accessed 23 August 2017.
2 See 'Statement: Civil Society Groups Condemn Violent Eviction of Borei Keila Residents' (3 January 2012) *LICADHO*, www.licadho-cambodia.org/pressrelease.php?perm=267 accessed 5 June 2017.
3 *Ibid*; Video: 'Borei Keila: Broken Promises in Cambodia', www.licadho-cambodia.org/video.php?perm=28 accessed 26 May 2017.
4 See n 2, above.
5 The Cambodian League for the Protection and Defense of Human Rights (LICADHO).
6 See LICADHO/LICADHO Canada, 'Borei Keila: Broken Promises', 12 January 2012, www.youtube.com/watch?v=bRp8VXCtLIk accessed 23 August 2017.
7 *Ibid*, at 2:12.
8 *Ibid*.
9 'KOF Index of Globalisation' (ETH Zurich 2015), http://globalization.kof.ethz.ch accessed 23 August 2017.
10 *Ibid*; Lukas Figge and Pim Martens, 'Globalisation Continues: The Maastricht Globalisation Index Revisited and Updated' Globalizations 11, no 6 (2 November 2014), 879, doi:10.1080/14747731.2014.887389.
11 *Ibid*, at 878.
12 'KOF Index of Globalisation'; Figge and Martens, see n 10 above, 878.
13 Rogers, 'Communication Under Article 15 of the Statute of the International Criminal Court: The Commission of Crimes Against Humanity in Cambodia, July 2002 to Present', paras 11–21.
14 Sebastian Strangio, *Hun Sen's Cambodia* (Yale University Press 2014) 50.
15 With the exception of being a co-Prime Minister from 1993 to 1998. Only five political leaders in the world have been in power longer than he has. '30 Years of Hun Sen' (*Human Rights Watch*, 12 January 2015), www.hrw.org/report/2015/01/12/30-years-hun-sen/violence-repression-and-corruption-cambodia accessed 23 August 2017; *Ibid*.
16 Notably, Cassel (2004) sees globalisation as essential to the global movement towards human rights, stating that communications technology both 'accelerates the spread of human rights consciousness and facilitates coordinated advocacy'. Douglass Cassel, 'The Globalization of Human Rights: Consciousness, Law and Reality' (2004) 2(1) Northwestern Journal of Human Rights, 1.
17 Boike Rehbein, 'Configurations of Globalization in Laos and Cambodia' (2007) 38(1/2) Internationales Asien Forum, International Quarterly for Asian Studies; München 67–85.
18 The authors note that, despite ILO labour standard compliance requirements, most Cambodian garment workers are employed under informal contracts that afford little job security and no benefits, and international trade agreements encourage the government to allow extremely low wages, so that the industry is regionally competitive; and international trade agreements encourage the government to allow extremely low wages, so that the industry is regionally competitive. Dennis Arnold and Toh Han Shih, 'A Fair Model of Globalisation? Labour and Global Production in Cambodia', Journal of Contemporary Asia 40(3) (1 August 2010).
19 See n 14, above, c 9.
20 According to data from LICADHO, private Cambodian firms hold 924,896 hectares of land over 144 concessions; Vietnamese companies holds 356,560 hectares of land over 55 concessions; Chinese companies hold 369,107 hectares of land over 42 concessions; Malaysia holds 90,844 hectares over 12 concessions; Thailand holds 59,663 hectares over seven concessions; Singaporean companies hold 137,815 hectares over 11 concessions. 'LICADHO: Cambodia's Concessions Dataset' *Cambodian League for the Promotion and Defense of Human Rights* www.licadho-cambodia.org/land_concessions accessed 26 May 2017; according to World Bank data, Cambodia has 3.8 million hectares of arable land: 'Cambodia: Arable Land (Hectares)' *World Bank Data*, 2014, http://data.worldbank.org/indicator/AG.LND.ARBL.HA?locations=KH accessed 23 August 2017.
21 Mu Sochua and Cecilia Wikström, 'Land Grabs in Cambodia' *The New York Times* (18 July 2012), www.nytimes.com/2012/07/19/opinion/land-grabs-in-cambodia.html accessed 23 August 2017.
22 For example, a 2016 study by *Global Witness* detailed how Prime Minister Hun Sen's family had amassed a great fortune, including on the back of land grabs: 'Hostile Takeover' *Global Witness* (7 July 2016), www.globalwitness.org/en/reports/hostile-takeover accessed 23 August 2017; 'How Cambodia's ruling family are pulling the strings on the economy and amassing vast personal fortunes with extreme consequences for the population' www.globalwitness.org/en/reports/hostile-takeover accessed 23 August 2017.
23 'Submissions to the UN's Universal Periodic Review for Cambodia' (Cambodian League for the Protection and Defense of Human Rights (LICADHO) 28 January 2014), www.licadho-cambodia.org/collection/21/upr_cambodia_2014 accessed 23 August 2017.
24 Thul Prak Chan, 'Cambodia Suspends New Land Concessions to Companies' *Reuters* www.reuters.com/article/cambodia-land-idUSL4E8G79HB20120507 accessed 26 May 2017.
25 'LICADHO UPR Submissions'.
26 'Cambodia: 60,000 New Victims of Government Land Grabbing Policy since January 2014' *Worldwide Movement for Human Rights* (22 July 2015) www.fidh.org/en/region/asia/cambodia/cambodia-60-000-new-victims-of-government-land-grabbing-policy-since accessed 26 May 2017.
27 For example, in January 2012, women and children participating in peaceful protests against forced eviction from the Borei Keila commune were arrested and detained without charge: 'Cambodia: A Mounting Human Rights Crisis,' FIDH Briefing Note (*Fédération internationale des ligues des droits de l'homme* (FIDH), 20 September 2012).
28 The local police were reportedly working with a CPP senator. Villagers' crops and houses were flattened by bulldozers. 'UPDATE (Cambodia): Killing of a Villager Working against Illegal Land Concession by a Tycoon Senator' *Asian Human Rights Commission* www.humanrights.asia/news/urgent-appeals/UP-017-2007 accessed 26 May 2017.
29 See n 14, above at 172.
30 The Cambodian government banned the documentary later made about his work and death. John Vidal, 'Cambodia Bans Film about Murdered Rainforest Activist' *The Guardian* (21 April 2016) www.theguardian.com/environment/2016/apr/21/cambodia-bans-film-about-murdered-rainforest-activist-chut-wutty accessed 23 August 2017; 'Five Years since the Murder of Our Friend Chut Wutty' *Global Witness*, (26 April 2017) www.globalwitness.org/en/blog/five-years-murder-our-friend-chut-wutty accessed 30 May 2017; the documentary can be viewed here: hazco.co.uk, 'I Am Chut Wutty' www.journeyman.tv/film/6541/i-am-chut-wutty?version=22610 accessed 30 May 2017.
31 The trial of the assailant, a poor man from a rural community who was heavily in debt, went by quietly in March 2017, with judges and prosecutors being criticised for not addressing 'troubling inconsistencies' in the case, including the fact that even the assailant's true name was

unclear: Julia Wallace and Neou Vannarin, 'A Life Sentence in Cambodia, but Kem Ley's Murder Is Far From Solved' *The New York Times* (23 March 2017), www.nytimes.com/2017/03/23/world/asia/cambodia-kem-ley-killing-life-sentence.html accessed 23 August 2017; 'Cambodia: Continue to Investigate Kem Ley Killing' *Human Rights Watch* (23 March 2017) www.hrw.org/news/2017/03/23/cambodia-continue-investigate-kem-ley-killing accessed 26 May 2017; 'The Killing of Dr Kem Ley' *New Matilda* (25 July 2016), https://newmatilda.com/2016/07/25/the-killing-of-dr-kem-ley.

32 See n 21, above.

33 The requirement that you produce evidence of land use since 1996 is onerous (Art 31), as are requirements to pay a fee: 'Land Law 2001 (English Translation)', Pub L No NS/RKM/0801/14 (2001) Arts 30, 31.

34 For example, the Land Law limits ELCs to 10,000 hectares yet, in practice, this limit has been ignored: *ibid* at Art 59; n 14, at 278.

35 For example, Art 31 of the Constitution affirms Khmer citizens as 'equal before the law', and Art 32 affirms Khmer citizens' rights to 'life, liberty and security of person'. Article 38 prohibits physical abuse and punishment, as well as unlawful arrest and detention. 'Constitution of the Kingdom of Cambodia (English Translation)' (1993), Arts 31, 32 and 38.

36 The 2016 Rule of Law Index records Cambodia as having a high degree of improper government influence in the civil and criminal justice systems, as well as these systems having high degrees of corruption: 'World Justice Project Rule of Law Index 2016' (World Justice Project 2016).

37 See n 13, above.

38 Global Diligence is a 'For-Profit Legal Advisory Service Engaged in Public Interest Work'. See 'ICC Cambodian Case Study' *Global Diligence*, www.globaldiligence.com/about-us/icc-cambodian-case-study accessed 28 May 2017.

39 See n 13 above, at para 29.

40 'Press Release: Global Diligence LLP Files the First Supplementary Communication to the Prosecutor of the International Criminal Court under Article 15', *Global Diligence* (22 July 2015) www.globaldiligence.com/2015/07/22/richard-rogers-of-global-diligence-llp-files-the-first-supplementary-communication-to-the-prosecutor-of-the-international-criminal-court-under-article-15 accessed 23 August 2017.

41 See n 31, above.

42 'States Parties to the Rome Statute: Cambodia', *International Criminal Court* (11 March 2003) https://asp.icc-cpi.int/en_menus/asp/states%20parties/asian%20states/Pages/cambodia.aspx accessed 23 August 2017.

43 *Ibid.*

44 Including either Cambodian nationals, or non-Cambodian nationals who were within Cambodia's borders at the time of the alleged commission of the crime: 'UNGA, Rome Statute of the International Criminal Court (last amended 2010, entered into force on 1 July 2002)' ISBN no 92-9227-227-6 § (1998) Art 25.

45 As long as a formal investigation is initiated prior to the date of withdrawal. See Mark Kersten, 'Burundi's Awkward – and Mostly Pointless – Farewell to the ICC' *Justice in Conflict* (16 October 2016), https://justiceinconflict.org/2016/10/16/burundis-awkward-and-mostly-pointless-farewell-to-the-icc accessed 23 August 2017; Alex Whiting, 'If Burundi Leaves the Int'l Criminal Court, Can the Court Still Investigate Past Crimes There?' *Just Security* (12 October 2016), www.justsecurity.org/33501/burundi-leaves-icc-international-criminal-court-investigate-crimes-there accessed 23 August 2017.

46 *Ibid*; see n 10 above, at 878.

47 For example, this video depicts a number of people filming the crimes occurring on their phones: 'Video: Borei Keila: Broken Promises in Cambodia' www.licadho-cambodia.org/video.php?perm=28 accessed 26 May 2017; see n 6, above.

48 *Ibid*.

49 See *The Phnom Penh Post*, 'Violent Second Eviction for Borei Keila Residents' (14 February 2011), www.youtube.com/watch?v=njxybcEfUGo.

50 *Ibid.*

51 *Ibid.*

52 KI Letters, 'Boeung Kak Lake Eviction on 16 September 2011: RFA Story behind the Story', (22 September 2011) www.youtube.com/watch?v=AQsha2tGm5I accessed 23 August 2017; VOA Khmer, 'Police Beatings, Arrests as Lake Resident Protest (Cambodia News in Khmer)', (21 April 2011) www.youtube.com/watch?v=qGBPtccFE6w accessed 23 August 2017; Khmer Media, 'Shukaku Destroy Homes at Boeung Kak Lake', (25 July 2013) www.youtube.com/watch?v=aTrKrqpI_Y8 accessed 23 August 2017.

53 'Video: Shooting in Chi Kreng, Siem Reap' www.licadho-cambodia.org/video.php?perm=3 accessed 26 May 2017.

54 The organisation asserts that this policy largely derives from their cognisance of low literacy rates in the state, and see video as a positive means to disseminate information throughout the state: 'Human Rights 2012: The Year in Review' (LICADHO: Cambodian League for the Promotion and Defense of Human Rights, February 2013), 31; 'Human Rights 2015: The Year in Review' (LICADHO: Cambodian League for the Promotion and Defense of Human Rights, February 2016), 27.

55 See 'Human Rights 2015: The Year in Review', 27–28, xvii; 'Human Rights 2014: The Year in Review' (LICADHO: Cambodian League for the Promotion and Defense of Human Rights, February 2015), 4, 11, 27–30; 'Human Rights 2013: The Year in Review' (LICADHO: Cambodian League for the Promotion and Defense of Human Rights, February 2014), 6, 12, 14–15, 31–32, 33; 'Human Rights 2012: The Year in Review', 30–31; 'Amnesty International and the Cambodian League for the Promotion and Defense of Human Rights Submission for the UN Universal Periodic Review, 18th Session of the UPR Working Group, January/February 2014' (LICADHO: Cambodian League for the Promotion and Defense of Human Rights and Amnesty International 2014), 6.

56 'Cambodia: A Risky Business – Defending the Right to Housing' (Amnesty International, September 2008), 6–7, 12–13.

57 'Land Situation in Cambodia 2013' (ADHOC: Cambodian Human Rights and Development Association, April 2013), 11.

58 See, eg, 'Land Cleared for Rubber, Rights Bulldozed: The Impact of Rubber Plantations by Socfin-KCD on Indigenous Communities in Bousra, Mondulkiri' (*Fédération internationale des ligues des droits de l'homme* (FIDH), October 2011); see n 27, above.

59 Paragraph 2 states: 'The International Federation for Human Rights (FIDH) fully endorses and supports the Communication.' See n 13, above.

60 *Ibid.*

61 'Questions & Answers: Crimes against Humanity in Cambodia from July 2002 to Present' (Paris: Global Diligence and *Fédération internationale des ligues des droits de l'homme*, 2014).

62 See *WITNESS*, 'Video as Evidence: International Criminal Court v. Bemba', (13 September 2016) www.youtube.com/watch?v=KLObXyPB5tk&feature=youtu.be accessed 23 August 2017.

63 Judgment, *The Prosecutor v Jean Pierre Bemba Gombo* (International Criminal Court, 21 March 2016).

64 Decision on Prosecution's Motion for Admission of Video-

Recording MFI P1575, *Prosecutor v Vlastimir Dordevic* (International Criminal Tribunal for the Former Yugoslavia, 30 March 2010); Decision on the Prosecution Application to Admin the Tulica Report and Dossier into Evidence, *Prosecutor v Dario Kordic and Mario Cerkez* (International Criminal Tribunal for the Former Yugoslavia, 29 July 1999).

65 See n 10 above, at 878.

66 'Counsel' *Global Diligence*, www.globaldiligence.com/about-us/of-counsel accessed 7 June 2017; 'Partners' *Global Diligence*, www.globaldiligence.com/about-us/founding-partners accessed 7 June 2017; 'Global Diligence LLP: Overview' *LinkedIn*, 2017, www.linkedin.com/company-beta/3067092 accessed 23 August 2017.

67 Many of the counsel also have extensive experience in International Criminal Law beyond working at the ECCC, including through working at the International Criminal Tribunal for the Former Yugoslavia and ICC itself: see 'Counsel' at n 66 above; see 'Partners' at n 66 above.

68 'KOF Index of Globalisation'; See n 10 above, at 878.

69 See United Nations News Service Section, 'UN News – UN Expert Finds Corruption and Suspect Land Grabs Affecting the Poor in Cambodia' *UN News Service Section*, (20 September 2005), www.un.org/apps/news/story.asp?NewsID=15899&Cr=cambodia&Cr1. Inadequate legal protection for tenants, poor water and sanitation, and bias against women and indigenous people are among the major issues cited by a United Nations human rights expert on housing after a visit to the South-East Asian country.

70 See n 21, above; '"No Decision" Made Yet on Cambodia Loans: World Bank' *Radio Free Asia* (22 October 2014) www.rfa.org/english/news/cambodia/loans-10222014170636.html accessed 7 June 2017.

71 See UNGA 'Report of the Working Group on the Universal Periodic Review: Cambodia' (4 January 2010) http://lib.ohchr.org/HRBodies/UPR/_layouts/15/WopiFrame.aspx?sourcedoc=/HRBodies/UPR/Documents/Session6/KH/A_HRC_13_4_KHM_E.pdf&action=default&DefaultItemOpen=1 para 44 accessed 23 August 2017; in 2009, the OHCHR also noted that 'the court system has been used as a tool by land-grabbers to legitimize forced evictions and falsely prosecute housing rights defenders'. UNGA 'Summary Prepared By The Office Of The High Commissioner For Human Rights, In Accordance With Paragraph 15 (C) Of The Annex To Human Rights Council Resolution 5/1' (9 September 2009), http://lib.ohchr.org/HRBodies/UPR/_layouts/15/WopiFrame.aspx?sourcedoc=/HRBodies/UPR/Documents/Session6/KH/A_HRC_WG6_6_KHM_3_E.pdf&action=default&DefaultItemOpen=1 accesse 23 August 2017.

72 UNGA 'Report of the Special Rapporteur on the Situation of Human Rights Defenders, Margaret Sekaggya' (21 December 2011), www.ohchr.org/_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-55_en.pdf&action=default&DefaultItemOpen=1 accessed 23 August 2017.

73 UNGA 'Role and Achievements of the Office of the United Nations High Commissioner for Human Rights in Assisting the Government and People of Cambodia in the Promotion and Protection of Human Rights: Report of the Secretary-General' (15 August 2014) www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session27/_layouts/15/WopiFrame.aspx?sourcedoc=/EN/HRBodies/HRC/RegularSessions/Session27/Documents/A-HRC-27-43_en.doc&action=default&DefaultItemOpen=1 para 10 accessed 23 August 2017.

74 See n 13 above, at para 2.

75 This was within the context of condemning the murder of activists on a global level, and not placing a particular focus on Cambodia, as well as the murder of other activists around the world: 'Remarks by the President at Clinton Global Initiative' *The Whitehouse* (23 September 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/09/23/remarks-president-clinton-global-initiative accessed 23 August 2017; Assistant Secretary of State Tom Malinowski in July 2017 also condemned the murder of activist Dr Kem Ley, and called for Cambodia to grant external investigators permission to look into the crime: 'Press Roundtable with Assistant Secretary Tom Malinowski' *US Embassy in Cambodia* (19 July 2016) https://kh.usembassy.gov/press-roundtable-assistant-secretary-tom-malinowski accessed 23 August 2017.

76 'Subcommittee Field Hearing: Property Rights and Development in Southeast Asia' *Committee on Foreign Affairs* (21 August 2015) https://foreignaffairs.house.gov/hearing/subcommittee-field-hearing-property-rights-and-development-in-southeast-asia accessed 23 August 2017.

77 'Opening Statement of the Honorable Ed Royce, Chairman, Subcommittee Field Hearing: Property Rights and Development in Southeast Asia' *Committee on Foreign Affairs* (21 August 2015), https://foreignaffairs.house.gov/files/8-21-15%20Royce%20opening.pdf accessed 23 August 2017.

78 Notably, critiques of Cambodian land-grabbing crimes by the US have limited utility for the purposes of this analysis, as the US does not support the ICC. Not only has the US declined to ratify the Rome Statute, it has also enacted domestic law authorising the President to invade Holland in the situation that a US service member is indicted by the ICC – this act is colloquially known as the 'Hague Invasion Act': 'American Service-Members Protection Act (United States)', Pub L No Pub L 107-206, HR 4775, 116 Stat 820 (2002).

79 The Cambodian Foreign Minister, Hor Nahmong, said of the ICC investigation, 'the Investigation is like a balloon: when there is wind, it flies, but when there is no wind, it will drop down anywhere, even if it is a dirty place'. Statements such as these indicate that the Cambodian government is not yet concerned regarding the prospect of their crimes being investigated by the ICC. 'Cambodia: ICC Preliminary Examination Requested into Crimes Stemming from Mass Land Grabbing' *Worldwide Movement for Human Rights*, (7 October 2014) www.fidh.org/en/region/asia/cambodia/16176-cambodia-icc-preliminary-examination-requested-into-crimes-stemming-from accessed 7 June 2017.

80 'Understanding the International Criminal Court' (International Criminal Court, 2015), www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf accessed 23 August 2017.

81 See Alana Tiemessen, 'The International Criminal Court and the Politics of Prosecutions' (2014) 18(4–5) The International Journal of Human Rights 444–61, htttp://dx./doi:10.1080/13642987.2014.901310; Richard Dicker and Elizabeth Evenson, 'ICC Suspects Can Hide – and That Is the Problem' *Human Rights Watch* (24 January 2013) www.hrw.org/news/2013/01/24/icc-suspects-can-hide-and-problem accessed 23 August 2017; ie, States Parties to the Rome Statute and United Nations Security Council, and the prospect and degree of state cooperation with the Court. Consequently prosecutions have targeted only one side of the conflict and reflect the strategic political interests of the referring actors but promise a greater degree of state cooperation. The case studies selected here present variation in the nature of referrals and degree of cooperation, making for an instructive comparison and revealing an identifiable pattern of politicisation.

82 See *The Prosecutor v Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09) www.icc-cpi.int/darfur/albashir accessed 10 June 2017.

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Say what? The regulation of company statements arising from UNGP processes

Domestic regulation of company statements has significance to the increasing obligations on businesses to report publicly on human rights. The United Nation's Guiding Principles on Business and Human Rights (UNGPs), and subsequent developments, require public reporting on human rights in general or limited to specific areas like slavery or conflict minerals. The resultant reporting and statements present little risk of liability through existing international mechanisms. However there is considerable exposure under domestic regulation of misleading statements (regulation that was not designed with mandatory human rights reporting in mind). This article examines these domestic laws and the balance between mandatory reporting and liability for any such reports.

Introduction

The UNGPs encourage companies to publicise policies and procedures about human rights aspects of their operations.[1] This reporting framework has since been supported and replicated in other initiatives.[2] The UNGPs describe themselves as 'voluntary'; and there are few general mechanisms that review a company's UNGP compliance in word or deed.[3] However, many *domestic* laws regulate company statements and can apply to materials published by a company in following the UNGPs, such as regulation of false/misleading statements and corporate disclosure regimes. These national laws were not drafted or developed with human rights reporting in mind but now have a new realm of significance in their operation arising from the transparency and accountability within the UNGPs and related processes. In summary, this article emphasises a difference in corporate liability arising from *mandatory* reporting (which enjoys greater immunity) and *voluntary* statements (which are more strictly regulated). That summary informs both application of existing laws/standards, but also any movements towards domestic law reform associated with the UNGPs.

Domestic laws regulating corporate statements can be grouped into three categories:

1. controls over false/misleading publicity;
2. corporate disclosure regimes; and
3. misrepresentations in contract and tort law.

A brief summary of each of these is set out below (including their potential relevance to UNGP reporting), drawn frequently from Australian law but also including examples from some other jurisdictions. The aim is not to present the law of any particular jurisdiction, but rather to summarise some of the frequent ways in which domestic laws regulate company statements and reporting. This research then enables some observations to be made on the interaction between domestic regulation and the reporting requirements of the UNGPs (and analogues).

The efficacy of domestic laws depends, of course, on the particular institutional mechanisms and capacity in place to implement those laws. This applies to domestic law regulating corporate statements as it does to any other area of law. These laws do, however, loom large for the future of UNGP reporting.

False/misleading publicity and advertising

Many jurisdictions prohibit companies from using inaccurate publicity to attract business.[4] These laws primarily aim at ensuring a 'fair' market, protecting both consumers from being deceived and businesses from competitors' falsehoods,[5] but their application extends to broader corporate statements.

A relevant example is the United States litigation where proceedings were brought against Nike regarding statements it made about conditions in factories producing

its products. The grounds for action included that Nike's statements breached California's False Advertising Law and Unfair Competition Law. The proceedings were ultimately settled but not until various interlocutory decisions[6] about US Constitutional 'free speech' protections.[7] The upshot of *Nike v Kasky*, and subsequent US decisions, is that, for corporate statements in the US, '[w]hen the content and purpose... is promotional and related to products and services, then it is commercial speech [and more exposed to liability under false advertising laws, but]... [w]hen the content and purpose... is informational or engaging in public debate then it is fully protected under the First Amendment'.[8]

Useful guidance from this area of law, in informing how UNGP disclosures may be regulated, can be drawn from how some legal systems assess corporate environmental claims. There have been many legal actions and prosecutions in different jurisdictions, showing that businesses incur liability for statements where they are unable to substantiate their claims about their products or services.[9] The extension to UNGP statements and reporting may well follow the same approach regarding what any company publishes about its human rights policies/procedures, if there is no basis for the statements made by the company. If the company cannot show that it 'practices what it preaches', then that may well constitute false/misleading statements attracting liability in some jurisdictions.

Corporate disclosure regimes

Most jurisdictions have laws requiring reporting or disclosure from companies.[10] While some of this applies to *all* companies, and other requirements only fall on large companies, the most prevalent area of disclosure regulation is stock exchange disclosures. That is, for companies that choose to invite public investment in their shares, there are various obligations on those companies to keep the market informed.

The stock exchange reporting requirements in some jurisdictions have been informed by UNGP developments.[11] For example, UK-listed companies must now include, in their annual report, 'information about... social, community and human rights issues... to the extent necessary for an understanding of the... company's business';[12] and South African companies must monitor and report on a range of human rights and social issues (this applies to state-owned companies as well as companies listed on the stock exchange).[13] In the US, parts of the Dodd-Frank Act required companies using tantalum, tin, gold or tungsten to indicate either that: (1) their product does not come from the Democratic Republic of Congo and neighbouring countries; or (2) if that assurance cannot be given, then explain what due diligence and related checks are taken regarding conflict minerals.[14] Numerous stock exchanges are developing these types of 'apply or explain' obligations on companies in relation to sustainability procedures and indicators.[15] Most stock exchanges also have controls over statements that are misleading, and prosecutions are taken where company reporting has been inaccurate.

More broadly, many stock exchanges have continuous disclosure requirements, requiring companies publicly to notify of matters that may materially affect their share price. Stock exchanges with continuous disclosure requirements, like Australia, are seeing increasing legal liability arising from a failure to disclose a matter that could affect share price.[16] The relevance here to UNGPs is obviously more than just reporting: if a business learns of significant issues through its due diligence process, what written disclosure is required and when must that occur? Obviously, the answer to that cannot be provided in one or two sentences in this general article about the UNGPs, but hopefully the question is sufficient to reinforce that this is a significant issue to be considered regarding any publicly listed companies operating under continuous disclosure laws.

Misrepresentations: contract and tort law

Companies can incur liability to parties who relied on the company's statements or representations that are subsequently shown to be incorrect.

Liability can arise where a party contracts with a company because of its representations.[17] This may seem an unlikely scenario here – that is, a party deciding to contract with a company *because of* something in the company's UNGP statements or reporting. However, that potential will become increasingly more common as a result of attention to supply-chain responsibilities. Financiers, such as the World Bank and Equator Principle banks, frequently require

information and action as a condition for lending. Many larger organisations (both government and corporate) are demanding their suppliers to commit formally or report in relation to UNGP matters.[18] Should such statements later be found inaccurate, that could well present liabilities around breach of contract or improper entry to contract.

Companies can also incur tortious liability for misrepresentations, even where the parties are not in a contractual relationship.[19] To make a statement known to be wrong, or careless as to its accuracy, which then causes loss to another party, will render the maker of the statement liable in various jurisdictions.[20] The relevance to UNGP statements and reporting has some similarity to how false/misleading statements are approached: liability is likely to turn on what basis the company has to substantiate any statements it makes through UNGP processes.

Protections under domestic regulation

Where regulations direct a party to make some statement/report, many legal regimes will also give that party protection from liability arising from things said in that document.[21] The protection arrangements differ according to the extent of information or disclosure sought and the potential liability the party may incur if protection is not offered (which also relates to the likelihood of such reporting in the absence of legal protections). So, for instance, one legal structure requiring staff to report assaults in aged care facilities provides confidentiality and immunity to those making a report *as long as* the report is made to the relevant authorities in good faith and on reasonable grounds believing it to be true.[22] By contrast, stock exchange rules that require listed companies to make various reports do not provide blanket immunities but instead usually include additional rules making it an offence to provide inaccurate information. Protection is also frequently lost for statements known to be false: in the US – renowned for its free speech protection – even the constitutional protections do not cover 'false speech'.[23]

Quite plainly, there is no universal formula of what protection in return for how much compulsion. The different 'law-makers' (whether government regulators, legislators or judiciary) examine the context of the specified disclosure and set the related protection at what is considered an appropriate level.

This dynamic of protection for reporting that is compulsorily required creates a curious dilemma for the UNGPs and how they operate in any particular jurisdiction. Various governments have been reluctant to introduce any regulation addressing aspects of the UNGPs, purportedly because this may make some form of 'bureaucratic red tape'. The irony is that, in leaving corporate UNGP reporting completely voluntary, those jurisdictions with other laws regulating corporate statements may result in greater corporate exposure to liability for UNGP statements.

Notes

1 UN, *Guiding Principles on Business and Human Rights* (Human Rights Council 2011), eg, Guiding Principles 16(d), 18(b), 21, 31(e).

2 Eg, public reporting aspects feature in the *Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains* (China Chamber of Commerce of Metals, Minerals and Chemicals Importers & Exporters 2015); *International Code of Conduct for Private Security Service Providers* (2010, signatory companies); *Principles and Criteria for the Production of Sustainable Palm Oil* (Roundtable on Sustainable Palm Oil 2013); and *OECD Guidelines for Multinational Enterprises* (Organisation for Economic Co-operation & Development 2011) ('OECD Guidelines').

3 The closest form of international 'policing' would be through the OECD Guidelines (see n 2, above) but that imposes no legal liability for non-compliance.

4 Eg, Australia: Australian Consumer Law (Sch 2 to Competition and Consumer Act 2010), s 18; Canada: Competition Act 1985, s 52; United Kingdom: Consumer Protection from Unfair Trading Regulations 2008, regs 3–6.

5 Eg, UN, *Guidelines for Consumer Protection* (Department of Economic and Social Affairs 2003).

6 *Kasky v Nike Inc*, 79 Cal App 4th 165 (2000, Californian Court of Appeal upholding the trial judge's ruling that Nike's statements had constitutional protection); *Nike Inc v Kasky*, 27 Cal 4th 939 (2002, California Supreme Court overturning the lower decisions and ruling the action could proceed); *Nike Inc v Kasky*, 539 US 654 (2003, US Supreme Court dismissing appeal and directing the proceeding to continue).

7 US law makes a distinction between 'commercial' and 'non-commercial' speech (with the former receiving less Constitutional protection), see Myers, 'What's the legal definition of PR?: An analysis of commercial speech and public relations' (2016) 42(5) Public Relations Review 821, 824–825.

8 Myers, see n 7, above, at 829 (summarising from a range of court decisions following and applying the *Nike v Kasky* judgment and reasons).

9 Eg, Australian Competition & Consumer Commission, *Green marketing and the Australian Consumer Law* (Australian Government 2011); Canadian Standards Association, *Environmental Claims: A Guide for Industry and Advertisers* (Competition Bureau Canada 2008). Another

example is the decision of the UK Advertising Standards Authority *Final Adjudication – Shell International* (A08-50657, 13 August 2008).

10 Gillian North, *Company Disclosure in Australia* (Thomson Reuters 2013) 41.

11 Sumithra Dhanarajan and Claire O' Brien, 'Human Rights and Businesses: Background Paper' (Asia Europe Foundation 2014) 19: '[V]arious countries' stock exchanges have put in place either mandatory or voluntary disclosure requirements for social and environmental impacts'.

12 Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013, reg 3 (inserting s 414C(7) into the Companies Act 2006).

13 Companies Regulations 2011, s 43.

14 The current extent of US reporting requirements is in flux given the February 2017 Congress and Presidential disapproval of the 2016 US Securities and Exchange Commission's 'Disclosure of Payments by Resource Extraction Issuers'.

15 IHRB and UNEP, Human Rights and Sustainable Finance: Exploring the Relationship (United Nations Environment Programme, Nairobi 2016) 43. See also, UN Sustainable Stock Exchanges Initiative, *Model Guidance on Reporting ESG Information to Investors* (Geneva: UNCTAD Division on Investment and Enterprise (CHE) 2015); and World Federation of Exchanges WFE, *ESG Recommendation Guidance and Metrics* (London: World Federation of Exchanges 2015).

16 Eg, *Grant-Taylor v Babcock & Brown Ltd* [2016] FCAFC 60, [92]–[93] and [96] per Allsop CJ, Gilmour and Beach JJ; *Melbourne City Investments v UGL* [2015] VSC 540, [156] per Robson J.

17 Eg, Australia: *Alati v Kruger* [1955] HCA 64; 94 CLR 216, 222; South Africa: *Brink v Humphries & Jewell (Pty) Ltd* [2004] ZASCA 131, [2]; UK: *Salt v Stratstone Specialist* [2015] EWCA Civ 745, [1]–[4].

18 Eg, examples of government procurement and contracting in the US, EU, Denmark, Italy, Holland and UK are noted in DIHR and ICAR, *Briefing Note: Protecting Human Rights through Government Procurement* (Danish Institute for Human Rights 2014) 3–6; a corporate example is FIFA, 'Executive Committee Sets Presidential Election for 26 February 2016 and Fully Supports Roadmap for Reform' (Fédération Internationale de Football Association 2015).

19 Eg, Canada: *Queen v Cognos Inc* [1993] 1 SCR 87, 108; UK: Misrepresentation Act 1967, s 2.

20 Eg, US: *Dun & Bradstreet v Greenmoss Builders*, 472 US 749 (1985) 761.

21 Eg, Australia: Aged Care Act 1997, s 96.8 (protection for mandatory reporting of assaults); US: *Beeman v Anthem Prescription Management*, 58 Cal 4th 329 (2013), section III per Liu, Kennard, Baxter and Werdegar JJ (discussing the US law and protections on 'compelled speech').

22 *Ibid*, Aged Care Act, s 96.8.

23 Eg, *New York Times v Sullivan*, 376 US 254 (1964) 279–280 (recovering damages for defamation permitted where the statement was made 'with knowledge that it was false or with reckless disregard of whether it was false').

The rule of labour law and conflict with international human rights guidelines

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Summary

Countries throughout the world have taken different approaches to the right of association of employees and the right to organise labour organisations. The common thread is that these rules of law deny to some extent an employee's free choice to determine whether or not to associate with or consent to representation by a labour organisation. These conflicts raise particular issues under international frameworks and the International Labour Organization's (ILO) Conventions. When these Conventions are included in treaties, the conflict between the labour laws of the countries involved in such treaties and the ILO Conventions becomes more significant.

Introduction

When it comes to the right of association by employees and the right to organise labour organisations, countries around the world have taken very different approaches. In some countries, the representation of employees by a labour organisation is mandatory depending on the size of the employer or the industry in which the employer operates. At the other end of the scale, there are some countries in which it is illegal for any type of labour organisation to represent the employees. Between these two polar opposites are countries, such as the United States and Canada, where unionisation is largely left to elections in which even a slight majority may decide that all employees in a designated unit are to be represented by a union, even

those employees who voted against union representation. In certain Canadian jurisdictions, union representation is decided by card-check certification, which is to say that it takes only a simple majority of union cards signed by employees in a proposed bargaining unit to certify the entire group in that unit and trigger union representation. In some of these countries, in order to retain their employment, employees who are opposed to a labour organisation may still have to join and/or pay dues as a member of that organisation.

What these rules of labour law all have in common is that they deny to some extent an employee's free choice to determine whether or not to associate with or consent to representation by a labour organisation. This conflict exists not just with the actual written labour laws of countries. When one reviews the actual operation of labour relations in many countries, the conflict between employee labour rights around the world and the rights of employees under international human rights guidance becomes even more pronounced.

In light of these conflicts, a serious discussion needs to be had about the true nature of any internationally recognised conventions, framework agreements and guidelines that relates to employees' rights to either associate with a labour organisation or consent to representation by a labour organisation.

The United Nations has incorporated the ILO core conventions, as set out in the ILO's Declaration of Fundamental Principles and Rights at Work, into its International Bill of Human Rights. In many ways, this incorporation is largely uncontroversial. For example, the ILO has protections against forced labour. When it comes to the rule of law, the authors are unaware of any country that currently has laws that legitimise slavery. Unfortunately, there are numerous countries where forced labour does occur and, in fact, studies would indicate that over 20 million workers throughout the world are serving in some form of indentured service. Rules against slavery and child labour are not often affected by the existence of the rule of law but rather by the lack of it.

The area of labour law that relates to the rights of associations and of representation by labour organisations is, however, highly governed by the rule of law in countries throughout the world and its inclusion in the definition of accepted international human rights is not without controversy.

The application of the rule of law regarding labour laws becomes even more complex as nations incorporate by general reference the ILO Conventions and UN human rights guidelines into international free trade agreements. The recent Comprehensive Economic and Trade Agreement (CETA) (the trade agreement between the European Union and Canada) is just one such example. At times, countries have agreed to such trade agreements with references to the UN guiding principles and ILO Conventions even though it is clear that, under the operation of the country's labour laws, it is unlikely that the country would be able fully to abide by the terms of these free trade agreements or ILO Conventions.

United States

All free trade agreements concluded by the US since the North American Free Trade Agreement (NAFTA) in 1993 include provisions requiring the parties to enforce labour and employment laws that reflect 'internationally recognised' human rights with the source of these rights stated as the ILO Conventions. This is the case even though the US has not ratified many of the ILO Conventions, including those related to an employee's rights of association and rights to representation by a labour organisation. The fact that the US has not ratified these Conventions may be the result of an understanding that US labour law conflicts with them. The labour law of the US provides protections for the ability of employers to exercise free speech in commenting on union organisations and in actually opposing organisation of employees by labour unions. Many, including many of those involved with union organisations, will argue that the ILO Conventions would require employers to remain neutral in the face of union organisation attempts.

The issues that cause this conflict are not just those of law, but also of economic policy. In the US, employers are largely left to negotiate collective bargaining agreements with unions that apply only to the unit of employees represented by the union at a specific location. Only in a few industries, such as the refining industry, are there negotiations by a designated leading employer that will set terms for the industry. In even more limited cases, such as with professional sports leagues, are there industry-

wide agreements. This arrangement is quite different from what is found in Europe, where industry-wide labour agreements are the norm. Furthermore, US labour law recognises both the employers' and the employees' right to take economic action to pursue their goals in labour relations. This means that employees have the right to strike and that employers have the right to lock out the employees. It also means that, should the employees engage in an economic strike in the US, the employer has the right to replace those employees permanently. Further, US labour law puts limitations on when strikes can occur and when an employer can exercise its right to lock out the employees. It is not entirely clear how the details of US labour law that limit employees and unions and their activities are consistent with what has been interpreted as very broad protection of the right to strike under the ILO Conventions.

There is also the conundrum of how the US' so-called 'right-to-work' laws would be viewed under the ILO Conventions. Under federal labour law in the US, each of the 50 states has a right to determine whether it will implement a law that prohibits agreements between employers and unions that require all employees in the bargaining unit to be a member in good standing of the union. Whether these right-to-work laws are consistent with the ILO Conventions could be hotly debated. Labour organisations may take the position, as they have in recent situations when some of the states in the US have enacted such laws, that these laws discourage union organisation and are therefore contrary to the ILO Conventions. At the same time, given that the protections in the ILO go to each individual employee, it could be argued that, in those states in which an employer or labour organisation is allowed by law to agree that each employee must be a member of a union, there is a violation of the rights of employees in the selection of their labour representative that is protected under the ILO Conventions.

Other provisions of the ILO Conventions require that the legal proceedings necessary to enforce labour laws must not be unnecessarily complicated, prohibitively costly, entail unreasonable time limits or unwarranted delays. In the US, the National Labor Relations Board (NLRB) (the 'Board) is a five-member board appointed by the President. This appointment process has become highly politicised in the past 20 years. At times, the political climate around the Board has resulted in it operating with as few as two members. This has resulted in cases pending before the Board for as long as three years, if not more. Also, as the US President will usually appoint the majority of his political party to the Board, the decisions of the NLRB often vary depending upon which party is in power. Lack of reliance upon prior precedent and the deferral of the US federal courts to decisions reflecting the changing winds of politics at the Board have created an uncertain environment for labour organisations, employers and as employees. Arguments can be made that this process in the US is not a fulfilment of the requirements of the ILO Conventions related to avoiding unnecessarily complicated processes that entail unreasonable delays in the enforcement of labour laws.

Another peculiarity of US labour law is that employees who are categorised as supervisors under that law do not enjoy the same rights as other employees. In particular, such supervisory employees in the US do not generally enjoy the right to union representation. Nothing in the ILO Convention would appear to endorse this lack of such rights for a specific class of non-upper management employees.

Canada

As one looks at the staggering trade volume numbers covered by free trade agreements, it is not surprising that labour and employment considerations are a prime concern for Canada in these types of agreements.

For example, Canada's most recent free trade agreements with South Korea and with the EU, otherwise known as CETA, contain elaborate trade and labour provisions. Despite the appearance of these provisions, within these agreements, trade unions still remain opposed and are bitter opponents of these agreements.

Aside to these considerations, it is important to remember that, unlike the US, Canada is a signatory to ILO Convention no 87, which is one of the core conventions set out in the ILO's Declaration of Fundamental Principles and Rights at Work. In this regard, Convention no 87 deals with freedom of association and the protection of the right to organise. The Canadian government has recently announced that it would soon sign ILO Convention no 98 which, Canada has not signed to date. Convention no 98 covers the right to organise and collective bargaining.

Although Canada is or will shortly become a signatory to these Conventions, there are issues

that apply. First, the very language found in those Conventions nos 87 and 98 may already be contrary to the provisions of Canadian labour statutes and/or codes. In this regard, in a previous paper co-authored by one of the present authors, it was stated that:

> 'the Trade and Labor Chapter ("Chapter") of the Canada/EU agreement requires each party to ensure that its labor law and practice obey and provide protection of the fundamental principles and rights at work and… in accordance with its obligations as a member of the ILO and its commitments under the ILO Declaration on Fundamental Principles and Rights at Work.'[1]

In addition, the Chapter requires the parties to provide effective legal procedures that are not excessively complicated or costly and that avoid 'unnecessary delays' to protect the labour rights of employees and unions alike. Therefore, should we understand that the right of an employer to contest a bargaining unit under applicable Canadian law, and the employer's ability to request and attend a hearing to contest the bargaining unit would, in effect, constitute a violation of the principles under, for example, the Trade and Labour sections of the Canada/EU free trade agreement?

Second, Canadian and US labour laws are similar in that a union is given a monopoly to represent all employees in a group that the applicable or relevant labour relations board defines as the bargaining unit. This monopoly is based on the unions' ability to demonstrate that it has a majority of 50 per cent plus one of the employees in the bargaining unit who wish to be represented by a trade union, as demonstrated either by a membership count in a card-check jurisdiction or by the results of a representational vote.

In reality, these features that are equally applicable not only to the Wagner Act in the US but also all applicable labour laws in Canada are contrary to the ILO's interpretation of freedom of association and collective bargaining, as set out in the two Conventions mentioned above. In effect, the ILO interprets freedom of association, for example, as requiring all collective bargaining to be voluntary and not compelled by the state. Further, unions should be entitled to negotiate on behalf of a significant number of the employees and, at the same time, the parties to this voluntary collective bargaining must be able to decide on how it will take place. Moreover, the parties should not have state-required collective bargaining that must take place at a particular level, which includes the physical location over which a trade union would claim representational rights and the union's ability to bargain on behalf of the employees.

A third and further example would be demonstrated by those Canadian provinces that are still card-check jurisdictions. A card-check jurisdiction is one where the union's right to be certified and negotiate on behalf of the bargaining unit employees is decided by the number of cards filed at a specific point in time. Normally, this specific point in time is the filing of the petition in certification. If the union, at the time of the filing of the petition, files a sufficient number of signed union cards which, in most card-check jurisdictions, would represent 50 per cent plus one of the bargaining unit employees, the union would automatically be certified by the labour board. Interestingly enough, this procedure is contrary to the very principles decided by the ILO's own Committee of Experts (ILO, 1996e, Case No 1765, para 100).

These are but three of the clear examples that question the applicability of these Conventions, and the general language often found in free trade agreements, to the labour law in Canada.

One must remember that free trade agreements and the ILO Convention bind the state but not the individual players (companies and the like) within the country. Those individual actors are governed by the specific labour legislation that applies to them.

Notwithstanding, the Supreme Court of Canada has, on several occasions over the last few years, applied international principles when interpreting the labour laws affecting employees working within the provinces in Canada. These decisions of Canada's highest court have recognised the applicability of the principles of ILO Convention nos 87 and 98 into the fabric of Canadian labour laws. Therefore, it is not surprising to learn that trade unions in Canada have seen an increase in their rights, including a recognition by the Supreme Court of Canada that the right to strike is constitutionally guaranteed.

What remains to be seen is whether the Supreme Court of Canada and other Canadian courts will find in the future that, while existing labour laws can be enhanced by the ILO Conventions and the interpretation thereof, the same should also be possible where employers contest the legality of certain laws and regulations, including the

legality of card-check legislation.

Recent proposed amendments to both labour laws in the provinces of Ontario and Alberta will be closely monitored to determine whether the amendments, if passed, will be subject to legal contestation by employers on the basis of whether, in part, these amendments run foul of the ILO Conventions and, at the same time, may ultimately also run foul of the Canadian government's undertakings under applicable free trade agreements including the recent CETA agreement. In truth, only time will tell.

Notes

1 Article 3 of Chapter X+1 (Chapter 24): Trade and Labour of the CTEA.

The role of the rule of law in human rights

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Summary

The democratic states of the Americas are proud tenants of constitutions with a divine prose which, in most cases, do not transcend to the reality of the state in which they exist. This article explains how I follow the legacy of my uncle, José Napoleón Duarte, who was the first president democratically elected in El Salvador and how the echo of his words 'we have to make democracy work' rings in my ears every day. When the Executive and Legislative power are not working, there is only one way left to make democracy work: litigation.

Fighting impunity through inclusion: the case of El Salvador

For the past year, El Salvador has been in the media for several negative reasons: increased gang violence, which led to the country being given the label of the murder capital of the world;[1] corruption scandals from the last three presidents in office;[2] lack of economic growth;[3] and a fiscal crisis[4] that has led the country to face a situation similar to that of Greece. These factors have left the Lesbian, Gay, Bisexual, Trans and/or Intersex (LGBTI) agenda at the bottom of the list of government and societal priorities, despite this group being one of the social groups most affected by violence.[5]

Prejudice against the LGBTI community is fuelled by religion.[6] This climate creates a reasonable fear of rejection[7] for individuals expressing sexual orientation and a prisoner's dilemma scenario, in which the majority inside a minority group decide to stay in the closet, resulting in a perpetual social coma from the LGBTI privileged[8] sector and a situation where people become, as confirmed by the history[9] of the movement, accomplices of their condemnation owing to their inaction.

The Salvadoran State is the centre of all action to man. At the centre of society, on the other hand, is the family, being that central and vital institutions such as marriage are found as the basis of the family. After a simple review of how these social structures are shaped, it can be seen that LGBTI people are excluded from that society. Igualitos[10] was formed from a very basic point of view: that, in a country where unalienable human rights are guaranteed by its constitution, all people should be treated as equal, without regard to race, sex, religion, creed or sexual orientation.

One of the mechanisms through which a democratic government supports the freedom of its population is through various civil and legal institutions. These civil and legal institutions should be equally available to all members of a democratic society. Minority social groups may only enjoy these liberties when a government maintains its integrity by legal and legislative regulation. Such regulation would promote plurality in government, secularisation of the judicial system, progression of civil rights and general equality for all citizens.

The discrimination that many minorities suffer is real and affects thousands of men and women in our country. This discrimination doesn't distinguish social condition, age or profession. It affects different areas of life: social aspects, family

and labour. Discrimination has also taken the lives of many innocent people whose only offence was being different. In El Salvador, thousands of LGBTI people are assassinated every year because of the country's intolerance towards sexual diversity.

Law is an objective standard of behaviours that has been deemed acceptable in society. A change in law, with the purpose of inclusion, rather than exclusion, would be a giant step towards the inclusion of historically marginalised groups. History has demonstrated that society tends to accept what is considered legal. Further, society denounces what has been deemed illegal, regardless of traditional convictions.

Starting in 2009,[11] conservative religious groups have been successfully putting pressure on the National Assembly to approve constitutional reforms that block same-sex marriage, adoption and recognition of marriages celebrated in other jurisdictions. Fortunately, such reforms have not yet been ratified.

It is for this aspiration of true liberty and equality that the first initiative commenced by Igualitos is a constitutional claim (Inc 184-2016) to impede a constitutional reform that appeals to the Family Code to classify LGBTI individuals as second-class citizens and prevent access to civil institutions offered by the state. Those regulations restrict the LGBTI population from essential legal and social institutions that formalise, regulate and protect unions that form the basis of our society. Such limitations would only serve to widen the gap of inequality for minorities, who would be disavowed at the national level. On the contrary, an official recognition of the unconstitutionality of limitations in the Family Code would validate, promote and protect diversity within our society.

Considering the winds of change that are now blowing against the direction of equality – as a more conservative Republican party has gained power through President Donald Trump and Vice-President Michael Pence – the few years left for four out of the five members of the Salvadoran Supreme Court's Constitutional Court, before their mandate expires, and the extreme violence the LGBTI sector faces in El Salvador led Igualitos to consider that the filing was necessary. Getting the support[12] of the historical leader of the LGBTI movement, William Hernández, confirmed that.

With the Igualitos flag, we have challenged the ban against same-sex marriage in El Salvador; presented claims to block constitutional reforms that would degrade same sex couples; denounced hate crimes against the LGBTI population that are occurring every day in El Salvador at the Inter-American Commission on Human Rights; and have pleaded for equalitarian access to the institutions that states offer and in favour of issuing a gender identity law before the Inter-American Court of Human Rights.

'Litigation is a tear in the fabric of society' states Alexandra Lahav, in her recent book *In Praise of Litigation*. No one can deny that litigation is an essential aspect of democratic states, as it's a tool that gives voice to injustices citizens are living. Sometimes, it is the last resort available in a democratic society to fulfil the promise behind the premise of the rule of law: all men are created equal and no one is above the law.

Notes

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3 P García, 'Indicadores económicos del país se deterioraron en los últimos 10 años' *El Diario de Hoy* (2016), www.elsalvador.com/articulo/negocios/indicadores-economicos-del-pais-deterioraron-los-ultimos-anos-101404 accessed 23 August 2017.

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8 Consulta Nacional sobre realidades LGBTI en El Salvador efectuada por la Dirección de Diversidad Sexual de la Secretaría de Inclusión Social, http://amate.org.sv/doc/Consulta%20Nacional%20sobre%20realidades%20LGBTI%20en%20El%20Salvador.PDF accessed 23 August 2017.

9 J Archila, 'Salvadoreño aboga por el matrimonio entre

personas del mismo sexo' *El Blog* (November 2016), http://elblog.com/noticias/registro-36873.html accessed 23 August 2017.

10 Igualitos is the LGBTI rights movement that was created shortly after the filing of the equal marriage claim and it has evolved into the formation of the *Fundación para el Fortalecimiento y Promoción de los derechos de las personas LGBTI*. It is currently under formation in accordance with Costa Rica Law. More information on Igualitos is available at www.facebook.com/igualitos.as and www.igualitos-as.com accessed 23 August 2017.

11 R Méndez, 'Matrimonios gays; entre lo religioso, lo legal y lo político (I entrega)' *La Pagina* (14 September 2009), www.lapagina.com.sv/nacionales/17252/2009/09/14/Matrimonios-gays-entre-lo-religioso-lo-legal-y-lo-politico-(I-entrega) accessed 23 August 2017. J Aguilar, 'Derecha legislativa acuerda tratar de amoldar la Constitución a lo que dice la Biblia' *El Faro* (2012), www.elfaro.net/es/201202/noticias/7755/Derecha-legislativa-acuerda-tratar-de-amoldar-la-Constitución-a-lo-que-dice-la-Biblia.htm accessed 23 August 2017. M Quehl, 'ARENA pide ratificación de matrimonios hombre-mujer' *La Prensa Gráfica* (16 November 2016), www.laprensagrafica.com/2016/11/16/arena-pide-ratificacion-de-matrimonios-hombremujer accessed 23 August 2017.

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Commitment to a civil society: a call for businesses to commit to the rule of law and for their lawyers to ensure that they do

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Summary

The rule of law: identify an issue, apply a law and resolve the conflict. Human rights abuses are present because government has failed to enforce it. Businesses must step in by committing to operating under a rule of law that prevents such abuses. Lawyers need to uphold the rule of law by ensuring their clients identify the human rights issues in their business, apply procedures to address and prevent such issues, and relieve sustained abuses. Bar associations must take steps that require lawyers to distance themselves from clients that contribute to these abuses because the rule of law is absent.

Introduction

The rule of law is fundamental to a civil society. It is the trust that we will not abuse others, that abusers will be held accountable and that the abused will have access to relief. It is basic and aspirational but never automatic. It changes with time, geographical region and industry. It can be an ambiguous and unthinking phrase but, when defined and committed to, it can achieve great things.

The *Magna Carta*, a cornerstone of commitment to the rule of law, demands fundamental rights to life, liberty and property and that those rights not be subjected to arbitrary laws or absolute power.[1] Since then, societies have fought to expand the depth and breadth of those rights. Still today, people subject others to abuse of the most fundamental rights. This occurs because governments are not held accountable, inadequately equipped to address the issue, complicit in the abuse or absent. Indeed, new patriotic isolationism is placing national economic interests over concerns for such abuses.[2] Further, increasing government regulations shift the responsibility for dealing with these social ills to international businesses.[3]

In these situations, the rule of law is absent, and its absence enables these abuses. When this occurs, businesses, as citizens of society,[4] must impose their rule of law, and their lawyers, if not ethically required to do so then, as pillars of civil society must ensure that they do.

Businesses must commit to the rule of law

Businesses must commit to operating under the rule of law. They need not address all the world's problems, but their commitment must be more than perfunctory. A proper commitment will identify, address and resolve human rights abuses in its operations.[5]

Commitment includes identifying human rights that are at risk in the business's operations, both directly and indirectly.[6] Specificity assists in developing efficient procedures and from committing to overly broad and ineffective policies. Applied, textile manufacturers can proclaim vendors are to treat their employees humanely but need to uphold that commitment by enacting procedures that address abuses in their manufacturing markets. [7] If connections to human rights violations appear too attenuated, review local issues, self-reflection and aspirational goals. Consider climate and environment issues, ensure equal pay for equal work, or aspire to pay a better wage, which are all identified as human rights.[8]

Commitment means addressing existing abuses and preventing future harms. It is easy to look down the direct business to ensure that the business operations are not contributing to human rights abuses, although aspirational goals may expose weaknesses. The difficulty lies when addressing remote and removed operations that rely on vendors and business partners, particularly in regions with little regulation and oversight. Due diligence policies and procedures can verify that the business, its vendors and business partners are not contributing to human rights abuses identified by the company.[9] Here, the same textile manufacturer may be in a position to require that its vendors provide minimum working conditions and on-sight inspections to ensure not only compliance, but that abuses are not outsourced to subcontractors.[10]

Last, the commitment must allow for resolution. The resolution depends on many factors. Still, a commitment includes rules and procedures that allow for the aggrieved to notice their grievances, and obtain remediation of abuse and relief for harm. Local representatives with the authority to abate sustained abuses and terminate relationships can assist with continued compliance.[11]

Commitment to the rule of law takes awareness of the industry and geographical conditions, knowledge of international laws and treaties and flexibility to address changing geopolitical, economic and social issues. The level of commitment and process will vary from business to business, but will ensure that the company operates under a rule of law that, at a minimum, prevents it from contributing to human rights abuses.

Lawyers must uphold the rule of law

As lawyers, we are trained in the rule of law and must uphold it. To do so, we must recognise when its absence allows for abuse of human rights, provide guidance to address such issues and counsel grievances to a resolution. Attorneys can fulfil this duty by ensuring their clients commit to the rule of law and limit their representation of those that contribute to abuses because of its absence.[12]

To start, educate clients on the human rights issues relevant to their business. Mining industry clients need to understand how they are exposed to child labour abuses in Africa more than attenuated worldwide freedom of religion issues, although no less important.[13] The International Bill of Human Rights, a collection of three United Nations instruments, is a primary resource when identifying rights to be considered.[14] This bill of rights is the beginning of a web of international treaties, covenants and protocols that define various rights and standards relevant to different situations and regions.[15] Individual and specific issues include those affecting indigenous people, migrant workers and individuals with disabilities.[16]

Next, advise how to address these issues. Understanding the regions these clients operate in and the conditions of the laws, or the lack thereof, are keys to advising on due diligence procedures that catch and prevent such abuses in varying situations. For example, when the business involves land or mineral rights, a lawyer should be satisfied that the local officials can deliver a clear title that does not adversely affect the rights of indigenous people.[17] If local conditions and laws put the title into question, then we must counsel our client to conduct additional verification and compensate the rightful owners.

Last, ensure that clients can resolve the abuses they identify. The resolution, similar to due diligence, is issue and harm dependent. Here, attorneys should be aware of the various international agreements that have established arbitration or judicial forums.[18] Human rights abuse claims before the various international tribunals may ensnare

clients working with government partners in signatory countries. For example, the American Convention on Human Rights, which most North American countries are a signatory to, has an investigative body and court; and the European Convention on Human Rights established the European Court of Human Rights, which can hear complaints against Member States brought by individuals.[19] If able to address the issues clients face, these international bodies may be adequate enforcers of the rule of law. Nevertheless, lawyers must counsel clients to include systems that allow them to hear from stakeholders and provide relief from sustained grievances.

Each client's rule of law will differ and may only need to supplement meaningful government enforcement. However, clients should be encouraged not to lower the standard but to raise it by identifying, addressing and resolving human rights issues beyond the traditional standards.

Ensuring our clients commit to the rule of law should not only be our moral obligation to civil society and the prudent counsel for our clients, but it is increasingly our ethical responsibility. Indeed, these 'soft laws and regulations' are becoming hard obligations as governments continue to enact laws and regulations that require international businesses to report on and address human rights abuses in their operations.[20] These legislative acts effectively shift enforcement obligations to international trade who, in turn, will look to our compenent counsel. But, lawyers must go further by limiting representation of clients that wilfully contribute to human rights abuses because the rule of law is absent. If ethical rules do not allow for perjury, then they should not allow for the contribution to human rights abuses because available law or enforcement is inadequate.[21]

Distancing ourselves from a client for unregulated issues can be a difficult proposition. Indeed, suggesting that a firm drops its largest client because the client's operations may be contributing to human rights abuses in far-off lands has not been the conventional path to a long and lucrative legal career. Therefore, bar associations must provide support. That support must provide the confidence that attorneys with lesser morals will not benefit from another's refusal to advance a client's interests if those interests contribute to abuses of fundamental human rights. Certainly, the Law Society of Ireland calls on its members to respect the rule of law.[22] Ethical rules should be stronger, however, and prohibit lawyers from providing services to clients that contribute to human rights abuses by failing to uphold the rule of law.

As governments fail adequately to apply the rule of law so as to prevent violations of human rights, businesses, as citizens of a civil society, must commit their rule of law to ensure that such abuses do not occur and, as trustees of a civil society, the Bar must uphold the rule of law when it is absent.

Notes

1 The *Magna Carta* of Edward 1 (1297), 25 Edw 29.
2 See Peter Baker, 'To Trump, Human Rights Concerns Are Often Barrier to Trade' *New York Times* (20 May 2017).
3 Eg, Modern Slavery Act 2015, c 30.
4 See *Citizens United v Federal Election Commission*, 558 US 310, 342–44 (2010) (holding United States First Amendment protections to rights of political speech applied to corporations).
5 See generally, Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, United Nations, HR/PUB/11/04 (2011).
6 See OECD Guidelines for Multinational Enterprises (2011) available at http://mneguidelines.oecd.org accessed 23 August 2017.
7 See Brian Stauffer, 'Follow the Thread: The Need for Supply Chain Transparency in the Garment and Footwear Industry' *Human Rights Watch* (2017), www.hrw.org/report/2017/04/20/follow-thread/need-supply-chain-transparency-garment-and-footwear-industry.
8 See United Nations Human Rights Office of the High Commissioner, *International Human Rights Law*, United Nations, www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx accessed 30 May 2017 (a summary of UN human rights instruments).
9 See OECD, *Due Diligence Guidance for Responsible Business Conduct*, Draft 2.1 (2017), http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-Responsible-Business-Conduct.pdf (comment period closed 9 February 2017) accessed 23 August 2017.
10 See n 7, above.
11 *Ibid.*
12 See, generally, International Bar Association, *IBA Practical Guide on Business and Human Rights for Business Lawyers* (2016), www.ibanet.org/Article/NewDetail.aspx?ArticleUid=420dc178-5f9d-48eb-978e-8876feffd8ab accessed 30 May 2017.
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15 See Human Rights Office of High Commissioner, *The Core International Human Rights Instruments and their monitoring*

bodies, United Nations, www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx accessed 31 May 2017.
16 See n 8, above.
17 See Chris Arsenault, *How to protect Peru's rainforest? Indigenous land titles, researchers say*, Thomas Reuters Foundation (3 April 2017), http://news.trust.org/item/20170403200705-par3y accessed 31 May 2017.
18 See n 15, above.
19 American Convention on Human Rights (San Jose, Costa Rica, 22 November 1969), 9 ILM 673 (1970), entered into force 18 July 1978; and European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), 312 ETS 5, as amended by Protocol No 3, ETS 45; Protocol No 5, ETS 55; Protocol No 8, ETS 118; and Protocol No 11, ETS 155; entered into force 3 September 1953 (Protocol No 3 on 21 September 1970, Protocol No 5 on 20 December 1971, Protocol No 8 on 1 January 1990, Protocol 11 on 11 January 1998).
20 See *Proposition de loi du 21 février 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* (Proposition of Law of 21 February 2017 Relating to the duty of vigilance of parent and subsidiary companies) (voted for, but yet to be enacted); see also Koninkrijk der Nederlanden, *Initiatiefvoorstel-Van Laar Wet zorgplicht kinderarbeid* (Kingdom of the Netherlands, Initiative proposal of MP Van Laar for a duty of care to prevent child labour) (24 June 2016).
21 International Bar Association, *International Principles on Conduct for the Legal Profession* (2011), Rule 2.
22 Law Society of Ireland, *A Guide to Good Professional Conduct for Solicitors* (2013).

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Forthcoming NAFTA renegotiation is an opportunity to recognise and address human rights issues under the original agreement

Summary

The North American Free Trade Agreement (NAFTA) is going to be renegotiated as early as August 2017. Canada, Mexico and the United States will have the opportunity to address human rights issues raised by the original agreement, particularly in the areas of labour, environment and investor-state dispute settlement tribunals. This article cites the international law providing for human rights affected by NAFTA, points out specific mechanisms in NAFTA affecting those rights and identifies opportunities for improvement along with some policy recommendations.

Introduction

On 23 January 2017, US President Donald Trump upheld a campaign promise and removed the US from the Trans-Pacific Partnership (TPP), a free trade agreement the US had been negotiating since 2008. President Trump also promised to terminate or renegotiate the NAFTA 1.0.[1] On 18 May 2017, the US Trade Representative (USTR) officially informed the US Congress of President Trump's intent to renegotiate the NAFTA 1.0,[2] and Canada and Mexico issued statements indicating their willingness to participate in negotiating the terms of an updated NAFTA (NAFTA 2.0).[3]

NAFTA 1.0, which addresses more than trade matters, has been criticised within all three countries for its negative impact on human rights in the areas of labour and the environment and for its use of investor-state dispute settlement (ISDS) tribunals.[4] All three NAFTA parties were part of TPP negotiations, which touch upon these three areas of concern. Mexico and the US have expressed an interest in beginning and ending renegotiations as quickly as possible, leading observers to conclude that NAFTA 2.0 will largely be an update incorporating TPP, rather than a complete overhaul.[5] Ultimately, NAFTA renegotiation is an opportunity

for Canada, Mexico and the US to correct weaknesses in NAFTA 1.0 and better protect human rights in North America.

Human rights problems under NAFTA 1.0

During the three-year negotiation of NAFTA 1.0, many critics voiced concerns about the agreement's threats to human rights. However, the promise of job creation wooed law-makers and it went into force 1 January 1994. NAFTA 1.0 greatly affected the flows of goods and services between the US and Mexico. In 1993, the US did not have a trade deficit with Mexico; in 2016 it was $63.2bn.[6]

Some say the major failing of NAFTA 1.0 in the human rights context has been Mexico's failure to protect basic rights of workers.[7] The US Department of Labor reported in 2016 that child labour is used in Mexico in the production of chilli peppers, coffee, cucumbers, aubergines, green beans, melons, onions, sugarcane, tobacco and tomatoes.[8] The US State Department has also reported on the existence of forced labour in both 'agricultural and industrial sectors'.[9] There have also been criticisms against the US for its immigration policies as applied to migrant workers and the existence of child labour on farms.[10] Environmental degradation related to NAFTA includes greater nitrogen pollution from agricultural operations and increased water and air pollution in the immediate areas surrounding factories, especially on the Mexican side of the Mexico-US border.[11]

Sceptics of NAFTA 1.0 are particularly wary that it allows ISDS.[12] ISDS tribunals are not part of domestic courts systems bound by due process and their decisions are not subject to review on appeal. ISDS can obligate governments to pay large sums to foreign investors.[13] A 2015 report found Canada has paid approximately C$172m, Mexico has paid US$204m, and the US has paid $0 under NAFTA ISDS.[14] Critics argue the ISDS system has a chilling effect on regulations that protect the quality of life of citizens and upholds the rights of corporations over the sovereignty of nations.[15] The Office of the USTR vigorously denies these arguments.[16]

Legal basis for human rights related to labour, environment and ISDS

Labour laws touch on many human rights. The Universal Declaration of Human Rights (UDHR) Article 23 provides for the right to work.[17] Canada, Mexico and the US are parties to the International Convention on Civil and Political Rights (ICCPR), which declares in Article 22(1) the right to form and join trade unions.[18] All NAFTA countries are member states of the International Labour Organization (ILO), a United Nations agency with eight fundamental conventions; all three NAFTA countries are parties to two – the Abolition of Forced Labour Convention and the Worst Forms of Child Labour Convention.[19]

Canada and Mexico are parties and the US is a signatory to the International Covenant on Economic, Social and Cultural Rights (ICESCR), which recognises in Articles 7 and 8 the rights of everyone to the enjoyment of just and favourable conditions of work, to form trade unions and to strike.[20] The American Convention on Human Rights (ACHR), to which Mexico is a party and the US is a signatory (Canada is neither), contains in Article 6 the right of freedom from slavery and involuntary servitude, in Article 16 the right to associate freely for labour purposes, and in Article 26 the principle of workers' right to collective bargaining.[21]

Laws on environmental protection affect human rights because '[a] safe, clean, healthy and sustainable environment is integral to the full enjoyment of a wide range of human rights, including the rights to life, health, food, water, and sanitation'.[22] The right to a healthy environment is often implied from the right to life in ICCPR Article 6 and ACHR Article 4 as well as the right to health found in UDHR Article 25 and ICESR Article 12.[23] Mexico amended its Constitution in 2011 to expressly recognise 'the human right to a healthy environment'.[24] As for ISDS tribunals, they affect the rights to an effective remedy and due process in ICCPR Articles 2 and 14 as well as many rights in ICESR and the right to participate in government in ACHR Article 23.[25]

Opportunities for better human rights protection in NAFTA 2.0

Each nation's objectives for NAFTA 2.0 are under development. Based on their economic policies in general, Canada wants 'the most favourable conditions for Canadian businesses to compete internationally', Mexico wants greater involvement in global markets through 'the creation of new trade and investment opportunities', and the US wants a deal favourable to 'the interests of the American worker'.[26]

Issues of labour and environment were

discussed toward the end of NAFTA 1.0 negotiations and resulted in two formal agreements – the North American Agreement on Labor Cooperation (NAALC)[27] and the North American Agreement on Environmental Cooperation (NAAEC)[28] – that are separate from but parallel to NAFTA 1.0. In a broad stroke, the NAALC and NAAEC aim to enforce the enforcement of domestic labour and environment laws. Both agreements have been criticised as inadequate protections for human rights because they suffer procedural and substantive flaws and are infrequently utilised, modestly funded and have no enforcement mechanisms of consequence.[29] It is unclear whether or not renegotiating NAFTA 1.0 automatically opens these side agreements, but NAFTA 2.0 could contain language that supersedes theNAALC and NAAEC. The following are some areas of opportunity for improvement to protect human rights.

Labour

NAFTA 1.0 mentions labour in its preamble, but the bulk of labour considerations exist in the NAALC. The NAALC affirms the rights of each country to create its own domestic labour laws with the obligations that the standards be 'high' and the countries should 'continue to strive to improve'.[30] Annex 1 contains a list of 11 principles that are guidelines for domestic labour laws, but 'do not establish common minimum standards'. Articles 8 to 14 establish the Commission for Labor Cooperation – a Council of a Secretariat and each country's labour minister – which may be assisted by National Administration Offices (NAOs) within each party's country. In reality, the NAOs of each country are quite active but the Commission is not.

Should one party fail to enforce its own labour laws, NAFTA governments may try to reach a resolution via their respective NAOs or through engagement in 'ministerial consultations'.[31] If the issue persists, a government may request an Evaluation Committee of Experts to conduct an independent investigation.[32] If the investigation findings reveal a 'persistent pattern of failure… to adequately enforce' standards relating to occupational safety and health, child labour or minimum wage, then the other two countries, if they both agree, may initiate formal arbitral proceedings under Article 29. The ultimate penalty is a fine that, if not paid, may be collected by the other countries through a calculated suspension of NAFTA benefits.[33]

TPP heightens protection for human rights by mandating each party to adopt as law the 'freedom of association… and the right to collective bargaining', 'the elimination of… forced or compulsory labour', 'the effective abolition of child labour', and 'the elimination of [employment] discrimination'.[34] Parties are also obligated to establish minimum wages, hours of work, and occupational safety and health conditions.[35] Additionally, TPP prohibits parties from changing their laws to decrease protection in labour laws that would undermine their obligations under Article 19.3, a concept found in NAFTA 1.0 Article 1114 but only as related to safety or environmental provisions.

There are several ways to improve human rights related to labour under NAFTA 2.0. First, replace abstract goals and principles in Article 2 and Annex 1 with more tangible labour protections.[36] TPP provides a good example. Whereas NAALC upholds the principle of the right of workers to bargain collectively to establish minimum wage – a difficult task for workers in rural areas where knowledge of the law may be lacking[37] – the TPP shifts the burden to governments to establish minimum wage.

Second, change the formal dispute mechanism so that it is more accessible to the public. Currently, the public cannot trigger investigations or the arbitration process. Likewise, the role of the Secretariat could be rewritten to include and prioritise processing citizen submissions.

Third, amend Articles 23 and 27 to allow more types of labour rights be subject to independent review. Currently, if a NAFTA country fails to enforce laws protecting union organisation and collective bargaining, which are protected under ICCPR and other international human rights instruments, there is no recourse under the current NAALC arbitration system.

Environment

The NAFTA 1.0 contains many provisions related to the environment.[38] In almost identical language to the NAALC, NAAEC Article 3 affirms the right of each country to create its own domestic environmental laws with the obligations that the standards be 'high' and the countries should 'strive to continue to improve'. But the structure

differs significantly. NAAEC Articles 9 to 15 establish the Commission for Environmental Cooperation – a Council of each country's environmental ministers, a Secretariat and a Joint Public Advisory Committee. The Secretariat reviews citizen complaints and the Council, by a two-thirds vote, may direct the Secretariat to develop a factual record regarding a citizen complaint and, by another two-thirds vote, make the report public. If one of the parties finds in the record a 'persistent pattern of failure by [another party] to effectively enforce its environmental laws' that government may choose to initiate the consultation and arbitration process in Articles 22 to 24. Arbitration may result in a fine and failure to pay that fine may result in the loss of NAFTA benefits.[39] The Commission, based in Montreal, Canada, is quite active and focuses much of its efforts on cooperative studies, reports and outreach programmes.

The TPP is widely regarded for the sheer number of parties who agreed on common binding environmental obligations, however, it is not altogether dissimilar from the NAAEC in its capacity for citizen participation and power to enforce. The NAFTA 2.0 could improve upon the NAAEC in several ways. First, by freeing the citizen complaint process from government control by allowing the Secretariat to determine independently whether or not to develop or publish a factual record. The current structure creates an inherent conflict of interest for Council members.[40] Some commentators have noted this would require increasing the Commission's budget, which has remained the same since 1994. Second, by giving the Secretariat more power. Currently, the Secretariat cannot make legal conclusions in their factual findings, make follow-up inquiries into whether or not a party has started to enforce its own environmental laws, or compel enforcement of environmental laws.[41] Finally, give citizens a larger role in the arbitration process. Both the NAAEC and TPP only permit governments to initiate the formal arbitration process.[42]

Investor-state dispute settlement

Human rights activists are adamant ISDS has no place in NAFTA 2.0.[43] For instance, the American Federation of Labor and Congress of Industrial Organizations is in favour of its removal. In 2015, United Nations Independent Expert Alfred-Maurice de Zayas recommended to the General Assembly the abolition of ISDS arbitrations in TPP and its replacement by state-to-state settlement before the International Court of Justice or domestic courts bound by Article 14 of the ICCPR.[44] The same suggestions could be applied to NAFTA 2.0. Alternatively, Canada recently completed a trade agreement with the European Union and embraced a hybrid ISDS tribunal system. In this system, the parties populate a small arbitrator roster with five-year fixed terms and there is an appellate tribunal and appeals process.[45] This 'hybrid panel' is said to both increase consistency, predictability and transparency, and decrease the potential for foreign investors to win on weak claims.[46] Canada may consider suggesting this system during NAFTA 2.0 negotiations. Allowing the parties themselves to select eligible arbitrators addresses some human rights issues related to government participation. Furthermore, the creation of an appeals process supports human rights under the ICCPR and ICESR. The hybrid system may be an option worth exploring as it is an improvement over the current NAFTA 1.0 system from a human rights perspective.

Conclusion

In conclusion, NAFTA 2.0 is an opportunity to recognise and address human rights issues under NAFTA 1.0. The TPP, while a useful guide, is not binding on the terms of NAFTA 2.0.

Bolstering the protection for worker's rights in particular would stand to fulfil the goals of all three NAFTA countries. It would improve competition conditions for Canadian businesses by levelling the playing field; make Mexico a more attractive trade partner by showing its commitment to fair agreements; and benefit the US worker by reducing pressure on US wages.[47] Canada, Mexico and the US have ahead of them the opportunity to work toward an agreement that will better protect human rights.

Notes

1 North American Free Trade Agreement, 17 December 1992, US–Mexico–Canada, 32 ILM 289 (1993), www.nafta-sec-alena.org/Home/Texts-of-the-Agreement/North-American-Free-Trade-Agreement accessed 23 August 2017.

2 Executive Office of the President, Letter to Charles E Schumer (18 May 2017), https://ustr.gov/sites/default/files/files/Press/Releases/NAFTA%20Notification.pdf accessed 23 August 2017.

3 Global Affairs Canada, 'Statement by Foreign Affairs Minister on NAFTA' (18 May 2017), www.canada.ca/en/global-affairs/news/2017/05/statement_by_foreignaffairsministeronnafta.html accessed 5 June 2017; Secretaría de Economía, 'El Gobierno de Estados Unidos notifica su intención de iniciar negociaciones con México y Canadá' (18 May 2017), www.gob.mx/se/prensa/el-gobierno-de-estados-unidos-notifica-su-intencion-de-iniciar-negociaciones-con-mexico-y-canada accessed 5 June 2017.

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ROLE OF BAR ASSOCIATIONS

International human rights and United States State Bars: the Texas experiment

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Summary

Through the establishment of the International Human Rights Committee, the State Bar of Texas has become a leader among US bar associations with respect to providing information about international human rights issues that are related to doing business in international markets. The Committee is actively involved in providing presentations, publishing articles, developing its website, working with other organisations and developing Coninuing Legal Education (CLE) seminars. At the heart of this effort is the United Nations' Guiding Principles on Business and Human Rights, which set out the basic standards to be followed by businesses to enhance and develop respect for international human rights.

Introduction

In the summer of 2011, the Human Rights Council of the United Nations unanimously endorsed the Guiding Principles on Business and Human Rights (the 'Guiding Principles')[1] with the objective of promoting their acceptance by governments, businesses and the legal profession. The Guiding Principles stipulate that businesses should respect the types of human rights that are contained in the International Bill of Human Rights (IBHR). However, in light of their nature as a non-binding set of principles, the key to implementation of this objective rests with individuals and bar associations, among others. Thus, in June 2015, the American Bar Association (ABA) joined other bar associations and legal organisations in adopting a framework geared towards implementation of the Guiding Principles: the 'Joint Declaration of Commitment on the Development and Promotion of the Field of Business and Human Rights within the Legal Profession' (Joint Declaration).[2]

Not slow to follow, in June 2015, the International Law Section of the State Bar of Texas sponsored a discussion on international human rights during the Texas State Bar's Annual meeting. The presentation was used as an opportunity to argue that the State Bar of Texas should create an international human rights committee. To support this proposal, the first question that had to be answered was why Texas should step forward on this issue.

The answer was derived from a review of the following facts: first, in 2014, if Texas had been a nation, it would have had the 12th highest gross domestic product of all countries in the world. Houston, Texas, is home to one of the most significant ports in the United States and the world. It also shares a border with Mexico, which is the second-longest border of any US state with a foreign country. Fifty-two of the Fortune 500 companies claim Texas as their headquarters. A large number of companies operating in Texas have either foreign parent companies or have foreign operations. Texas is also home for much of the energy industry. Beyond the foregoing, the energy industry does not generally have total freedom in deciding where in the world its operations are carried out; rather, the location of oil, gas and other minerals tends to dictate those locations. If one was to overlay a map of where these resources are located with a map of where in the world human rights violations are most prevalent, one would see many of the same locations identified on both maps.

What the above facts reveal is that lawyers

in Texas, whether they are in-house counsel, outside counsel advising corporations, counsel who advise or represent employees or indigenous people, or those who work for the government, have a high likelihood that their practice may be touched by issues related to international human rights. Therefore, in August 2015, under the direction of the International Law Section of the State Bar, the Texas Bar created the International Human Rights Committee of the State Bar of Texas. The Committee's membership includes counsel with law firms, in-house counsel, sole practitioners and law school professors.

Shortly following its creation, the Committee approved the following elements of its Statement of Purpose:

1. to study those issues that confront practising lawyers due to violations of international human rights;
2. to develop guidance for lawyers practising in the international arena and issues presented by international human rights violations;
3. to provide information on international human rights at the State Bar of Texas's annual meeting, the International Section's Annual Institute, or at other state or local meetings;
4. to assist law firms and law schools further addressing their training and education programmes, the issues of internationally recognised human rights and the issues presented in international law practices;
5. to encourage lawyers within the International Section within the State Bar of Texas in general to take a leadership role with regard to addressing violations of internationally recognised human rights;
6. to review the rules of disciplinary procedures of the State Bar of Texas to determine if any amendments would be appropriate or the further advising the members of the Bar on the issue of internationally recognised human rights;
7. to establish a network of lawyers within the State of Texas with experience in international matters and international human rights to provide technical assistance to lawyers confronted with such issues;
8. to discuss with government officials and other stakeholders the importance of addressing issues related to internationally recognised human rights by the legal profession in Texas; and
9. to report to the International Section of the State Bar of Texas on an annual basis on the progress that the committee has made on each of the goals stated herein.

Since its creation, the Committee has sought to expand its reach by making presentations to local bar associations in several cities and to other sections of the State Bar of Texas. It has also made multiple presentations at several law schools in the State of Texas. In addition, the Committee has published articles in legal magazines and publications and created a website that provides the text of many of the basic documents that relate to the issue of international human rights. On this website, it has also translated its statement of purpose into Spanish because of the large number of Spanish speakers in the State of Texas.

The Committee continues to work towards increasing the knowledge and involvement of Texas lawyers on the issue of international human rights through more direct and focused efforts. For instance, in February 2017, the Committee mailed 163 letters to the managing partners of 98 law firms in the State of Texas. The Committee is currently drafting a similar letter to in-house counsel for the major corporations located in the State of Texas. The Committee also intends to work with the University of Texas School of Law and its Civil Rights Clinic to complete a review of the Texas Disciplinary Rules of Professional Conduct (the 'Disciplinary Rules')[3] to determine if additional guidance related to international human rights should be incorporated in the Disciplinary Rules.

The State Bar of Texas continues to disseminate its message through various other means, including providing a CLE seminar that addresses these very points and is now a leader on the issue of international human rights. The impact that Texas business and legal practice has on international matters makes it particularly appropriate that it is the Texas State Bar that takes this role and will continue to work towards the promotion of the Guiding Principles and their ultimate incorporation into the everyday business vernacular.

The Guiding Principles and the American Bar Association

As first noted above, the genesis of this recent emphasis on international human rights can be traced to June 2011, when the Human Rights Council of the UN unanimously endorsed the

Guiding Principles. The very concept of international human rights is based on the IBHR, which comprises the Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948,[4] and two international treaties, the International Covenant on Civil and Political Rights[5] and the International Covenant on Economic, Social and Cultural Rights.[6]

The ABA has acknowledged and documented the importance of the Guiding Principles through the promulgation of two recent endorsements. First, in February 2012, the ABA disseminated Resolution 109, approving the Guiding Principles and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises.[7] The Resolution 'urges governments, the private sector and the legal community to integrate into their respective operations and practices the United Nations Guiding Principles and the OECD Guidelines'.[8] The publication of this Resolution constituted a necessary first step in the process of the active promotion and acceptance of the Guiding Principles by state, federal and local government entities, businesses and the legal profession.

Secondly, in June 2015, as mentioned above, the ABA became even more committed when it joined other bar associations and legal organisations in adopting the Joint Declaration. The Joint Declaration appears to be intended to serve as the foundation upon which the Guiding Principles will be implemented. It acknowledges the 'integral role of lawyers in promoting and defending human rights and the rule of law in all contexts', and sets out specific activities to be undertaken by the signatories: 'promoting the realization of human rights in the business context; educating lawyers about human rights in the business context; developing and implementing further policy initiatives' in the field of human rights; and 'meeting regularly to assess progress in realization of human rights in the business context'.[9] The ABA's participation in the Joint Declaration demonstrated that it intended 'to reinforce and strengthen lawyers' role in supporting and assisting businesses to respect human rights and further lawyers' contribution to the development and elaboration of the business and human rights field'.[10]

It is against this background that the Texas Bar Association created the International Human Rights Committee, and it is with the aforementioned international standards in mind that the Committee has undertaken its educational and other activities. The Committee has taken its lead from the ABA's stated policies and has studied other resources, such as the 'IBA Practical Guide on Business and Human Rights for Business Lawyers',[11] and will continue to build its resource base.

Notes

1 United Nations Guiding Principles on Business and Human Rights, www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.
2 www.americanbar.org/content/dam/aba/administrative/human_rights/joint_declaration.authcheckdam.pdf.
3 Tex Disciplinary R Prof Conduct (1989) reprinted in Tex Govt Code Ann, tit 2, subtit G, app (Vernon Supp 1995) (State Bar Rules art X [[section]]9)).
4 Universal Declaration of Human Rights, GA Res 217A (III), UN Doc A/810 at 71 (1948).
5 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol 999, p 171, available at www.refworld.org/docid/3ae6b3aa0.html accessed 19 May 2017.
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7 American Bar Association, Resolution 109, at 1 (6 February 2012).
8 *Ibid.*
9 *Ibid.*
10 Corinne Lewis, 'The ABA's Commitment to Develop and Promote Business and Human Rights within the Legal Profession: What it Means for Lawyers' (2016) 38 Houston Journal of International Law 1.
11 International Bar Association, Draft Guidance for Business Lawyers on the UN Guiding Principles on Business and Human Rights, Annex to the IBA Business and Human Rights Guidance for Bar Associations, part 3, P41-51 (2014), www.ibanet.org/Legal_Projects_Team/Business_and_Human_Rights_for_the_Legal_profession.aspx.