International Bar Association

the global voice of the legal profession®

IBA Interns' Newsletter

MARCH 2023

IBA Interns' Newsletter

IN THIS ISSUE

Tobiloba Akinyosoye

The role of carbon taxes in achieving net zero by 2050

Undoubtedly, greenhouse gas (GHG) emissions have astronomically increased over the last decade. The ripple effect of this has seen the Earth warm up at an alarming temperature of approximately 14 degrees Celsius.1 The World Meteorological Organization also noted that global temperatures are expected to rise by four degrees Celsius above preindustrial levels by the end of this century.2 Hence, governments are making conscious efforts to reduce these emissions, without jeopardising the growth of their economies. While there are many economy-driven approaches, one approach which is undermined by many is that of GHG tax, otherwise known as carbon tax.

Currently, CO2 resulting from the burning of fossil fuels remains the predominant GHG released into the atmosphere. Thus, this tax is typically imposed on coal, oil and natural gas, in proportion to the amount of carbon contained. The burden of this tax is passed in the form of higher prices to final consumers of electricity, petroleum-based products and energy-intensive goods.3 This approach influences consumer and producer economic behaviour, in that the demand of the former with respect to such goods will fall significantly and the latter will opt for cheaper and renewable means of generating power. Equally, the implementation of an effective carbon tax policy will increase the tax revenue of any given government. This revenue can then bolster domestic efforts in fighting climate change, which includes partnering with local companies to fund research on low-carbon technology.4 Additionally, the revenue can incite social and economic progress, by encouraging governments to invest in social infrastructures; mitigating the harshness of higher carbon prices on poorer households; and finally, lowering income taxes in order to foster economic growth.5 However, since GHG tax intends to reduce emissions, the revenue is expected to decline in the decades to come.

A comprehensive carbon tax policy is expected to have direct environmental, social and economic effects. Firstly, the carbon tax approach must be decided. Notably, there seems to be a consensus that the direct emissions approach is the most suitable for a modern society.6 This is because the approach seeks to achieve an emission trajectory that will ensure the gradual reduction of the GHG concentration in the atmosphere. Additionally, this approach is suitable to tax energy CO2 emissions and non-energy emissions.7 In other words, this approach allows a broader carbon tax base, which is another important consideration in determining an effective policy. The administrative ease of carbon tax must be considered. Generally, experts have recognised that carbon taxes are easy to administer because they can be piggybacked on existing fuel taxes, which many countries collect with ease.8 Perhaps, the most important consideration is the international attraction for carbon tax. An effective carbon tax policy can greatly abet countries in achieving their ambitious targets under the 2015 Paris Agreement. Furthermore, an internationally developed policy will promote certainty in setting an appropriate rate, in tandem with the social cost of environmental damages suffered across the globe and the desired net zero emissions by 2050. In setting a rate, it is argued that the total emission activities of such countries must be recognised. Hence, an average rate of $35 per ton carbon tax is sufficient for most countries to achieve their respective pledges under the Paris Agreement, apart from a few which made overly ambitious pledges which cannot be reached even with a rate of $70.

An international approach to implementing carbon tax is very crucial for a number of reasons. The suitability of carbon tax for achieving the pledges under the Paris Agreement is the major reason, as it means an international carbon tax policy will be developed in a manner consistent with already existing global efforts to fight against climate change. Additionally, an international policy will make it relatively easier for countries to implement the policy nationally with less political tension and difficulty. Nonetheless, there are certain international laws which can hinder the implementation of an effective international policy. For instance, emissions from international aviation are not

taxed at all as a result of the 1944 Chicago Convention.9 Similarly, international maritime transport is not taxable, although there are no international laws expressly prohibiting such.

Is the carbon tax approach a one-size-fits-all approach?

Notwithstanding the admirable prospects of an effective carbon tax policy, it will be misleading to assert that carbon tax policy alone will be sufficient to achieve the 2050 net zero objective. As such, there is need for collaboratives efforts among countries to develop additional initiatives on the reduction of GHG emissions, such as the recent efforts of the Organisation for Economic Co-operation and Development to establish climate mitigation measures,10 and the shifting view of investors on ESG.11

Notes

1 Temperature.Global, 'The Earth's Temperature' https://temperature.global accessed 9 November 2022.
2 Ian Parry, 'What is Carbon Taxation?' www.imf.org/external/pubs/ft/fandd/2019/06/pdf/what-is-carbon-taxation-basics.pdf accessed 9 November 2022.
3 Pew Centre on Global Climate Change, 'Tax Policies to Reduce Greenhouse Gas Emissions' (Pew Climate, 2008) www.c2es.org/wp-content/uploads/2008/11/tax-policies-reduce-greenhouse-gas-emissions.pdf accessed 9 November 2022.
4 *Ibid* 6.
5 Organisation for Economic Co-operation and Development, 'Taxing Energy Use 2019' 7 www.oecd.org/tax/tax-policy/brochure-taxing-energy-use-2019.pdf accessed 9 November 2022.
6 Carbon Tax Resource Centre, 'Carbon Tax Research & Analysis' https://taxfoundation.org/carbon-tax-research accessed 9 November 2022.
7 United Nations, 'United Nations Handbook on carbon taxation for developing countries, Chapter 3: Designing a Carbon Tax' 33 www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2020-11/Chapter%203_Design_UN%20CarbonTax%20Handbook.pdf accessed 9 November 2022.
8 Ian Parry, 'What is Carbon Taxation?' www.imf.org/external/pubs/ft/fandd/2019/06/pdf/what-is-carbon-taxation-basics.pdf accessed 9 November 2022.
9 International Civil Aviation Organization, ICAO'S POLICIES ON TAXATION IN THE FIELD OF INTERNATIONAL AIR TRANSPORT (Doc 8632-C/968) 7 https://www.icao.int/publications/Documents/8632_2ed_en.pdf accessed 10 November 2022.
10 Organisation for Economic Co-operation and Development, 'OECD Secretary-General Report to G20 Finance Ministers and central Bank Governors on the Establishment of the Inclusive Forum on Carbon Mitigation Approaches' http://www.oecd.org/g20/topics/international-taxation/oecd-secretary-general-report-g20-finance-ministers-central-bank-governors-establishment-ifcma-indonesia-october-2022.pdf accessed 11 November 2022.
11 Greg Ritchie, 'JP Morgan Product Reveals Wall Street's Shifting Views on ESG' (Law.com 7 September 2022) www.law.com/dailybusinessreview/2022/09/07/jpmorgan-product-reveals-wall-streets-shifting-views-on-esg accessed 11 November 2022.

Death penalty secrecy laws in the United States

Caitlin Fisher-Draeger

Following 2022, the year of the 'botched execution' in the United States,[1] transparency into the process of executions is more vital than ever despite the risk of emotional trauma to witnesses. The US is one of the few democratic countries in the world that still executes its citizens, but is fifth in the line of most prolific executioners, behind Somalia, Saudi Arabia, Iran and China respectively.[2] Almost all executions in the US are by lethal injection, although some states allow for execution by firing squad, electrocution or gas chamber.[3] Execution by lethal injection is becoming increasingly difficult to carry out in the US as the necessary chemicals become harder to procure. This has led states to resort to expired compounds; new, untested combinations of drugs; or other methods such as electrocution, nitrogen hypoxia,[4] or firing squad where lethal injections are not available.[5] Foreseeably, such methods are leading to disastrous outcomes,[6] especially where executions are carried out by prison staff with little to no training. Medical professionals, having taken an oath to 'do no harm', are prohibited from participating in executions.[7]

Researchers with the Death Penalty Information Center found that '[i]n 2022 seven out of the twenty US execution attempts were "visibly problematic" as a result of executioner incompetence, failures to follow protocols, or defects in the protocols themselves.'[8] The execution of Joe James Jr in Alabama was the longest botched lethal

injection execution in US history, after the executioners took three hours to set an IV line.[9] Capital punishment states have been responding to these botched attempts by proposing laws to limit public access to the information on when, where and how lethal injection drugs have been procured and restricting which parts of an execution can be seen or heard by witnesses.[10] This isn't entirely a new trend. None of 17 of the states that conducted executions between 2001 and 2018 were transparent throughout the whole execution process, blocking either sound or view, and not informing witnesses of when and which drugs were being injected.[11] In a democracy like the US, where public opinion on capital punishment correlates to the persistence of death penalty statutes,[12] states should not hide any part of the execution process from witnesses. Transparency is vital, despite the possibility that witnessing a botched execution may be a violation of that witness' right to be free from torture.[13]

States must be held accountable for when their methods of execution subject inmates to intense pain and drawn-out suffering – violating the domestic prohibition on cruel and unusual punishment, and the international prohibition on torture.[14] Accountability is only possible where there is sufficient transparency into the methods and procedures used in executions. When states adopt execution secrecy laws they limit meaningful discussion and oversight of executions.[15] In November 2022, Alabama Governor Kay Ivey sought a pause in executions, following the second failed lethal injection of that year where prison officials failed to place an IV line, and ordered a review on the state's execution procedures.[16] Tennessee Governor Bill Lee also halted executions in April 2022 pending a review of the protocols after learning that the Tennessee Department of Corrections had failed to test its lethal injection drugs for contaminants.[17] Arizona has also halted executions, after botching three out of three executions in 2022 (having only resumed them that year following an eight-year hiatus) during which one inmate had to talk the prison staff through inserting the IV line.[18] While public outcry was not always listed as the reason for halting executions it is hard to imagine that the governors would have taken such steps without witness accounts of watching prison staff try for hours to set an IV line or watching inmates convulse, bleed or otherwise suffer through drawn out procedures.[19]

Beyond the need for accountability, executions should be witnessed because research has found that individuals who witness an execution are likely to change their opinion of the death penalty – not necessarily because they believed that the process was unfair to the inmate, but because of the psychological toll on those participating in or witnessing the execution.[20] Not all witnesses have a choice in being present. The presence of prison staff, journalists or lawyers may be required as part of their work. Some states require witnesses who are members of the public and unaffiliated with the case.[21] Further research should be done into the psychological repercussions of being required to participate in executions as many correctional staff report suffering from 'life-altering trauma'.[22] The harm to witnesses must be understood, even as it is vital that as long as executions are carried out, they are also being witnessed. Evidence suggests that individuals who are involved with or witness executions are likely to change their stance on the death penalty.[23] NPR spoke with 26 people who worked on more than 200 executions in 17 states and found that none of them who had witnessed an execution expressed support for the death penalty, including those who had initially supported it.[24]

States should not be allowed to shroud their execution process in secrecy by prohibiting from disclosure the names of the companies, distributors and pharmacies that provide lethal injection chemicals.[25] The public needs access to more information than can be provided by simply witnessing an execution. The types of chemicals being used in lethal injection, the extent to which they have been tested and where they have been sourced from should all be made public

Witnessing an execution without knowing what drugs are being used does not allow for a full picture. There is no correlation between how easy an execution is to watch, and how much someone is suffering. While difficult to watch, researchers have posited that the most humane way of executing someone is likely by firing squad where death is instantaneous.[26] Death by lethal injection can have the appearance of quick and easy death because of a paralysing agent that masks the physical responses to the chemicals which are causing death while in reality the inmate may be experiencing intense pain and distress.[27]

The application and legality of the death penalty in the US is on a 20-year decline.[28] Increased public scrutiny of executions is necessary, despite the harm to witnesses, because the more understanding of harm caused by executions to the individuals executed and to witnesses, the more quickly abolition will be reached. Transparency is necessary to the path forward. The more people know about the death penalty, the less likely they are to support it.[29]

Notes

1 Death Penalty Information Center, 'The Death Penalty in 2022: Year End Report' (16 December 2022) 2 https://deathpenaltyinfo.org/facts-and-research/dpic-reports/dpic-year-end-reports/the-death-penalty-in-2022-year-end-report accessed on

2 Cornell Center on the Death Penalty Worldwide, 'Top Executioners 2022' https://deathpenaltyworldwide.org/ accessed on

3 Cornell Center on the Death Penalty Worldwide, 'United States of America' (2 October 2020) https://deathpenaltyworldwide.org/database/#/results/country?id=84 accessed on

4 Dana Smith, 'New Execution Method Touted as More "Humane," but Evidence is Lacking' (Scientific American, 23 September 2022) www.scientificamerican.com/article/new-execution-method-touted-as-more-humane-but-evidence-is-lacking/ accessed on

5 https://reports.deathpenaltyinfo.org/year-end/Year-End-Report-2022.pdf p3 (South Carolina allows a choice between electrocution and firing squad.)

6 Austin Sarat, 'Botched Executions Aren't New – but Americans Finally Seem to Be Noticing Them' (Slate, 21 December 2022) https://slate.com/news-and-politics/2022/12/death-penalty-botched-executions-public-opinion.html accessed on

7 Scientific American, 'Let's Stop Pretending the Death Penalty Is a Medical Procedure' (1 May 2014) www.scientificamerican.com/article/lets-stop-pretending-the-death-penalty-is-a-medical-procedure-editorial accessed on

8 See n 1

9 Elizabeth Bruenig, 'Dead to Rights: What Did the State of Alabama do to Nathan James in the Three Hours Before His Execution' (The Atlantic, 14 August 2022) www.theatlantic.com/ideas/archive/2022/08/joe-nathan-james-execution-alabama/671127/ accessed on

10 Death Penalty Information Center, 'Execution Secrecy Bill Passes in Florida, Fails in Idaho' (11 March 2022) https://deathpenaltyinfo.org/news/execution-secrecy-bill-passes-in-florida-fails-in-idaho accessed on

11 Robin Konrad, 'Behind the Curtain: Secrecy and the Death Penalty in the United States' (Death Penalty Information Center 2018) 21 https://documents.deathpenaltyinfo.org/pdf/SecrecyReport-2.f1560295685.pdf accessed on

12 Christian Caron, 'Public Opinion and Death Penalty Policy Under Direct Democracy Institutions: A Longitudinal Analysis of the American States' (American Politics Research 2021, Vol 49) https://journals.sagepub.com/doi/pdf/10.1177/1532673X20943560 accessed on

13 A/77/270 Note by the Secretary-General on Extrajudicial, summary, or arbitrary executions. 14 https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/452/71/PDF/N2245271.pdf accessed on

14 *Ibid*

15 See n 11

16 The Guardian, 'Alabama Seeks Pause in Executions After Third Failed Lethal Injection' (Birmingham Associated Press, 22 November 2022) www.theguardian.com/us-news/2022/nov/22/alabama-pause-lethal-injection-failed accessed on

17 Death Penalty Information Center, 'Tennessee Gov. Says No Death Warrants Until Execution Protocol Problems Fixed' (17 January 2023) https://deathpenaltyinfo.org/news/tennessee-gov-says-no-death-warrants-until-execution-protocol-problems-fixed accessed on

18 Death Penalty Information Center, 'Botched Executions Prompt New Arizona Governor and Attorney General to Halt Executions Pending Independent Review of State's Execution Process' (23 January 2023) https://deathpenaltyinfo.org/news/botched-executions-prompt-new-arizona-governor-and-attorney-general-to-halt-executions-pending-independent-review-of-states-execution-process accessed on

19 Death Penalty Information Center, 'Witness: In "Surreal" Event, Possibly Innocent Death-Row Prisoner Helped Arizona Executioners Find a Vein After They Failed to Set IV Line' (15 June 2022) https://deathpenaltyinfo.org/news/witness-in-surreal-event-possibly-innocent-death-row-prisoner-helped-arizona-executioners-find-a-vein-after-they-failed-to-set-iv-line accessed on

20 Chiara Eisner, 'Carrying Out Executions Took a Secret Toll on Workers – Then Changed Their Politics' (NPR, 16 November 2022) www.npr.org/2022/11/16/1136796857/death-penalty-executions-prison accessed on

21 Gareth Evans, 'The Americans Volunteering to Watch Executions' (BBC News, 11 April 2017) available at https://www.bbc.co.uk/news/world-us-canada-39535957 accessed on

22 Death Penalty Information Center, 'South Carolina Execution – Team Members Talk of Debilitating Emotional Toll of Capital Punishment, Former Warden Calls Death Penalty 'Inequitable' (12 November 2021) https://deathpenaltyinfo.org/news/south-carolina-execution-team-members-talk-of-debilitating-emotional-toll-of-capital-punishment-former-warden-calls-death-penalty-inequitable accessed on

23 See n 20

24 *Ibid*

25 https://verdict.justia.com/2023/02/06/south-carolina-tries-to-ramp-up-secrecy-in-a-frantic-effort-to-restart-executions

26 See n 4

27 *Ibid*

28 See n 1

29 Furman v Georgia 408 US 238 (1972)

Kanyiri Kariuki

The Faustian Pact of Carbon Trading

Dr Ntina Tzouvala in her monograph Capitalism as Civilization A History of International Law employs the insights of Marxist and post-structuralist philosophical approaches with sharp legal analysis to examine how the Standard of Civilization has been used by International Lawyers to shape the capitalist regime of the international legal order for decades. She argues that the Standard of civilization is an argumentative pattern which oscillates between what she calls "The Logic of Improvement" and the "Logic of Biology"

For this analysis I shall restrict myself to the Logic of improvement, which offers a prospect of inclusion in the international economic order that is firmly conditioned upon capitalist transformation. The logic of improvement conceptualized and promoted the historically contingent form capitalist modernity had assumed in the West as the only morally acceptable state of being and equated any deviation from it with collective moral failure[1]

Within the register of the 'logic of improvement', arguments about civilization revolved around the practical universalization as well as the universal ethical validity of what were some core institutional and legal preconditions of the establishment and reproduction of the capitalist mode of production.[2]

What this essentially does as Tzouvala puts is to reproduce the imperialist spheres of political domination and intensified economic exploitation, or in the most recent iteration, it structures 'global value chains' in order to transfer value from the periphery to the imperial center.

Throughout the nineteenth century, a wide variety of juridical techniques were mobilized by settlers, colonial administrators and imperial bureaucrats in order to reconstruct the legal systems governing land, natural resources, animals, humans and their mutual interactions, and subject them to the rationalities of capitalist accumulation.[3]

There is no doubt whatsoever that the greatest threat the world currently faces is the adverse effects of climate change. These adverse effects having been brought about by the nature of extractive capitalism into a political economy over the last two hundred and fifty years. As the systemic threats of climate change, ecosystems destruction, inequality, grinding human rights issues, and food insecurity become manifest, fundamental questions remain for how the legal world should build new offerings to serve the transition?[4]

Efforts towards a more regenerative mode of capitalism have re-written the "Logic of Improvement" by having its modern iteration with the genuine goodwill under the term "Sustainable Development goals" Do not get me wrong here, this is not a blanket condemnation of the efforts to tackle the threat of climate change, rather it is an observation that even the Devil can cite Scripture for his purpose[5]

What does the Logic of improvement look like in this case? Legal services to enable companies and investors to understand the opportunities created by the multilateral ESG/SDG architecture, the Paris Climate Agreement, the EU Green taxonomy, and a broad proliferation of sustainability driven policy changes worldwide[6] Among the most critical issues identified are the following Governance; Climate Change; Corporate Responsibility; Sustainable Finance; Environmental Liability; Carbon Trading; Business and Human Rights; Ownership of Natural Assets; and ESG Capital Markets/ Securities Regulation[7]

I wish to place emphasis on Carbon Trading. Because most countries, institutions, companies and individuals will continue to generate greenhouse gas emissions through their activities even as the world decarbonises, many choose to compensate for these 'residual' emissions. The most common approach for doing so is to purchase carbon credits. This is commonly known as 'offsetting' emissions, with the terms 'offsets' and 'carbon credits' often used interchangeably.[8] However, disagreements over technical details and the principle of compensation – exacerbated by loose terminology – have fuelled controversy

over the degree to which carbon credits should be used to allocate resources for decarbonisation.[9]

A recent article titled "Living with uncertainty in carbon markets"[10] put it as follows

> Governments and companies are betting heavily on the voluntary carbon market (VCM) to achieve decarbonisation goals. However, many carbon credits are not only risky (because saving carbon is not guaranteed) but highly uncertain in the sense that the chance of success simply cannot be measured. Such uncertainty leads to endless debate over the value of credits and the methodologies used to measure that value – as evidenced by a recent investigation by journalists at The Guardian, Die Zeit and SourceMaterial into rainforest carbon offsets issued by the largest voluntary standard, Verra.

In July 2017, a strange scene unfolded at the G20 summit in Hamburg. Responding to a question by an Ivorian journalist about the possibility o fa Marshall Plan for Africa, the President of France, Emmanuel Macron, retorted, 'The challenge of Africa, it is totally different, it is much deeper, it is civilizational today. What are the problems in Africa? Failed states, the complex democratic transitions, demographic transitions, which is one of the main challenges facing Africa.'[11] Six Years later at COP27 the narrative of Africa being the largest victims of the climate crisis had already rooted itself It is at this moment the Logic of Improvement and the Logic of Biology begin their twin dance to sustain the capitalist regime. In depth reading of 19th century colonial history reveals that capitalism and the attendant hunger for resources was the wind behind the sails driving imperial colonialism.[12] This unexplained focus on Africa while addressing a global problem will reveal to careful observers the way in which capitalism has positioned itself to reclaim its position at par with contemporary sovereignty.[13]

Dr Mordecai Ogada is keen to point out that the first sign of this is when conservation interests provide avenues for corporations to further their capitalist objectives. One such outfit happens to be the Northern Rangelands Trust. NRTs carbon credit project in Northern Kenya is the world's first large scale grasslands soil carbon project. Through land protection and rotational grazing practices the project helps improve grazing facilities for pastoralists and the sale of carbon credits generates revenue for 14 of NRT's 39 conservancies in the arid and semi-arid lands of Northern Kenya.

On the 17th of November, at a COP27 event in Sharm el-Sheikh, Egypt, the Natural Climate Solutions Alliance (NCSA), awarded the NKRCP as a Lighthouse Project. This prestigious award recognizes the Project as a Natural Climate Solution (NCS) that is a true beacon for best practice, and that delivers high-integrity NCS carbon credits, generates biodiversity gains, and provides substantive social and economic benefits to indigenous communities[14]

A look at the communities within these conservancies and the perceived carbon foot print reveals a disingenuous routing of the funds to conservation organizations headquartered in the source countries.

Notes

1 Tzouvala, N. (2020). Capitalism As Civilisation: A History of International Law (Cambridge Studies in International and Comparative Law). Cambridge: Cambridge University Press P 55
2 Tzouvala, N. (2020). Capitalism As Civilisation: A History of International Law (Cambridge Studies in International and Comparative Law). Cambridge: Cambridge University Press P 58
3 *Ibid*
4 The Blended Capital Group, Riding The Dragon, The Future of the ESG Law Firm, P 13
5 William Shakespear, The Merchant of Venice
6 The Blended Capital Group, Riding The Dragon, The Future of the ESG Law Firm, P 1
7 The Blended Capital Group, Riding The Dragon, The Future of the ESG Law Firm, P 83
8 https://www.lse.ac.uk/granthaminstitute/explainers/what-are-carbon-offsets/
9 https://www.lse.ac.uk/granthaminstitute/explainers/what-are-carbon-offsets/
10 https://www.lse.ac.uk/granthaminstitute/news/living-with-uncertainty-in-carbon-markets/
11 https://criticallegalthinking.com/2017/07/14/macron-africas-civilisational-problem/
12 Mordecai Ogada, https://panafricanreview.rw/climate-change-the-ominous-global-focus-on-africa/
13 Mordecai Ogada, https://panafricanreview.rw/climate-change-the-ominous-global-focus-on-africa/
14 https://www.nrt-kenya.org/news-2/2022/12/16/the-northern-kenya-rangelands-carbon-project-a-community-based-climate-solution-10-years-in-the-making

Omer Omer

Accountability gaps and private security contractors: The case of Black Shield Security Services

Between 2019 and 2020, hundreds of Sudanese individuals were employed by Black Shield Security Services, an Emirati private military and security company (PMSC), to work as security guards in the United Arab Emirates.[1] Instead, they were forced to participate in the armed conflict in Libya as hired mercenaries.

This case is a unique intersection of labour and humanitarian law that exposes an alarming gap in accountability for non-state actors. On the one hand, the security guards were offered deceptive labour contracts under abusive work conditions. On the other, they were exposed to an armed conflict that left them both as potential military targets and possible perpetrators of war crimes.

Background

After being hired, the workers were transported upon arrival in the UAE to a remote military facility run by the Emirati armed forces.[2] The military officials expected them to complete eight weeks of military training and confiscated the workers' phones and passports.[3] Eventually, they were presented contracts that implied securing Emirati assets inside and outside the country.[4]

The workers were then secretly transported to an Emirati airbase in Libya, from which they were moved to a military compound run by fighters of the Libyan Arab Armed Forces (LAAF). The LAAF enjoys heavy financial and military backing from the UAE.[5] The workers were instructed to protect this compound, as it secures surrounding oil fields that are critical to the operations of the LAAF.[6]

Labour law and the prohibition of forced labour

The labour conditions of the UAE give context to the deceptive conduct of Black Shield Security and the Emirati armed forces. The UAE labour market tolerates far-reaching abuses of foreign workers.[7] Workers fear retaliation from their employers, who regularly confiscate their documents and withhold salaries and other benefits.[8]

Yet, this case presents several violations of existing UAE laws. For one, government regulations already prohibit employers from confiscating documents.[9] Moreover, international legal standards prohibit forced labour practices. The Forced Labour Convention 1930 defines forced labour as work not offered voluntarily exacted under the 'menace of any penalty'.[10] The Convention obliges states parties to criminalise forced labour, while its 2014 Protocol requires action to prevent, sanction and remedy forced labour.[11]

Humanitarian law and the principle of distinction

Beyond labour violations, the Black Shield Security workers were acutely exposed to a non-international armed conflict (NIAC). Their participation triggers applicable rules of international humanitarian law, namely the principle of distinction.

Common Article 3 of the Geneva Conventions require parties to a NIAC to distinguish between those taking no active participants in hostilities, including civilians.[12] Civilian populations, as well as individual civilians, are prohibited from being the object of attack.[13] Article 13(3) of Additional Protocol II further states that civilians shall enjoy protection 'unless and for such time as they take a direct part in hostilities'.[14]

These standards were restated specifically for PMSCs in the Montreux Document.[15] The 2008 agreement binds contracting states to humanitarian law principles even when outsourcing military operations.[16] The treaty reaffirms the responsibility of states over private sector conduct and their due

diligence obligation when contracting such firms.[17]

Accountability gap

The Black Shield Security workers were employed under false pretences and did not benefit from any national or international labour protections. The workers instead faced sanction by their private employer and the threat of serious punishment from their military commanders.[18]

Black Shield Security should be held accountable for violations of Emirati labour law. However, the implication of the Emirati armed forces limits the potential for accountability. The armed forces' participation moves this conduct beyond corporate responsibility to include state responsibility for potential international crimes.

The risk of harm against the Black Shield Security workers was compounded by the nature of their work as state-sponsored military contractors, resulting in serious potential violations of humanitarian law. The workers were deployed to an active battlefield to protect military assets, causing them to possibly lose civilian protection as de facto members of the UAE's armed forces.[19]

While private contractors are entitled to civilian protection insofar as they do not actively partake in hostilities, it can be lost if they are absorbed as fighters of a belligerent party.[20] In such circumstances, contracted fighters are granted a 'continuous combat function' as an organised unit under the command responsibility of a party to the conflict.[21]

The Black Shield Security workers were deployed under the Critical National Infrastructure Authority, a government body that was incorporated into the Emirati armed forces.[22] As a result, for the duration of their forced labour in Libya, the Black Shield Security workers were exposed to direct attacks that would not automatically constitute attacks on protected civilians. This protection was removed against their will and with fear of punishment, while potentially absolving an attacking party of criminal responsibility for a violation of humanitarian law.

Conclusions

After one worker managed to make outside contact, the workers were quickly repatriated.[23] Despite attempts at further litigation, the case against Black Shield Security has received little attention since.[24] Nevertheless, PMSCs are increasingly prominent in modern armed conflict, and have developed close relationships with states that are parties to various armed conflicts. This relationship helps them avoid national and international labour standards, while the nature of their work in armed conflict settings may further enable impunity for humanitarian law violations.

These gaps in accountability can be exploited by PMCSs to possibly disastrous ends. In the case of Black Shield Security, the damage so far was minimal, yet without adequate regulation and enforcement, prominent non-state actors such as PMSCs can steer impunity in modern conflict towards dangerous new heights.

Noyes

1 'Sudan Workers Hired in UAE Deceived into Fighting in Libya, HRW Reports' (Middle East Monitor, 5 November 2020) www.middleeastmonitor.com/20201105-sudan-workers-hired-in-uae-deceived-into-fighting-in-libya-hrw-reports accessed 3 March 2023.
2 Human Rights Watch, 'Recruited as Security Guards in the UAE, Deceived into Working in Conflict-Ridden Libya Instead' (1 November 2020) www.hrw.org/news/2020/11/01/recruited-security-guards-uae-deceived-working-conflict-ridden-libya-instead accessed
3 *Ibid.*
4 *Ibid.*
5 International Crisis Group, 'After the Showdown in Libya's Oil Crescent' (Middle East and North Africa Report N°189, 9 August 2018) www.crisisgroup.org/middle-east-north-africa/north-africa/libya/189-after-showdown-libyas-oil-crescent accessed
6 See n 2 above.
7 Mustafa Qadri, 'The UAE's Kafala System: Harmless or Human Trafficking?' (Carnegie Endowment for International Peace, 7 July 2020) https://carnegieendowment.org/2020/07/07/uae-s-kafala-system-harmless-or-human-trafficking-pub-82188 accessed
8 *Ibid.*
9 See UAE Labour Law, Article 13(2); Ministry of Interior Circular No 267/2002. See further International Labour Organization, 'United Arab Emirates: Regulatory framework governing migrant workers' (8 September 2022) www.ilo.org/beirut/projects/fairway/WCMS_776529/lang–en/index.htm accessed
10 International Labour Organization, Forced Labour Convention (Number 29) (adopted 28 June 1930, entered into force 1 May 1932), Article 2. The UAE is a state party to the Convention as of 27 May 1982.
11 International Labour Organization, Protocol of 2014 to the Forced Labour Convention 1930 (adopted 11 June 2014), Article 1, 25. See further UNGA, International Covenant on Civil and Political Rights (adopted 16 December 1966) 999 UNTS 171, Article 8(3).
12 International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (adopted 12 August 1949) 75 UNTS 287, Article 3.
13 ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)

(adopted 8 June 1977) 1125 UNTS 609, Article 13(2).
14 *Ibid*, Article 13(3).
15 The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict (adopted 17 September 2008).
16 *Ibid*, page 11.
17 Ibid. See further ICRC, 'Principle of Distinction' https://casebook.icrc.org/law/principle-distinction accessed
18 See n 2 above.
19 Nils Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (ICRC, May 2009), 37–40.
20 *Ibid.*
21 *Ibid*, 31, 34, 39.
22 See n 2 above.
23 *Ibid.*
24 News outlets reported the protests that sparked the eventual return of the workers. In subsequent articles, they reported the start of extensive legal proceedings against high-ranking UAE officials. See 'Sudanese begin proceedings to prosecute UAE's Black Shield' (Middle East Monitor, 3 March 2020) www.middleeastmonitor.com/20200303-sudanese-begin-proceedings-to-prosecute-uaes-black-shield/ accessed

Nathalie Awada

A national court for the crime of aggression against Ukraine is not a solution

Introduction

In February 2022, Russia launched its invasion of Ukraine. Since then, many Ukrainian civilians have been killed, injured, displaced or have fled the country. They have also been subjected to rape, sexual violence and torture. Russia's actions – aided by Belarus – are palpably a brutal aggression. Moreover, they can be characterised as crimes against humanity, war crimes and genocide.[1]

According to Article 8 *bis* (1) of the Rome Statute, '"crime of aggression" means planning, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations'.[2] Hence, such crimes are 'leadership crimes'; leaders are the ones who initiate those crimes as they are in a position of control.

Additionally, the International Criminal Court (ICC) has no jurisdiction to take the case of aggression because: (1) Russia and Ukraine are not State Parties to the Rome Statute; and (2) Russia's veto can be exercised in the UN Security Council against any case referral to the ICC.[3] Thus, a special tribunal would fill these gaps to be able to prosecute Russian officials. This article will tackle the option of a special court within the Ukrainian court system.

International response

A year full of international law violations, during which Russia has been carrying out several ground and air strikes over Ukraine – a global response was inevitable. Russia's horrific crimes have so far been condemned by the UN General Assembly, admonished by the International Court of Justice and by the European Court of Human Rights.[4] The G7 countries have been showing continuous support to Ukraine in order to undermine Russia's military capabilities.

On 12 December 2022, the European Council reaffirmed its commitment to support Ukraine to face Russia's 'illegal, unjustifiable and provoked war'.[5] Subsequently, on 19 January 2023 the European Parliament adopted a resolution that calls for the establishment of an international war crimes tribunal to hold Russia accountable for its invasion of Ukraine. Philippe Sands KC was the first to propose it and was backed by international lawyers and the UN,[6] where the draft resolution was first circulated and was described as a 'Nuremberg-style tribunal'.[7]

Nevertheless, ICC prosecutor Karim Khan KC opposed a special tribunal as he believes the ICC is the right place to prosecute those crimes if member states amend the founding treaty. The latter was supported by Annalena Baerbock, Germany's minister for foreign affairs.[8]

On 20 January 2023, the UK's foreign secretary James Cleverly announced a collaboration with other international partners to achieve accountability for Russia's actions.[9] In its view, the most convenient court would be a 'hybrid tribunal', integrated within the Ukrainian national system but implementing international elements.[10]

Hybrid court risks

According to Resolution 2482 (2023),[11] the Parliamentary Assembly of the Council of Europe has again called on member states to establish a special international criminal tribunal for the crime of aggression against Ukraine. The proposed features would prevent the following risks:[12]

1. Immunising Russian officials against prosecution

As previously demonstrated and defined, the crime of aggression is a 'leadership crime'. In order to prosecute Russian leaders, they must lack impunity. However, personal immunities are attached to national courts, which can be seen in the 2002 judgment in *Yerodia* by the International Court of Justice.[13] Furthermore, waiving the immunity of officials is usually done by the state – something unlikely to happen in Russia's case with Putin as the head of state.[14]

2. Violating the Ukrainian Constitution

Under Article 125 of the Ukrainian Constitution, the 'establishment of extraordinary and special courts is not permitted'.15 Additionally, under Article 157, 'the Constitution of Ukraine shall not be amended in conditions of martial law or a state of emergency'. On 24 February 2022, immediately after Russia invaded Ukraine, Ukrainian President Volodymyr Zelensky imposed martial law across the country.16

This law empowers military officials and puts them in charge, and also differs from country to country.[17] President Zelensky has extended the martial law five times since it came into force. The latest extension lasted until 19 February 2023.[18]

3. Unauthoritative rendered judgments

Verdicts shall be in the interest of the whole international community. States won't be able to take it as an example. A Ukrainian court would also be subject to propaganda campaigns, especially if it held a trial in absentia.

4. Belarusian leaders avoiding responsibility

Belarusian leaders are not involved in the crimes before the ICC such as war crimes, crimes against humanity and genocide. Therefore, they cannot be prosecuted in the absence of a special tribunal.

5. Light weight of warrant arrests

Warrant arrests issued by national courts will not have the same weight as warrants issued by international tribunals. States won't be forced to cooperate if the court is not established through an agreement with the UN.

6. Sentencing issues

Under Article 437 of the Ukrainian Criminal Code, 'Planning, preparation or waging of an aggressive war or armed conflict, or conspiring for any such purposes, shall be punishable by imprisonment for a term of seven to twelve years' and 'Conducting an aggressive war or aggressive military operations, shall be punishable by imprisonment for a term of ten to fifteen years'. Such sentences would be considered relatively short given the crime.

Conclusion

This article highlighted the limitations of a hybrid court within the national Ukrainian justice system. Taking into consideration the gravity of the atrocities committed by Russia, leaders in charge must be held accountable to ensure justice is served. Therefore, establishing a special tribunal for the crime of aggression would be crucial. Such tribunal, with minimal risks, would have the following criteria: (1) created by a multilateral agreement with the support of international components; (2) a register of damage as a record for all evidence; and (3) an international claims commission at a later stage.

It has been one year since Russia invaded Ukraine, and thus it is imperative for the international community to act in favour of creating the special tribunal as soon as possible.

Finally, it is worth noting that in February 2023, an international office for the prosecution of the crime of aggression in Ukraine will be set up in The Hague to collect and preserve evidence.[19] However, such an office can't replace the special court for the crime of aggression.

Notes

1 Milena Sterio, 'The Russian Invasion of Ukraine: Violations of International Law' (Jurist, 12 July 2022) www.jurist.org/commentary/2022/07/milena-sterio-russia-war-crimes-ukraine accessed
2 Rome Statute of the International Criminal Court, see: www.icc-cpi.int/sites/default/files/RS-Eng.pdf.
3 Gordon Brown, 'Summon a Special Tribunal for Putin's crimes in Ukraine' (Project Syndicate, 16 January 2023) www.project-syndicate.org/commentary/special-tribunal-putin-crimes-ukraine-by-gordon-brown-2023-01 accessed
4 Institut Montaigne, 'A special tribunal for the Russian crime of Aggression in Ukraine' (31 January 2023) www.institutmontaigne.org/en/analysis/special-tribunal-russian-crime-aggression-ukraine accessed
5 European Council, 'G7 Leaders' Statement' 12 December 2022 www.consilium.europa.eu/en/press/press-releases/2022/12/12/g7-leaders-statement accessed
6 JP Leskovich, 'European Parliament urges establishment of war crimes tribunal for Russia, Belarus' (Jurist, 10 January 2023) www.jurist.org/news/2023/01/european-parliament-urges-establishment-of-war-crimes-tribunal-for-russia-belarus accessed
7 Patrick Wintour, 'Russian war crimes draft resolution being circulated at the UN', The Guardian (4 December 2022) www.theguardian.com/law/2022/dec/04/russian-war-crimes-draft-resolution-circulated-un-ukraine-zelenskiy accessed
8 Eszter Zalan, 'MEPs urge EU countries to back a special tribunal on Russia', EUobserver (19 January 2023) https://euobserver.com/rule-of-law/156624 accessed
9 Foreign, Commonwealth & Development Office, 'UK joins core group dedicated to achieving accountability for Russia's aggression against Ukraine' (20 January 2023) www.gov.uk/government/news/ukraine-uk-joins-core-group-dedicated-to-achieving-accountability-for-russias-aggression-against-ukraine accessed
10 *Ibid.*
11 'Legal and human rights aspects of the Russian Federation's aggression against Ukraine', (Parliamentary Assembly, 26 January 2023) https://pace.coe.int/en/files/31620/html accessed
12 Jennifer Trahan, 'Why a "Hybrid" Ukrainian Tribunal on the Crime of Aggression Is Not the Answer', (Just Security, 6 February 2023) www.justsecurity.org/85019/why-hybrid-ukrainian-tribunal-on-crime-of-aggression-is-not-the-answer accessed
13 See www.icj-cij.org/public/files/case-related/121/121-20020214-JUD-01-00-EN.pdf.
14 Janet Anderson, 'Everything you need to know or argue about a special tribunal on Russia's crime of aggression', (Justice Info, 13 December 2022) www.justiceinfo.net/en/110201-everything-you-need-to-know-argue-special-tribunal-russia-crime-of-aggression.html accessed
15 See www.refworld.org/pdfid/44a280124.pdf.
16 Akanksh Naik, '1200 men have tried to flee Ukraine martial law since Russian invasion', (Jurist, 1 January 2023) www.jurist.org/news/2023/01/12000-men-tried-to-flee-ukraine-martial-law-since-russia-invaded accessed
17 Asha C Gilbert, 'Ukraine's president declared martial law after Russia's attach. But what is it?', (USA Today, 24 February 2022) https://eu.usatoday.com/story/news/world/2022/02/24/martial-law-ukraine-russia-attack/6925581001 accessed
18 *Ibid.*
19 See n 12 above.