International Bar Association

the global voice of the legal profession®

IBA Interns' Newsletter

DECEMBER 2022

IBA Interns' Newsletter

IN THIS ISSUE

Annie Reiber

The future of internet and digital privacy legislation: EU approach v US approach

According to research from the Global Web Index, 51 per cent of European respondents are concerned about the internet eroding their personal privacy and 60 per cent fear how their personal information is being used by companies.[1] In the US, these figures rise to 62 per cent and 65 per cent respectively.[2] There is increasing awareness of the importance and value of personal information and, as a result, people are demanding greater control over their information and increasingly becoming unwilling to give up that information. While the EU has taken great strides to protect consumers' privacy and safeguard their data in recent years, the US appears to lag behind in working to understand and address these harms through regulation, instead ceding immense power over the economy and society entirely to private actors.[3] Going forward, the EU's trailblazing approach can offer considerable guidance to the way the US handles digital regulation.

EU approach

The General Data Protection Regulation, or GDPR, is one of the most significant and wide-ranging pieces of legislation concerning the privacy rights of everyday users and the data they create online.[4] By passing the GDPR in 2016, the EU focused on gaining permission to collect personal data from users of the web, and putting control of that data into the hands of the users from whom it's collected.[5] In 2022, the European Commission became more ambitious and upgraded the rules governing digital services in the EU by agreeing to the Digital Services Act (DSA) and the Digital Markets Act (DMA).[6] Together they form a single set of new rules that will be applicable across the whole EU to create a safer digital space where the fundamental rights of users are protected and to establish a level playing field for businesses.[7]

US approach

Market failures, regulatory gaps and enforcement oversights have left Americans with few alternatives but to suffer violations of privacy and civil rights in order to use increasingly essential online services.[8] Regulation is arguably not a matter of if – but when, how much and the degree to which it will tilt the current balance of power.[9] People across the US are starting to question the need for government intervention in regard to online privacy, and elected officials are listening.[10] Currently, three states in the US have three different comprehensive consumer privacy laws: California (CCPA and its amendment, CPRA), Virginia (VDCPA) and Colorado (ColoPA).[11] California's Consumer Privacy Act appears to be the strongest and advances the GDPR by preventing the denial of services to those who opt not to participate in the data collection and monetisation economy.[12] Regardless of which state a company is located in, the rights the laws provide apply only to people who live in these states and lingering concerns related to unauthorised disclosure of user information, particularly location data, have prompted calls for federal legislation.[13]

Several bills to address these concerns have been introduced in the US Senate, with some of the most prominent being the American Innovation and Choice Online Act (AICOA), the Open App Markets Act, and the Platform Accountability and Transparency Act.[14] These Acts address a subset of the issues that the DMA and the DSA tackle, but so far lag behind the EU's ambitious twin legislation.[15] The US took a step in the right direction this year by leading 60 other countries in endorsing a 'Declaration for the Future of the Internet'.[16] The declaration reaffirms a shared commitment to an internet that is 'open, free, global, interoperable, reliable, and secure'.[17] Despite its non-binding nature and lack of enforcement, this declaration is

better than none, yet pales in comparison to the comprehensive regulatory systems for online services that the European Union is implementing through the DSA, DMA and others.[18]

Looking to the future

The future of internet regulation depends on the ability of policymakers to embrace a new model of regulation that uses very different tools from the still dominant and traditional model of command-and-control regulation.[19] To its credit, the FCC has begun to move partially towards a new model of regulation and refrained from using the old model in the internet context thus far.[20] However, the FCC has yet to develop an institutional strategy for operating in the internet ecosystem.[21]

Moving forward, the FCC should indeed set broad norms to govern internet policy, but its ability to develop those norms – whether through prescriptive regulation or even adjudication – will be tested if it is not able to rely on mediating institutions (like an SRO under its oversight).[22] An essential challenge for the FCC is to focus not merely on the broad norms that will govern internet networks, but also to develop its institutional strategy.[23] Whether the FCC can develop new models that will operate effectively may well determine whether the agency transitions to the internet age.[24]

Overall, the future of data privacy looks to be far less reactive and much more proactive.[25] It will be one in which consumers are more educated about the issues and will not wait until the next embarrassing data breach to take steps to safeguard their personal data.[26] It will also be an era in which cooperation binds actual tech to actionable policies and one where everything from federal regulations to corporate terms and conditions will consider and respect implications to user privacy.[27] For those who have fallen victim to data exposure or been taken advantage of by a bad actor, that future can't arrive soon enough.

Notes

1 Ken Mortensen, 'What's been done for data privacy since GDPR?'. 15 May 2019. Available online: www.techradar.com/news/whats-been-done-for-data-privacy-since-gdpr.
2 Ibid.
3 Erin Simpson, Erin Corner 'How To Regulate Tech: A Technology Policy Framework for Online Services'. 16 November 2021. Available online: www.americanprogress.org/article/how-to-regulate-tech-a-technology-policy-framework-for-online-services.
4 Mike Moore, 'What is GDPR? Everything you need to know about the new EU data laws'. 5 November 2019. Available online: www.techradar.com/news/what-is-gdpr-everything-you-need-to-know.
5 Ibid.
6 https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package.
7 Ibid.
8 Simpson, n3.
9 Philip J. Weiser, The Future of Internet Regulation, 43 U.C. Davis L. Rev. 529 (2009).
10 Ibid.
11 Thorin Klosowski, 'The State of Consumer Data Privacy Laws in the US (And Why It Matters)'. 6 September 2021. Available online: www.nytimes.com/wirecutter/blog/state-of-privacy-laws-in-us.
12 Ibid.
13 Ibid.
14 Andreas Schwab, 'The EU ushered in a new era of digital regulation. Will the US follow suit?'. 22 June 2022. Available online: www.theparliamentmagazine.eu/news/article/eu-new-era-digital-regulation-will-us-follow-suit.
15 Ibid.
16 Alex Engler, 'The Declaration for the Future of the Internet is for wavering democracies, not China and Russia'. 9 May 2022. Available online: www.brookings.edu/blog/techtank/2022/05/09/the-declaration-for-the-future-of-the-internet-is-for-wavering-democracies-not-china-and-russia/#:~:text=The%20declaration's%20vision%20for%20the,stakeholder%20approach%20to%20internet%20governance.
17 www.brookings.edu/blog/techtank/2022/05/09/the-declaration-for-the-future-of-the-internet-is-for-wavering-democracies-not-china-and-russia/#:~:text=The%20declaration's%20vision%20for%20the,stakeholder%20approach%20to%20internet%20governance.
18 Engler, n17.
19 Weiser, n9.
20 Ibid.
21 Ibid.
22 Ibid.
23 Ibid.
24 Ibid.
25 Dunst, n11.
26 Ibid.
27 Ibid.

Omer Ahmed
Hamed Omer

International law and sequencing transitional justice: navigating Pandora's toolbox

Introduction

In a few decades, transitional justice ('TJ') developed significantly as a 'field' that encompasses a range of strategies to address violence and atrocities.[1] TJ includes a variety of actors, each with increasingly perceived relevance.[2] The UN, for example, rests its understanding of TJ on a 'normative foundation' of specially developed 'international norms and standards'.[3] The UN emphasises a 'comprehensive' approach suggesting 'the greater the number of [TJ] measures selected, the better'.[4] Moreover, an '*appropriate* combination' of measures should be selected that conforms to these standards.[5]

To this end, critically examining the 'international norms and standards' of TJ opens to contestation the 'normative idealism' of what is considered 'appropriate' to TJ.[6] To this end, this piece explores how TJ responses can in fact be limited by its normative framework – a phenomenon that can be broadly captured under the notion of 'sequencing'.

To construct a definition, sequencing relates to the selection, prioritisation and coordination of TJ measures over space and time to best achieve certain aims, such as peace and reconciliation. Put plainly, sequencing relates to *what, when* and *how* to operationalise TJ, as well as connected questions of *for whom, where* and *why* TJ intervenes.[7] Among these concepts, there is an 'inherent tension' between the universalism of international law and the divergent local traditions it should accommodate.[8] Here, the question of *what* to sequence exposes the normative defaults that shape TJ interventions.

Sequencing rights: uncovering implicit relationships

The normative force of international justice fuels a parallel right of victims to justice.[9] The right to justice nominally includes both civil-political rights ('CPRs') and economic, social and cultural rights ('ESCRs').[10] Yet, significant scholarship problematises the 'dominant script' of TJ for its emphasis of CPR over ESCR violations and its situation of the latter as 'daily life concerns'.[11]

Briefly, classical human rights scholarship views ESCRs as 'less justiciable and less achievable'.[12] Consequently, TJ can be seen as 'inherently short-term, legalistic, and corrective' and 'should focus on accountability for gross violations of [CPRs]'.[13] The underlying assumption is that ESCRs are – conversely – long-term, programmatic policy goals. On the other hand, more radical scholarship seeks to widen the scope of 'justice' to 'systemic violence' and 'structural inequality'.[14] Much of this scholarship exceeds the relatively narrow capacity of ESCRs by assuming that they inherently relate to 'root causes of conflict'.[15]

Neither camp is persuasive. On the former, overlooking ESCR harms and their potential for straightforward correctives under-addresses the large-scale victimisation caused in transitional settings. The conceptual ambiguity of the latter school reinforces earlier assumptions on the nature of ESCRs as long-term, systemic-institutional issues.[16] Emerging practice has more accurately examined CPR and ESCR violations.[17] The Commission for Reception Truth and Reconciliation in East Timor ('CAVR'), for example, connected violations of the rights to food, housing and healthcare with the right to life to address crimes such as famine and forced displacement.[18] Its final report concluded that these abuses fell under Indonesia's failure as an occupying power 'to provide for certain basic needs'.[19] While engaging with legal rights, the CAVR simultaneously acknowledged the 'root causes' of conflict,

including its colonial and occupational history.[20]

To be sure, structural abuses are an integral part of a holistic vision of 'justice'. Yet, scholarship that understates or overstates the capabilities of ESCRs overlooks a wide spectrum of violence at the expense of those who hold a 'right' to justice. The 'right to justice' becomes more akin to a 'collective policy goal' when it diminishes socio-economic harms in favour of civil-political harms.[21] This policy-driven agenda reveals an implicit sequence that front-loads criminal accountability – via the right to justice – while leaving behind other 'rights' as secondary or derivative considerations. TJ may thus need to abolish its distinctions between CPRs and ESCRs in favour of alternative metrics for sequencing, such as the gravity of violations or their timing in the local context.[22]

Conclusion

A 'dominant script' shaped by the universal norms of TJ defines its interventions.[23] The 'universality' of these values is evident in its 'toolbox', wherein specific norms are promoted as international standards.[24] Yet, there is a significant gap between 'declaring' and 'realising' norms that is particularly evident in transitioning societies.[25] Concretising abstract, highly contested ideals, therefore, relies on a 'sense of reality' that the normative idealism of international law seems to neglect.[26] To this end, TJ offers little guidance on how to 'make real' what are otherwise moral aspirations translated into socio-political policy ambitions.[27]

The normative framework of TJ is operationalised through rights that emphasise victims as the recipients of certain duties.[28] Likewise, TJ characterises complex societal injustices as violations of legal rights that demand intervention.[29] Yet, there is a stark contrast between the 'rights' owed to victims and actual agency over their social realities. Freely exercised 'rights' are distinct from collective policies that are imposed in service of these rights. Refashioned as policy goals, rights can appear more damaging, exclusionary or neglectful of the abuses suffered by victims.[30]

If TJ aims to sequence itself in transitional settings, it may not be sufficient to assume certain 'international norms and standards' that apply without question. Indeed, any measure of sequencing first needs to evaluate its assumptions before questioning the specific modalities of its intervention.[31] To this end, TJ needs to resolve normative inconsistencies that persist at its peripheries, including the question of local agency and socio-economic justice.[32] Assuming the sequencing of these concepts reduces their contestation to a technical product – a 'toolbox' used to determine which type of TJ mechanism applies, rather than a deeper interrogation of the field's interventions in every context.[33] In any case, a normatively sound sequencing strategy remains elusive.

Notes

1 For this work, transitional justice is referred to as a field, notwithstanding relevant discourse on its status as such. *See* Christine Bell, 'Transitional Justice, Interdisciplinarity and the State of the 'Field' or 'Non-Field'' (2009) 3 International Journal of Transitional Justice 5-27.

2 These include 'UN agencies, international development partners and international NGO'. *See* Thomas Obel Hansen, 'The Vertical and Horizontal Expansion of Transitional Justice: Explanations and Implications for a Contested Field' in Susanne Buckley-Zistel and others (eds), *Transitional Justice Theories* (Routledge 2015) 107.

3 Ibid para. 9-10.

4 UN Secretary General, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice* (2010) S/2004/616 principle 8; Grover, 'Transitional Justice, International Law and the United Nations' 373.

5 UN Secretary General, *2004 Report* para. 26; UN Secretary General, *2010 Guidance Note* principle 8.

6 Paul Gready and Simon Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8 International Journal of Transitional Justice 339-361, 343.

7 Loosely expanding on Nagy's questioning of 'the categories of when, to whom and for what transitional justice applies' and inspired by the gap identified by McEvoy. See Rosemary Nagy, 'Transitional Justice as Global Project: Critical Reflections' (2008) 29 Third World Quarterly 275-289; Kieran McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' (2007) 34 Journal of Law and Society 411-440 ('many lawyers ... tend not to overly analyze fundamental existential questions such as 'what is transitional justice for?' or 'whom does it serve?'... [and] appear to spend most energy ... analyzing ... case law and relevant international standards.').

8 Larissa van den Herik and Carsten Stahn, *The Diversification and Fragmentation of International Criminal Law* (Brill | Nijhoff 2012) 26.

9 See Raquel Aldana-Pindell, 'In Vindication of Justiciable Victims' Rights to Truth and Justice for State-Sponsored Crimes' (2002) 35 Vanderbilt Journal of Transnational Law 1399-1502 1415.

10 UN Secretary General, *2010 Guidance Note* principle 9. See further United Nations General Assembly, *Vienna Declaration and Programme of Action* (12 July 1993) A/CONF.157/23 para. 5.

11 Cavallaro and Albuja, 'The Lost Agenda' 125; Evelyne Schmid and Aoife Nolan, '"Do No Harm"? Exploring the Scope of Economic and Social Rights in Transitional Justice' (2014) 8 International Journal of Transitional Justice 362-382 376; Sharp, 'Emancipating Transitional Justice' 160 citing Zinaida Miller, 'Effects of Invisibility: In Search of the "Economic" in Transitional Justice' (2008) 2 International Journal of Transitional Justice 266-291.

12 Turner, 'Transitional Justice and Critique' 64 citing Paige Arthur, 'How "Transitions" Reshaped Human Rights: A Conceptual History of Transitional Justice' (2009) 31 Hum Rts Q 321.

13 Lars Waldorf, 'Anticipating the Past: Transitional Justice and Socio-Economic Wrongs' (2012) 21 Social & Legal Studies 171-186 179.
14 Catherine Turner, *Violence, Law and the Impossibility of Transitional Justice* (Routledge 2017) 32.
15 Schmid and Nolan, '"Do No Harm"?'.
16 Ibid 374.
17 See Laplante, 'On the Indivisibility of Rights'.
18 Lisa J. Laplante, 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework' (2008) 2 International Journal of Transitional Justice 331-355; See further Commission for Reception Truth and Reconciliation in East Timor (CAVR), *Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor* (31 October 2005) 140 (Executive Summary); Office of the High Commissioner for Human Rights, *Transitional Justice and Economic, Social and Cultural Rights* (1 January 2014) HR/PUB/13/5; Ruben Carranza, 'Plunder and Pain: Should Transitional Justice Engage with Corruption and Economic Crimes?' (2008) 2 International Journal of Transitional Justice 310-330.
19 Office of the High Commissioner for Human Rights, *Transitional Justice and Economic, Social and Cultural Rights*; Laplante, 'Transitional Justice and Peace Building'. See further CAVR, *Chega! Final Report* 141, see further Part 2, Part 6, Part 7.
20 Office of the High Commissioner for Human Rights, *Transitional Justice and Economic, Social and Cultural Rights*.
21 Nino, 'The Duty to Punish Past Abuses of Human Rights' 2621.
22 See Juan Carlos Ochoa-Sánchez, 'Economic and Social Rights and Transitional Justice: A Framework of Analysis' (2019) 18 Journal of Human Rights 522-542; Dustin N. Sharp, *Justice and Economic Violence in Transition* (Springer 2014).
23 Sharp, 'Emancipating Transitional Justice' 153. See further Dustin N. Sharp, 'Beyond the Post-Conflict Checklist: Linking Peacebuilding and Transitional Justice through the Lens of Critique' (2013) 14 Chicago Journal of International Law 165-196 (TJ measures 'have spread ... not necessarily by adapting themselves de novo to each new context, but through a process of "acculturation" whereby a dominant script or practice is replicated.').
24 Vieille, 'Transitional Justice: A Colonizing Field?'.
25 Haldemann, Unger and Cadelo, *The Principles to Combat Impunity* 347 ('[The] gap between declaring a norm and realizing it is further exacerbated in the aftermath of mass atrocity. Nowhere more than here does the concrete implementation of an abstract political ideal ... depend on the particularity of each situation.').
26 Ibid citing Isaiah Berlin, *The Sense of Reality: Studies in Ideas and Their History* (1st edn, Farrar, Straus and Giroux 1997).
27 Haldemann, Unger and Cadelo, *The Principles to Combat Impunity*.
28 De Greiff and Duthie, *Transitional Justice and Development* 58.
29 Fletcher, 'International Criminal Law and the Subordination of Emancipation' 709.
30 Ibid.
31 Fletcher, Weinstein and Rowen, 'Context, Timing and the Dynamics of Transitional Justice'.
32 Sharp, 'Interrogating the Peripheries' 152.
33 Ibid.

Lara Oliveira Sampaio

Who lives, who dies, who tells your story?: a call to study human rights through a decolonial lens in Latin America

Decolonising human rights is, necessarily, about questioning power structures. In this sense, one aspect that stands out regarding the importance of decolonising human rights is to raise and spread awareness about issues of oppression and domination rooted in Latin America's history over the past centuries.

For Boaventura de Sousa Santos, the hegemony of human rights is fragile. In his understanding, most of the world's population is not the subject, but rather the object of a human rights speech. This scenario often excludes specific groups, like native populations. Thus, mere discourse does not contribute effectively to the struggle of the excluded and exploited. However, the author proposes that even though human rights are part of a hegemony that consolidates and legitimises oppression, it is possible to subvert it. To this end, it is necessary to face its weaknesses and flaws to convert them into tools for social emancipation in different contexts.[1]

Therefore, the critical theory of human rights stands out. Enrique Dussel states that the human rights history and culture taught as universal is Eurocentric, as no cultural revolution has occurred in the colonised countries of Latin America. Meanwhile, the continent's history is unknown, ignored or even despised. Dussel points out that

Antiquity and the Middle Ages are studied in a general way so that people from Latin America are not included, appearing only in the Modern Age, as 'conquered'.[2] Thus, it is necessary to respect the accomplishment of the history of struggles that led to progress regarding human rights in Latin America.[3]

Hélio Gallardo affirms that the state's actions in Latin America have systematically violated all generations of human rights. Therefore, misery and poverty are not fatalities but outcomes of actions, political omissions and economic projects. For him, an abyss separates human rights discourse from its practical implementation in modern societies. Thus, these rights cannot be seen as innate, natural or proper. In the same sense as Enrique Dussel, Gallardo points to the construction of a 'colonial identity' on the continent, which is marked by a context of domination, extermination, conflicts and enslavement.[4]

Regarding the decolonial thinking approach in Latin America, there is a need to rescue a silenced memory fiercely. However, a new approach within the theme does not mean suppressing existing contributions. In this sense, Barreto presents an alternative to decolonial thinking of human rights by bringing Hegel's conception of dialectics. In synthesis, Barreto presents this concept as a complex dynamic of preservation and destruction of argument through a threefold process that contemplates building a thesis, formulating an antithesis and reaching a synthesis between the two.[5]

Specifically, concerning decolonial thinking, Barreto states that there is a particular set of rights coming from the West that, although not universal, must be considered. However, there is a need to recover parts of history that have been erased due to the perpetuation of the effects of colonisation, such as domination and oppression over the centuries.[6]

Therefore, Barreto sustains the possibility of bringing two points of view: the 'Eurocentric' vision of human rights and the view that recovers contributions from non-European traditions. The dialectic between those lines could achieve a new way of telling the human rights story.

Back to Dussel's statement that Eurocentrism has left Latin America off the map and that what is taught in schools also reflects a Eurocentric heritage in terms of culture and history.[7] The question arises as to whether the same is valid within the curricular structures of law courses in the region.

Extermination and domination, centuries of slavery, the concentration of income and social inequality resulting from the exploitation policy of the colonies have led to consequences suffered to this day by the Latin population. The 20th century was marked by coups d'état and oppressive approaches for Latin America. Even today, the region's countries struggle to establish and strengthen their recent and fragile democracy.

Back to the concept of a dialectic colonial thought brought by Barreto, the intention is not to disregard the contributions of the Western formation to law, but to present a counterpoint with the history of Latin America and its colonised countries. After all, knowledge of the past is crucial in defining future steps – essentially, not repeating the same mistakes.

Linked to the geographic space, memory contributes to a notion of belonging. Therefore, the study of memory and the awareness arising from the strengthening of identity linked to the space and knowledge of its own history are essential tools for inserting Latin America as a focal point for understanding what human rights are, and who they are for, in the region. It is necessary to take ownership of these concepts to effectively break with the 'fragile hegemony' referred to by Boaventura de Sousa Santos.[8]

The study of memory in law courses allows for a critical reflection on identity formation on the continent and stands as a counterpoint to the Eurocentric formation. Thus, as proposed by Barreto, the existence of a thesis and an antithesis form the dialectical construction of a decolonial thought. The history of human rights needs to be seen and told in a critical way. To do so, one next step is to design reforms in the justice education system itself.

Notes

1 Boaventura de Sousa Santos, *If God Were a Human Rights Activist* (Stanford University Press 2015)
2 Enrique Dussel, ' " (19 June 2018) www.youtube.com/watch?v=Q86_LPat-IQ accessed 18 January 2022)
3 Joaquín Herrera Flores, *A reinvenção dos Direitos Humanos* (Fundação Boiteux 2009)
4 Hélio Gallardo, *Teoria Crítica: matriz e possibilidade de direitos humanos* (Unesp, 2014)
5 José-Manuel Barreto, *'Decolonial Thinking and the Quest for Decolonising Human Rights'* (2018) 46 Asian Journal of Social Science 484
6 Ibid.
7 Dussel (n 2).
8 Santos (n 1).

Lucie Linossier

The lack of accountability in the chain of command for the committed crimes against humanity in Xinjiang, China

The Uighurs are a persecuted minority who live primarily in Xinjiang Uighur Autonomous Region, located in northwest China. They mainly speak their own Turkic-based language and see themselves as culturally and ethnically close to the Central Asian nations of the former Soviet Union (ie, Kazakhstan). Uighurs are predominantly Muslim in a country where religion is tightly controlled and generally discouraged. The persecution of the Uighurs takes different forms with the same goal, namely, to show greater allegiance to the Chinese Communist Party (CCP) led by Xi Jinping. To achieve this aim, the CCP has taken oversteps to weaken and arguably destroy Uighur culture and make it difficult to practice their religion (Islam).

Several reports and a major tribunal have addressed allegations that the People's Republic of China (PRC) has committed genocide, crimes against humanity and torture against the Uighurs. Under the Rome Statute of the International Criminal Court (ICC), which came into effect in July 1998, crimes against humanity are specified severe offenses that are knowingly committed as part of a widespread or systematic attack against any civilian population. 'Widespread' refers to the scale of the acts or the number of victims. A 'systematic' attack indicates a pattern or methodical plan. Crimes against humanity can be committed during peacetime and during armed conflict, so long as they are directed against a civilian population. A civil society-led tribunal held in London in December 2021 by the chairman Sir Geoffrey Nice KC, concluded that China has in fact, engaged in a widespread and systematic attack on the Uighurs and also genocide.[1] Among other things, it documented the construction of numerous detention centres that effectively operate as concentration camps, sterilisation of women and sexual violence in the camps, the destruction of mosques and the interference in the lives of the Uighurs across the entire region.

Liability for CAH and genocide can be ascribed to perpetrators at the lowest and highest levels of the Chinese government. The doctrine of command or superior responsibility stipulates that a superior military or civilian leader can be held criminally responsible when their subordinates commit international crimes. The doctrine has become part of customary international law and has been incorporated into the statutes of the international criminal tribunals and into the Rome Statute of the International Criminal Court (ICC).[2]

A brief analysis follows of officials who likely bear responsibility for such crimes against the Uighurs and other minorities.

At the top of the hierarchy is Xi Jinping, the General Secretary of the Central Committee, who was reelected to a third five-year term in October 2022.[3] In addition to serving concurrently as general secretary of the CCP and state president, Xi also serves as chairman of the CCP and State Central Military Commission and as the 'core' of the Central Committee and the party as a whole. In his 2014 speeches,[4] Xi authorised the Xinjiang government to draft a local legal regulation to address religious extremism. The 'relevant local regulations' highlighted by Xi in his speeches refer to the XUAR De-Extremification Regulation, which was issued in March 2017. It laid the foundation for the 'normalization, standardization, and legalization' of Xinjiang's re-education through 'centralized education' involving 'behavioral correction'.[5] Re-education camp construction bids and anecdotal accounts from the ground indicated that Xi's campaign of mass internment began shortly after the regulation came into effect.[6] Also, Xi's statement from 28 May 2014, states that 'regarding those who violate the law, those

who should be seized should be seized, and those who should be sentenced should be sentenced, there must be no one above the law'. These and other statements made by Xi Jinping laid the ground for the ongoing campaign of preventative internment for the purpose of political re-education.[7] Xi himself ordered regional authorities to 'implement practical measures such as expanding the number of employed [staff in detention facilities], enlarging the capacity [of these facilities], and increasing investment [in these facilities] within the set time frame'.

Below Xi in the party hierarchy is the Central Committee's elite, a seven-man political bureau (Politburo) standing committee, of which Xi is a member, and the Central Committee's 25-person Politburo, from which the standing committee is drawn.[8] Li Keqiang, (China's second highest politician), is focusing on employment in the Xinjiang region, together with Zhoa Kezhi, the minister of public security. Zhao's speech provides evidence that between one and two million people, mostly Uighurs, have been incarcerated.[9] It also demonstrates that Xi has been personally aware of the details of this campaign and that he issued instructions that enabled its continuation and expansion. Gao Shengkun, who currently serves as a Politburo member, is also implicated in CAH and genocide in Xinjiang. Gao reported on prison capacity challenges he witnessed during his visit to Xinjiang in April 2017.[10]

At the regional level, Chen Quanguo is the former CCP Committee Secretary of Tibet from 2011 to 2016. He was enlisted to serve that same role in the XUAR from 2016 to 2021, primarily because of his successful repression in Tibet. His speech from February 2018 mandated that the PRC should 'round up all who should be rounded up'.[11] A set of internal documents from the Chinese government was leaked to the Uyghur Tribunal in London in September 2021. In document number three, a Xinjiang government document issued in June 2017, Chen Quanguo mandates that 'all persons with motives of committing crimes' or those who engage in 'abnormal behavior' should be subjected to the command 'round up all who should be rounded up' and 'detain all who should be detained' in order to prevent the occurrence of any 'lone wolf' attacks. In document number four, Chen Quanguo repeatedly invokes the need to fulfill the will of the central government. Zhu Hailun, who serves as the current vice chairman of the standing committee of the People's Congress of XUAR approved one of the most important documents that were leaked[12]. 'The manual' for the re-education camps that was leaked details the prison systems and the education transformations.[13] This constitutes relevant evidence for the link in the superior responsibility doctrine for the committed CAH.

At the local level, guards and others working in the detention centres, as well as the local police who enforce policies issued by those senior to them, also may be culpable for CAH and genocide. There are numerous disturbing reports of sexual violence against Uighur Muslim women in detention that guards, and others, have committed at the detention centres. Tursunay Ziawudun, now based in Washington, DC, was held in a camp for nine months in 2018. She reported that masked men gang-raped her on three occasions, that these same men used electroshock on and inside her genitals and that camp authorities took women in her cell to be raped 'every night'.[14] In addition to Ms Ziawudun's first-person account, a number of other former detainees and camp teachers have said they witnessed, or heard of, Uighur women being raped. A political education camp teacher, Qulbinur Sedik, a Uighur, said police officers told her women were being raped, including with electric batons.[15]

In their testimony at Human Rights Watch, several Uighurs have described systematic rapes in the camps.[16] Chinese officers frequently subject Uighur women to sexual violence, with one of the former teachers, Sayragul Sauytbay, forced to work in the re-education camps testifying that 'rape was common' and the guards 'picked the girls and young women they wanted and took them away'. Additionally, Sauytbay recounted a specific event of a woman who was approximately 21-years-old being repeatedly raped by several police in plain view of other inmates. Forced sterilisation and birth control are also part of the sexual violence endured by the Uighurs and a central feature of a 'population optimisation' strategy and seek to dilute 'problem' populations by embedding 'positive' (ie, ethnic Han) populations within them, thus reducing the monoethnic nature of southern Xinjiang, and decreasing the space for religious 'extremism' and hence 'terrorism' to develop. (This approach proved largely effective in Tibet.) To obtain this result, they also are instituting a birth prevention and sterilisation campaign on

Uighur women. In 2019, Xinjiang's Health Commission's family planning budgeted $16.7m (RMB120m) for this project.[17] The Uyghur Tribunal was satisfied that rape and other sexual violence was widespread and proven. Consequently, these and many other cases chronicled in press accounts and human rights organisation reports provide compelling evidence that China has likely committed the crime of sexual violence under the Rome Statute. [18]

In conclusion, a multi-level chain of command is implicated with respect to CAH and genocide committed against the Uighurs. Authorities in Beijing constitute the first and most crucial level, including Xi, members of the central government and the Politburo. Second, authorities at the XUAR Regional Autonomous Regional level who directly implement Beijing's directives and policies are likely culpable. The third level is the prefectural or county level. Fourth, officials in towns, villages, work units and 're-education' centres (guards and police) are the most critical implementers of these directives. Those working in these fourth-level institutions are directly linked with the mistreatment of the Uighurs; their actions constitute evidence of a methodical plan that implements a 'systematic' and 'widespread' attack, especially given the staggering number of Uighurs who have been detained and directly impacted by the policies.

With a non-binding decision, the London Uyghur Tribunal was satisfied that President Xi Jinping, Chen Quanguo and other very senior officials bear primary responsibility for acts that have occurred in Xinjiang. The Tribunal recognised that the perpetration of individual criminal acts that may have occurred, whether rape or torture, could not have been carried out with the detailed knowledge of President Xi and others. The Tribunal concluded that these crimes occurred as a direct result of policies promulgated by President Xi and others, and furthermore, these policies could not have been implemented in a country with such rigid hierarchies as the PRC without implicit and explicit authorisation from the very top.[19] The International community needs to take more energetic measures to bring to a halt the crimes being committed in Xinjiang, as there is ample evidence of an ongoing genocide and a multi-year campaign of repression against the Uighurs and other Muslim minorities that rises to the level of crimes against humanity under the Rome Statute.

Notes

1 Uyghur Tribunal, London, December 2021 (The following crimes have been proved; Deportation: Beyond reasonable doubt; Imprisonment: proved; Torture: proved; Sexual violence: proved; Persecution: proved; Enforced disappearances: proved; Inhumane acts: proved) (Genocide: All the elements of an intended genocide to be accomplished by a Convention-listed act imposing measures to prevent births within the group are established, subject only to whether the 'part' subject of the intended destruction would qualify. If the 'part' is sufficiently large, then genocide would be proved.) – The Tribunal has no power to sanction individuals.
2 Command Responsibility, Harmen van der Wilt, Oxford bibliography, February 2017.
3 Xi Jinping secures historic third term in power – as it happened, The Guardian, 23 October 2022
4 The Xinjiang Papers – Document No.1 (Speeches by Xi Jinping, 28-30 April 2014); London Uyghur Tribunal
5 Xinjiang Uyghur Autonomous Region De-extremification Regulations, 29 March 2017
6 Adrian Zenz, "Thoroughly reforming them towards a healthy heart attitude": China's political re-education campaign in Xinjiang', 5 September 2018
7 The Xinjiang Papers – Document No.2; P.9 (Speeches by Xi/Li/Yu, 28-29 May 2014) London Uyghur Tribunal
8 ('CCP Central Committee Politburo Standing Committee Meetings'), website of the CPC Central Organization Department.
9 Document No.2 P.25 London Uyghur Tribunal
10 Gao, Xuejing, and Ming Li. 2017. [A Research into the Core Content and the Promoting Tactics of the Counter-terrorism Strategy of Embedding in Xinjiang]. Journal of Beijing Police College (05): 26-33.
11 The Xinjiang Paper, Document n°8, Chen Quanguo Autonomous Region Party Committee Standing Committee, 22 February 2018.
12 China Cables is an investigation into the surveillance and mass internment without charge or trial of Uighurs and other Muslim minorities in Xinjiang.
13 Zhu Hailun, the man behind China's Uighur prison camps, France 24, 26 November 2019.
14 Matthew Hill, David Campanale, and Joel Gunter, '"Their goal is to destroy everyone"': Uighur camp detainees allege systematic rape', BBC News, 2 February 2021,
15 Ruth Ingram, 'Confessions of a Xinjiang Camp Teacher', The Diplomat, 17 August 2020.
16 Human Rights Watch, 'Break Their Lineage, Break Their Roots', 19 April 2021.
17 Sterilizations, IUDs, and Coercive Birth Prevention: The CCP's Campaign to Suppress Uyghur Birth Rates in Xinjiang, China Brief Volume: 20 Issue: 12, Adrian Zenz, 15 July 2020, P. 16.
18 Human Rights Watch interview with Aina Shormanbayeva via an electronic communication platform, 20 August 2020.
19 Uyghur Tribunal, London, December 2021.

Muskan Mahajan

UK Magnitsky sanctions: effectiveness of the global human rights regime

Introduction

Magnitsky sanctions are targeted sanctions imposed by governments on individuals and entities responsible for human rights abuses and corruption across the world. These targeted sanctions freeze the preparators' assets and ban them from travelling internationally. The Magnitsky sanctions have been a key tool for the UK government in addressing the most egregious cases of human rights violations, combatting illicit finance and preventing the UK from serving as a shelter for war criminals and kleptocrats.

The UK's Magnitsky sanction programme is composed of two regimes: (a) The Foreign Secretary is authorised to impose sanctions under the Global Anti-Corruption Sanctions Regime[1] against people and organisations who take part in bribery or the misappropriation of state property; and (b) The Foreign Secretary has the authority to impose sanctions under the Global Human Rights Sanctions Regime[2] on individuals and organisations for their engagement in crimes against the right to life, the right to be free from torture or the right to be free from slavery.

The examination of the Global Human Rights Regime[3] (2020), and an assessment of its current implementation, will be the main themes of this article. Although this regime is a recent development with few existing applications, the article identifies several possible limitations and offers recommendations that would enable the regime to reach its full potential.

Overview of the UK global human rights regime

As part of the post-Brexit legal framework, the Global Human Rights Sanctions Regulations went into force on 6 July 2020, outlining the UK government's national security targets and strategies for preserving international peace and security and advancing human rights.[4] The establishment of these regulations made it clear that the UK would no longer be a hospitable place for preparators of the most egregious human rights violations.

This regime allows the UK government to enforce sanctions measures to deter and provide accountability for acts that infringe an individual's rights to life, freedom from torture and freedom of slavery.[5] The aim is to deter preparators from committing human rights violations, champion human rights, good governance and rule of law, while simultaneously preventing any humanitarian drawbacks for the wider population.[6]

UK global human rights regime as targeted sanctions

The UK Global Human Rights Regime sanction system can be seen as an example of 'smart' or 'targeted' sanctions.[7] By focusing their restrictions on specific persons, these sanctions avoid punishing the people of the nation where the accused preparator originates. This strategy has originated in response to the adverse humanitarian impacts associated with the traditional comprehensive sanctions previously adopted by the UK. The term 'smart' sanction thus emphasises the notion that these restrictions are more humane and competent in achieving their goal than conventional trade sanctions.

The two-pronged goal of the sanction's regime is to prevent potential offenders from violating human rights while concurrently imposing accountability for current violators of such rights. Accordingly, a person can only be designated under this sanction if they can be definitively linked to human rights abuses in one of the ways specified in the law. Therefore, while contemplating designations, the Minister has to ensure that sanctions imposed would contribute towards the goal of deterrence or accountability for their human rights violation.

Limitations and going forward

Given the novelty of these sanctions, there is not much data to assess their efficacy. The regime does, however, have several

shortcomings that must be addressed to achieve its maximum potential. One of the major flaws in the regime is the lack of delisting provisions. Thus, if the goal of the sanction is to encourage improved behaviour, consideration of how to be removed from the sanction list should be made. This will guarantee that the new framework achieves its goal of enhancing human rights situations by promoting behavioural changes.

The government needs to take a considered and comprehensive approach to sanctions. When making sanctions decisions, the government has often failed to sanction key preparators. It is pertinent that the government takes a step forward beyond their initial focus of targeting mid- and low-level officials. This will ensure that the UK sanction regime does not become an ineffective political bargaining chip and instead improves human rights conditions by targeting those with more political influence who are directly involved in abuses.[8]

Another deficiency in the new regime that needs to be addressed is that these sanctions are not coordinated with key allies. Individual sanctions are more successful when they are coordinated internationally, particularly when the targets rely more on alternative markets and do not have substantial assets in the UK.[9] For example, in 2021, the US government imposed sanctions on 40 actors for human rights violations, in comparison, the UK government imposed just one sanction under the human rights regime.[10] Therefore, it is recommended that the UK should coordinate its sanction framework with concurrent regimes in Canada, the EU and the US for it to be impactful.[11]

The enactment of the Global Anti-Corruption Sanctions Regulations 2021[12] addresses initial criticism of the UK human rights regime by developing a second, targeted sanction regime aimed at those involved in corruption that prevents targeted individuals from moving money through the UK's financial system. To ensure that this legislation addresses the gaps in the 2020 framework, a clear and robust channel has to be developed between the two regimes to target individuals in both corruption and human rights abuses.

Conclusion

This article highlighted the existing limitations of the current UK sanctions regime. The article notes that, despite its flaws, the sanction regime has the potential to be useful if the discussed recommendations are implemented. There are a several potential barriers to implementation, and in order to overcome each one, government officials would need to commit to stronger policies and resources. Due to issues with implementation and enforcement, sanctions that seem substantial on paper frequently turn out to be far weaker in practice. Particularly, issues could develop because foreign parties are not legally required to adhere to the sanctions, making them only symbolic or merely interpretable rules. It is also pertinent to mention that there may be violations of the sanctions regime that are difficult for government officials to identify. In order to mitigate this, governments must invest significantly in monitoring possibly illegal transactions and conducting investigations. Overall, the article emphasises the need for a robust, controlled and cooperative infrastructure to guarantee that the regime meets its maximum potential.

Notes

1 The Global Anti-Corruption Sanctions Regulations 2021.
2 The Global Human Rights Sanctions Regulations 2020.
3 See The Global Huma Rights Sanctions Regulations, legislation.gov.uk, available at: www.legislation.gov.uk/uksi/2020/680/contents/made
4 'UK Sanctions', GOV.UK, available at: www.gov.uk/guidance/uk-sanctions
5 'The Global Human Rights Sanction Regime', GOV.UK, available at: www.gov.uk/government/collections/uk-global-human-rights-sanctions
6 See Explanatory Memorandum to the Global Human Rights Sanctions Regulations 2020, available at: www.legislation.gov.uk/uksi/2020/680/pdfs/uksiem_20200680_en.pdf
7 See The Legitimacy and Effectiveness of the UK Sanctions Regime as a Human Rights Tool, available at: www.ucl.ac.uk/americas/sites/americas/files/the_legitimacy_and_effectiveness_of_the_uk_sanctions_regime_as_a_human_rights_tool.pdf
8 See UK Magnitsky sanctions: Stuck in first gear? available at: https://redress.org/wp-content/uploads/2022/07/APPG-on-Magnitsky-Sanctions-Report-July-2022.pdf
9 See Inquiry into the effectiveness of the UK government's response to atrocity prevention, available at: https://redress.org/wp-content/uploads/2022/01/2022.01.19-IDC-Submission-REDRESS.pdf
10 See US Department of the Treasury, Press Release, "Treasury Sanctions Perpetrators of Serious Human Rights Abuse on International Human Rights Day" 10 December 2021, available at: https://home.treasury.gov/news/press-releases/jy0526
11 See Multilateral Magnitsky Sanctions at Five Years, available at: https://redress.org/wp-content/uploads/2022/11/Multilateral-Magnitsky-Sanctions-at-Five-Years_November-2022.pdf
12 See The Global Anti-Corruption Sanctions Regulations 2021, legislation.gov.uk, available at: www.legislation.gov.uk/uksi/2021/488/contents/made

Zakaria Yakubu

To err is the lawmaker: addressing the arbitrability of environmental disputes in Ghana

Introduction

Following recent climate commitments and goals, the government of Ghana is implementing its Nationally Determined Contributions (NDCs) under the Paris Agreement for 2020 to 2030. In a joint report by the Environmental Protection Agency and the Ministry of Environment in 2021[1], Ghana admitted that it has faced certain challenges in the implementation of these NDCs and would therefore have to revise its objectives under the UNDP's NDC Support Programme[2]. It can be safely deduced from the foregoing that the government of Ghana is aware of the perils of environmental degradation, global awareness thereto and wants to contribute to climate action. This attitude, however, sharply contrasts with Ghana's Alternative Dispute Resolution, 2010, Act 798, which outrightly excludes environmental matters as being capable of settlement through any of the alternative dispute resolution mechanisms. This paper shall criticise the position of Ghana's ADR Act on this issue and advocate in support of current calls for the parliament of Ghana to amend the law to remedy this grave setback.

Ghana's environmental crisis

Environmental issues are common in Ghana, and they affect the average Ghanaian's life in a very real way. The most common environmental issues in urban areas in Ghana include air pollution (16,000 people die prematurely in Ghana due to complications suffered from air pollution), plastic waste pollution (more than 3,000 metric tonnes of plastic waste are generated across Ghana every day and only two to five per cent are recycled) and e-waste pollution (171,000 metric tonnes of e-waste are generated annually)[3]. Rural areas in Ghana are also plagued with severe depletion in forest resources, land degradation and illegal artisanal and small-scale gold mining (which causes deforestation, loss of biodiversity, accelerated soil erosion and water and air pollution)[4], etc. Expectedly, these contribute to the climate crisis, which is already wreaking havoc on Ghana's agriculture, health and energy sectors, among others, with more consequences in waiting if we fail to act swiftly and decisively[5]. A legal system that is intentional about climate action is key to every country's climate efforts. Among the World Bank's recommendations to Ghana on how to mitigate our brewing environmental crisis is to *enhance enforcement of environmental regulations*. Doing so would require uniformity in Ghana's policy framework, as well as applicable laws. This paper shall proceed to analyse Ghana's ADR Act, 2010 and its attitude towards environmental disputes, in general – potentially including climate related disputes.

The ADR Act's exclusion of environmental matters

The Alternative Dispute Resolution Act, 2010, Act 798 was enacted on 31 March 2010 to repeal the previous Arbitration Act, 1961, Act 38. It was, and in fact is, still touted as a necessary refresher to the erstwhile Arbitration Act, 1961. For one, the new ADR Act recognises and regulates mediation and customary arbitration as dispute resolution methods in addition to arbitration, whereas the Arbitration Act, 1961, was strictly limited to arbitration. Further, it incorporates the New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958) and model arbitration agreements and clauses, ready-made for parties. The Act shows dynamism and a posture of alignment with international ADR standards. Section 1 of the ADR Act, titled 'Application' stipulates the applicability of the act. It reads;

'1. This Act applies to matters other than

those that relate to

a. The national or public interest
b. The environment
c. The enforcement and interpretation of the Constitution
d. Any other matter that by law cannot be settled by an alternative dispute resolution method.'

The ADR Act is often criticised for shooting itself in the foot by placing such ambiguous limitations on its applicability. The interpretation section of the act fails to define what it means by national or public interest, hence leaving it open to conflicting deductions. The constitution of Ghana defines *public interest* as any right or advantage that inures or is intended to inure to the benefit of all Ghanaians. This ambiguity presents a problem in that, government/public entities may challenge arbitration awards granted against them in court for being unenforceable because the award concerns a 'national or public interest'.

The ADR Act also excludes disputes pertaining to the environment. Therefore, environmental disputes in Ghana can only be settled through litigation. Considering the other attempts being made by the Ghanian government to contribute to global efforts to mitigate climate change, this exclusion is paradoxical. Ghana's climate actions have been described as ambitious for a developing country, being the first in the world to make certain commitments[6], and so on. It is indeed mysterious why such a (seemingly) climate-conscious country would make environmental matters not arbitrable, despite backlash from stakeholders.[7]

Conclusion and recommendations

Ghana's ADR Act's exclusion of environmental matters is peculiar because of two reasons. One, it seems to be the only country in the world with such provision and two, this exclusion was not in its old Arbitration Act, 1961. The benefits of ADR vis-à-vis litigation in dispute resolution are tried, tested and true. ADR is relatively less expensive, less time consuming, encourages constructive and sustainable settlement methods, legally enforceable by courts, increases access to justice and so on. These benefits await Ghana should it amend its ADR Act to make environmental disputes arbitrable. One would wonder if an award relating to the environment obtained in a foreign arbitration seat is enforceable in Ghana. This uncertainty also presents commercial risks to businesses which reduces Ghana's desirability for foreign investment.

Notes

1 UNDP, Ghana commits to implementing its ambitious climate actions by launching a revision process, accessed 10 November 2022.
2 MESTI. (2021). Ghana: Updated Nationally Determined Contribution under the Paris Agreement (2020 – 2030) Environmental Protection Agency, Ministry of Environment, Science, Technology and Innovation, Accra.
3 The World Bank Group, 'Ghana Country Environmental Analysis', Atlas of Economic Complexity accessed 12 November 2022.
4 Ibid.
5 Climate Risk Profile: Ghana (2021): The World Bank Group.
6 Climate & Clean Air Coalition, Ghana Profile, accessed 19 November 2022.
7 Judges, Lawyers Demand Arbitration For Environmental Disputes, accessed 19 November 2022.