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Immigration law permits deportation of foreign nationals in Northern Cyprus on the basis of HIV status.

The Aliens and Immigration Law prohibits HIV positive foreign nationals from staying in Northern Cyprus. Human rights organisations in the country have called for the policy to be set aside, arguing that it is discriminatory and that it undermines human rights. It also appears that the provisions of the Aliens and Immigration Law are not in line with the country's own constitution, which provides for equality before the law and prohibits the enactment of any policy or legislation which is discriminatory.

Protecting public health vs. undermining rights

Article 6(1) (c) of the Aliens Law and Immigration Law states that any foreign national suffering from a contagious or infectious disease that is a danger to public health may be deported.¹ A report by UNAIDS on HIV-related travel restrictions clearly shows that restrictions on entry, stay and residence in a country based on HIV status is discriminatory and cannot be justified on public health grounds. It also indicates that such restrictions do not protect public health, but in fact, impede efforts to protect public health by creating barriers to access services for people living with HIV and people at higher risk of HIV.²

VOIS Cyprus, a local NGO in Northern Cyprus that advocates for the rights of international students, released a report titled 'If laws kill!' in which they stated that by criminalising foreign nationals living with HIV, the Northern Cyprus government is, in fact, creating an environment for the transmission of the disease and other STDs. This is because if people fear being deported on the basis of a positive test, they will tend to not go for tests.

Treatment of similar policies under international law

Although Northern Cyprus is a de facto state, the European Court of Human Rights (ECHR) stated in *Loizidou v Turkey* that the European Convention on Human Rights (Convention) applies to Northern Cyprus by virtue of Turkey's control over that part of the island. Therefore, residents of Northern Cyprus can seek recourse from the ECHR after exhausting local remedies.³

In *Kiyutin v Russia*, the ECHR held that member states could not refuse foreign nationals residence permits on the basis of HIV status, as this was a violation of Article 14 of the Convention, which prohibited discrimination.⁴ Similarly, in the case of *D v the United Kingdom* the court held that the removal of a patient dying of AIDS to his country of origin, where he had no access to adequate medical treatment, accommodation, family, financial or moral support, constituted a violation of Article 3 on the prohibition of torture or inhuman or degrading treatment. The Convention explicitly affirms that foreign nationals should enjoy the same rights as citizens, particularly the right of due process, political freedoms and equal legal protection.⁵

Under international law, it is acknowledged that states may impose immigration and visa restrictions as a valid exercise of their national sovereignty. However, they are also bound to uphold the human rights of non-discrimination and equality before the law. If states limit these rights, they must show that this is necessary to achieve a legitimate goal and that the means used actually achieve the goal in the least restrictive manner possible. The Northern Cyprus government has not shown that they are limiting the rights of foreign nationals to achieve a legitimate goal. In addition, the blanket exclusion of all people living with HIV is arguably not the most rational or least restrictive means

possible of achieving the goal of protecting public health.

In 2008, the Seoul High Court in the *Heo* case prevented the deportation of a Chinese citizen of Korean descent from South Korea on the basis of his HIV status, stating that the protection of public health should be balanced against the right to medical treatment and the right to privacy.⁶ In 2010, the United States government removed HIV from the definition of ‘communicable disease of public health significance,’ and from the scope of assessment for aliens entering the country. This act ensured that HIV status alone cannot be a reason for excluding, removing or deporting a person from the United States. In March 2015, the Constitutional Court of Russia held that HIV status was not a ground for deportation. According to the ruling, being HIV-positive did not represent an unconditional basis for deportation from the country for foreign nationals who had families in Russia.⁷

In conclusion, challenging the constitutionality of the Aliens and

Immigration Law in the local courts could prove difficult unless an applicant with legal standing – such as a foreign national who is on the verge of deportation and who has the capacity to litigate – raises such challenges.

Notes

- 1 VOIS Cyprus (2020), A VOIS Patients’ Right Report, pp. 9. Available at www.voiscyprus.com/static/1k.754a4a0f.pdf [accessed 03 March 2020].
- 2 United Nations Programme on HIV and AIDS (UNAIDS), UNAIDS Explainer, Still Not Welcome: HIV-Related Travel Restrictions 2019, pp. 5.
- 3 *Loizidou v. Turkey*, Application no.15318/89 (1996) 21 EHRR 188.
- 4 *Kiyutin v Russia*, Application no. 2700/10, Council of Europe: European Court of Human Rights, 10 March 2011, Judgement paragraph 68.
- 5 *D v United Kingdom*, 146/1996/767/964, Council of Europe/European Court of Human Rights, 2 May 1997 6 Human Rights Watch (2009), Returned to Risk: Deportation of HIV-Positive Migrants. Available at www.hrw.org/report/2009/09/23/returned-risk/deportation-hiv-positive-migrants
- 7 Darya Lyubinskaya (2015), Russia Beyond, HIV is not grounds for deportation, says Russia’s Constitutional Court. Available at www.rbth.com/society/2015/03/23/hiv_is_not_grounds_for_deportation_says_russias_constitutional_court_44689.html [accessed 21 December 2019].

Should employers require employees to receive a Covid-19 vaccine?

Jake Brownell¹



A Covid-19 vaccine is on the horizon, with pharmaceutical companies reporting better than expected clinical results and officials saying a vaccine could be available as soon as the end of this year.² However, polling suggests that large swathes of the public may be reluctant to take a vaccine when it becomes available. In a global survey conducted by the journal *Nature Medicine*, only 71.5 per cent of respondents said they would be ‘very or somewhat likely’ to take a Covid-19 vaccine.³ Given this hesitancy, there is widespread concern that the availability of an effective Covid-19 vaccine alone may not mean a return to business-as-usual.

Employers eager to bring employees back into the workplace may wish to require workers to receive a Covid-19 vaccine as a condition of continued employment. While employers likely have the legal authority to do so, compulsory immunisation policies also raise a variety of

legal, political, ethical and even practical questions that employers must weigh.

Balancing the interests

Underlying any compulsory vaccination policy is a fundamental tension between public health concerns and an individual’s interest in bodily autonomy and personal liberty. The success of a vaccine depends on the principle of herd immunity, which is only attainable when a substantial majority of a given population receives a particular vaccine.⁴ If individuals are allowed to voluntarily opt out of vaccination, herd immunity may be harder to achieve.

Meanwhile, individuals may object to vaccination for a variety of personal, religious or medical reasons, so mandating vaccination means potentially interfering with important

rights such as the right to privacy, the right to health and the right to freedom of conscience and religion.

When confronted with this tension, courts have historically resolved it in favour of public health. In the 1905 case of *Jacobson v Commonwealth of Massachusetts*, the US Supreme Court held that a city ordinance requiring residents to be vaccinated for smallpox did not unconstitutionally interfere with the rights of a plaintiff who wished not to be vaccinated.⁵ The Court explained that the functioning of society depends on the subordination of individual rights to the legitimate public health interests of the community.⁶ In subsequent cases, US courts have International human rights instruments – and courts interpreting those instruments – typically strike a similar balance. For example, although Article 8 of the European Convention on Human Rights grants individuals the right to ‘respect for private and family life,’ it also notes that this right may be abridged as ‘necessary in a democratic society’ for the protection of various state interests, including public health.⁸ In *Boffa v San Marino* – a 1998 decision by the former European Commission of Human Rights – the Commission dismissed a challenge to a compulsory vaccination law brought under the ECHR.⁹ The Commission held that, although the law did interfere with the plaintiffs’ right to privacy, the interference was justified under ECHR Article 8 because the law was necessary to safeguard the health of the public.¹⁰

Considerations for employers

Although employers face different legal considerations than states when adopting compulsory employee vaccination policies, they must contend with a similar tension – namely, between the employer’s responsibility to provide a safe work environment for their workers (and where relevant, their customers)¹¹ and an employee’s right to be free from discrimination.

In the US, employers generally can require vaccination as a condition of employment, so long as exceptions are made for individuals with ‘sincerely held religious objections’ to vaccination¹² and/or medical conditions that prevent them from being safely vaccinated.¹³ These exceptions have been narrowly construed by US courts,¹⁴ meaning the vast majority of at-will employees will likely have little legal recourse if fired or otherwise

excluded from the workplace for refusing to take a Covid-19 vaccine.

As a practical matter, employers in the US rarely mandate vaccination for employees. In the case of the seasonal flu, government guidance even explicitly suggests that employers ‘simply encourage’ employee vaccination rather than require it.¹⁵ However, it may be argued that employers’ responsibility under US and international law to provide a safe workplace entails an obligation to ensure that employees are vaccinated for Covid-19, given the contagiousness and mortality rate of the virus.¹⁶

Further complicating the issue is the fact that an overly coercive approach to vaccination by employers could undermine public confidence in a Covid-19 vaccine. The Nature Medicine study cited above also found that people would be less likely to accept a Covid-19 vaccine if it were mandated by their employer than if the vaccine were merely ‘generally available.’¹⁷ According to the study’s authors, compulsory vaccination policies may lead people to view a vaccine as ‘limiting employees’ freedom of choice or [as] a manifestation of employers’ self-interest,’ rather than as an important public health intervention.¹⁸ Given rising rates of vaccine hesitancy around the globe,¹⁹ this could pose a significant problem for the broader effort to control the spread of the virus. As such, although it may be in employers’ immediate interest to impose strict vaccination requirements on employees, adopting a policy of education and facilitation rather than enforcement may better comport with the objectives and advice of public health experts. However, where an employer operates a very public-facing business (ie, fast food restaurant or hair salon), an argument can be made that a strict requirement may be acceptable or even necessary for the business to provide its customers with the confidence to venture into their establishments.

Conclusion

Employers have broad discretion to impose compulsory vaccination requirements, but this does not mean that a mandatory policy is the best approach in all cases. To the extent that employer mandates could erode confidence in a Covid-19 vaccine, as public health researchers fear they could, such mandates may undermine public health,

placing employers at risk of interfering with important human rights, such as the right to health.²⁰

Pursuant to the UN Guiding Principles on Business and Human Rights – which obliges businesses to respect human rights²¹ – employers therefore have a responsibility to adopt the vaccination policies most likely to encourage employee vaccination and least likely to increase vaccine hesitancy among an already sceptical public. This likely means making the vaccine available to employees, educating them about its benefits and incentivising vaccination, rather than mandating it.²²

Notes

- 1 Jake Brownell is an intern with the IBA's Washington, DC office and a second-year law student at Georgetown University Law Center.
- 2 Pien Huang, *Operation Warp Speed's Logistics Chief Weighs in on Vaccine Progress*, NPR, www.npr.org/sections/health-shots/2020/11/09/933060635/operation-warp-speeds-logistics-chief-weighs-in-on-vaccine-progress (published November 9, 2020).
- 3 Jeffrey V. Lazarus, Scott C. Ratzan, et. al., *A global survey of potential acceptance of a Covid-19 vaccine*, *Nature Medicine*, www.nature.com/articles/s41591-020-1124-9#citeas, (published October 20, 2020).
- 4 *Herd Immunity: How Does It Work?*, Oxford Vaccine Group, www.ovg.ox.ac.uk/news/herd-immunity-how-does-it-work (April 26, 2016) (explaining that different diseases have different 'herd immunity' thresholds—eg measles requires a 90-95 per cent vaccination rate, while polio requires 80-85 per cent vaccination rate).
- 5 197 US 11, 25 (1905) ('According to settled principles, the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.').
- 6 *Id.* at 26.
- 7 *See, eg, Zucht v. King*, 260 US 174 (1922) (upholding the constitutionality of a San Antonio, Texas, ordinance requiring children to present a 'certificate of vaccination' before entering public or private school); *Phillips v. City of New York*, 775 F.3d 538, 540 (2d Cir. 2015) (holding a New York law requiring proof of immunisation to enter schools was a valid exercise of state police power which did not violate any provisions of the US constitution).
- 8 European Convention on Human Rights art. 8
- 9 *Boffa & 13 others v. San Marino*, Application no. 26536/95, Eur. Comm'n H.R. (1998) (available online at <http://hudoc.echr.coe.int/eng?i=001-88051>).
- 10 *Id.* at 34. The European Court of Human Rights Grand Chamber will again take up this question in the case of *Vavříčka v. the Czech Republic*, where it will examine whether compulsory vaccination laws in the Czech Republic violate individuals' rights to privacy, freedom of conscience, and education under the ECHR.
- 11 See 29 USC.A. § 654(a)(1) (West, Westlaw through P.L. 116-179) (establishing that employers have a 'general duty' to furnish a workplace free of 'recognized hazards that are causing or are likely to cause death or serious physical harm' to employees); See also International Labor Organization, *Occupational Safety and Health Convention*, art. 16 ('Employers shall be required to ensure that, so far as is reasonably practicable, the workplaces, machinery, equipment and processes under their control are safe and without risk to health.').
- 12 Title VII of the Civil Rights Act of 1964 prohibits discrimination against employees on the basis of religion. As such, an employer must accommodate an employee whose sincerely held religious belief prevents him/her from being vaccinated, so long as doing so does not present 'undue hardship' for the employer. See EEOC Compliance Manual, www.eeoc.gov/sites/default/files/migrated_files/laws/guidance/religion.pdf at 14 (accessed October 2020); see also 29 C.F.R. § 1605.1.
- 13 Like Title VII, the Americans with Disabilities Act requires employers to accommodate employees with disabilities unless doing so would pose 'undue hardship' on the employer. 42 USC.A. § 12112(b)(5)(A) (West, Westlaw through P.L. 116-169); *See also Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 306 (3d Cir. 1999) ('Discrimination under the ADA encompasses not only adverse actions motivated by prejudice and fear of disabilities, but also includes failing to make reasonable accommodations for a plaintiff's disabilities.').
- 14 *See eg Fallon v. Mercy Catholic Medical Center*, 877 F.3d 487, 489 (3d Cir. 2017) (holding employee claiming religious exemption to employer's mandatory vaccination policy was not entitled to exemption because his belief was not sufficiently religious in nature).
- 15 *See, eg, Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, EEOC, www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act (accessed October 2020).
- 16 *But see Teri Dobbins Baxter, Employer-Mandated Vaccination Policies: Different Employers, New Vaccines, and Hidden Risks*, 2017 Utah L. Rev. 885, 899 (2017) (explaining that 'no court has held that OSHA obligates an employer to require employees to get vaccinated').
- 17 *Global Survey of Potential Acceptance of a Covid-19 Vaccine*, *supra* note 3.
- 18 *Id.*
- 19 *See Top Ten Threats to Global Health*, World Health Organization, www.who.int/news-room/spotlight/ten-threats-to-global-health-in-2019 (accessed November 2020) (citing rising rates of vaccine hesitancy is a top threat to global health).
- 20 *See International Covenant on Economic, Social and Cultural Rights (ICESCR) art. 12.1, Dec. 16, 1966.*
- 21 *See Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, Human Rights Council, princ. 13, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie).
- 22 *See Nancy Rudner Lugo, Will carrots or sticks raise influenza immunization rates of healthcare personnel?*, *Am. J. of Infection Control*, Vol. 35 Iss. 1 (2007) (available at <https://doi.org/10.1016/j.ajic.2006.10.004>) (arguing vaccine education programmes and onsite workplace immunisation drives are more effective than mandates at increasing flu vaccination rates among healthcare workers).



Case studies: ESG liability in supply chains

In a world of globalised and complex supply chains, it has become increasingly difficult to determine who should be responsible for the environmental and social governance (ESG) failures of suppliers. Issues of jurisdiction and separate corporate personality have often made it hard for victims of these failures to gain access to remedy. However, recent years are signalling a shift towards greater corporate accountability, with judges across the world being progressively willing and able to play their part.

Case study one

In *Vedanta Resources PLC v Lungowe*,¹ 1,826 Zambian citizens brought a group action against the UK-based mining company Vedanta and its Zambian subsidiary KCM, claiming compensation for the damage caused by the mining of toxic waste on the surrounding environment, their health and livelihoods. The claimants sought remedy in England, due to the difficulties in obtaining legal aid in Zambia.

The final appeal to the UK Supreme Court in 2019 centred on the issue of jurisdiction, with the defendants claiming that England was not the proper place for trial. Interestingly, the Supreme Court agreed in a theoretical, academic sense, and said that it would have refused claimant permission to serve proceedings outside the jurisdiction of Zambia, had it not been the access to justice problem [87 – 88]. Significantly, this shows that it regarded substantial justice as more important than strictly legal arguments such as *forum non conveniens*, which it thought should only be litigated in a proportionate way [6].

The Supreme Court also affirmed the lower courts' finding that a 'sufficient level of intervention by Vedanta in the conduct of operations at the Mine [could be] demonstrable at trial' [61]. The legal reasoning behind this is significant because it highlighted that the parent/subsidiary relationship is not exempt from well-

established duty of care principles [54].

In this regard, the decision in *Vedanta* is in line with previous cases on parent company liability for a subsidiary's ESG, such as *AAA v Unilever PLC* (2018) and *Okpabi v Shell* (2018), where, despite not finding in favour of the claimants, the court similarly examined whether the defendant parent companies had foreseen the harm and assumed responsibility, whether there was proximity between the parties, and whether it would be fair, just and reasonable to impose a duty of care.

However, the judges in *Vedanta* went further than *Unilever* and *Okpabi* when it came to the part that group policies play in establishing this duty. In the earlier two cases, the majority judgment suggested that policies were not enough to show a sufficient level of parent company control over the activities of a subsidiary. In *Unilever*, in fact, the circumstances in which this control would be found were limited to cases where the parent had in substance taken over the management of the relevant activity of the subsidiary, or where it had given relevant advice to the subsidiary about how it should manage a particular risk [37].²

In *Vedanta* on the other hand, the judge said that 'even where group-wide policies do not of themselves give rise to such a duty of care to third parties, they may do so if the parent [...] takes active steps, by training, supervision and enforcement.' Significantly, he said that failing to meet the degree of supervision and control proclaimed in public statements could incur liability by omission [53] and that, on the facts, 'Vedanta may fairly be said to have asserted its own assumption of responsibility' in its published materials [61].

That said, the court did not prescribe exact corporate models in which such responsibility could be assumed. While *Vedanta* may set a precedent for future litigation against corporates, it remains to be seen whether the requisite level of control can be reached for more distant actors in a supply chain, such as between third-party suppliers and corporate end users.

Case study two

A case to watch in this area is the US federal class action filed by a group of Congolese claimants in December 2019 against Apple, Alphabet (the parent company of Google), Dell, Microsoft and Tesla for ‘knowingly benefiting from and aiding and abetting’ forced child labour in the DRC to mine cobalt, a key component of their lithium-ion batteries.³

Such knowledge, as highlighted by the defendants in their appeal to dismiss the case, is a high bar to meet.⁴ The plaintiffs, however, anticipated this argument by highlighting the extensive evidence that has been published on the systemic problem of forced labour in the DRC, and arguing that the ‘minimal’ [17] whistleblowing and grievance mechanisms and other ‘bogus programs’ [79] established by the defendants were merely evidence that they knew about it. Moreover, the court papers state that the defendants ‘had the authority to supervise, prohibit, control and/or regulate their cobalt supply chain,’ [94] but failed to do so, (despite publically proclaiming to have ‘robust due diligence practices.’)⁵

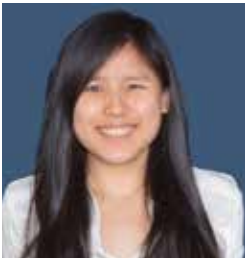
As for the obstacle of jurisdiction, the plaintiffs sought to tackle it in their complaint by highlighting how US law now explicitly provides for extraterritorial jurisdiction for such human rights lawsuits,⁶ whereas Congolese law does not. Moreover, they highlight that the corruption in their ‘virtually non-functioning’ [18] judicial system and the civil unrest would make it impossible to bring such claims in the DRC.

Conclusion

Despite the differences in the facts of this complaint and *Vedanta*, as well as the sources of law relied upon, the key legal issues of both come down to jurisdiction and the level of control that the defendants had over the activities of their suppliers. However, as *Vedanta* demonstrates, substantive justice can in fact trump all technicalities. In the context of increasing calls for greater corporate accountability and transparency, along with the technology⁷ to make this possible, it is becoming more and more difficult for multinationals to continue operating in the same way. Increased litigation in this area is only one of the many signs that the ESG liability landscape is changing.

Notes

- 1 www.supremecourt.uk/cases/docs/uksc-2017-0185-judgment.pdf
- 2 <http://3yf6pp3bqg8c3rycgf1gbn9w-wpengine.netdna-ssl.com/wp-content/uploads/2018/07/Approved-Judgment-AAA-Ors-v-Unilever-Anr.pdf>
- 3 http://iradvocates.org/sites/iradvocates.org/files/stamped_per_cent20-Complaint.pdf [accessed 26 November 2020]
- 4 www.business-humanrights.org/en/latest-news/major-tech-companies-respond-to-lawsuit-over-child-labour-in-cobalt-mines-argue-that-global-supply-chains-do-not-fall-under-the-scope-of-the-trafficking-victims-protection-reauthorization-act [accessed 28 November 2020]
- 5 www.business-humanrights.org/en/latest-news/major-tech-companies-respond-to-lawsuit-over-child-labour-in-cobalt-mines-argue-that-global-supply-chains-do-not-fall-under-the-scope-of-the-trafficking-victims-protection-reauthorization-act [accessed 28 November 2020]
- 6 TVPRA amendments in 2013, see 18 U.S.C. § 1596.
- 7 See the statement by Nathan Williams, founder and chief executive of blockchain technology tracing company ‘Minespider,’ in his interview with Raconteur www.leighday.co.uk/Blog/May-2020/The-Congolese-families-taking-the-tech-giants-to-C [accessed 26 November 2020]



Trash talking Europe's food waste: learning from Korea's food waste management experience

Introduction

International organisations and national policymakers alike are increasingly concentrating on the issue of food loss and waste (FLW) as concerns grow surrounding food security and environmental degradation. To tackle such issues, a multitude of developed states are in the process of creating and reinforcing legislation related to food waste reduction. Studies have shown, however, that the voluntary programmes that are often adopted to address this issue are much less effective in reducing food waste than more stringent legislation that promotes concepts such as the 'polluter pays' principle, as well as other economic incentives. Even the European Union, despite being seen as a global leader in environmentally-oriented policy, has only lacklustre legislation surrounding food waste reduction efforts. An in-depth appraisal of contemporary EU food and waste management laws and instruments demonstrates that current methods are inadequate to affect the large-scale food waste reduction. The experience of Korea, as well as other western municipalities, however, shows that more widespread adoption of the system is no doubt possible.

Approaches to addressing FLW

The European Union

The European Commission has sought to address the problem with various legal instruments. The EU has pledged to achieve UN SDG 12.3, which calls for the halving of retail and consumer per capita food waste by 2030.¹ In addition to this, official 2008 EU policy (revised in 2018), stated in the Waste Framework Directive (WFD), aims to realise 'an indicative Union-wide food waste reduction target of 30 per cent by 2025 and 50 per cent by 2030' for consumers and retailers alike.² Even before committing to SDG 12.3, the Commission had circulated

various documents pledging itself to fight against food waste.³

An audit of the Package, conducted by the European Court of Auditors, argues, however, that despite all these highly publicised efforts, the aforementioned strategic documents have instead revealed that waste reduction targets have been lowered, revealing in actuality that 'the Commission's ambition in regard to food waste has decreased over time.'⁴ In addition, the response from Member States to the various regional and international laws and policies set down by the EU have been inconsistent and often unsatisfactory.⁵

South Korea

While South Korea now has arguably the world's most stringent food waste laws, it once had a significant FLW problem. Prior to enacting anti-food waste legislation, which was first passed in 2008, despite having a population only twice the size of Taiwan, Korea generated around three times more food waste.⁶ To address these challenges, the government chose a bottom-up approach focused on facilitating prevention through a VBWF system, a common manifestation of a pay-as-you-throw (PAYT) approach.

Korea is now one of the world's lowest food waste producers among the OECD countries, at 95 kilograms per capita annually.⁷ The foundation blocks for Korea's food waste management system were laid in 1986, with the passing of the Waste Management Law.⁸ This framework set the legal foundation for an overall volume-based weight fee (VBWF) system, that came with the 1998 revision of said law.⁹ Such a system is a PAYT arrangement that relies on volume as the basis for measuring the costs imposed on those who produce the waste.¹⁰ The cost of VBWF is collected primarily from the sale of state sanctioned bin bags. While the Korean government has implemented various policies over the years, the VBWF system, now entering its 22nd year,



has proved to be the most innovative, effective and enduring.¹¹ However, a number of studies support the proposition that weight-based fee (WBF) systems, wherein disposers are charged for the weight of their refuse instead, may be even more effective in reducing food waste.¹² WBF systems are both exceptionally environmentally effective and a desirable way to modify consumer behaviour due to the system's preciseness, as it compels residents to be much more conscientious about their food waste habits in comparison to volume-based schemes. In fact, the lowest residual waste amounts are attained with WBF programmes supplemented with highly aware citizens and a well-developed infrastructure.¹³ However, predictably, the WBF system is also the most costly, due chiefly to the intricacy of weight measuring devices and a discharger recognition system. Despite these issues, the WBF system has grown in popularity since 2012. Of the 146 Korean municipalities eligible to participate in the WBF programme, all but one did.¹⁴

WBF in Europe

WBF has been successful in Europe as well, though only on a local scale. Data from local pilot projects in both Sweden and Germany have shown exceptional numbers. For general waste streams, municipalities in Sweden saw an average of 20 per cent reductions reported, though the highest number reported reached 90 per cent.¹⁵ In 2013, Aschaffenburg, Germany's food waste amounted to 53.6 kg per capita annually, in comparison to the average residual waste quantity of the state which was recorded at around 56.8 kg per capita annually.¹⁶ Furthermore, Morlock et al claim that PAYT, and, more specifically, WBF is a Best Environmental Management Practice.¹⁷

Conclusion

Food waste has undeniably decreased in Korea since the introduction of VBWF and even more so under the WBF system. The Korean experience proves that, coupled with appropriate incentives for households, a PAYT system could be extremely effective, despite the expense and complexity of such waste disposal systems. Though not without issues, Korea, as well as other municipalities that have adopted such measures have found solutions to some of the most common concerns levelled towards the system. The EU

should take note and adopt more stringent food waste management legislation by drawing lessons from South Korea's successful regulatory frameworks.

Notes

- 1 'Goal 12: Sustainable Development Knowledge Platform.' Sustainable Development Knowledge Platform, United Nations, 2019.
- 2 'Directive (EU) 2018/851 of the European Parliament and of the Council of 30 May 2018 Amending Directive 2008/98/EC on Waste.' European Environment Agency, 8 Apr. 2019.
- 3 'Roadmap to a Resource Efficient Europe COM (2011) 571.' *European Environment Agency*, 8 Apr. 2019, p. 17; 'EU Platform on Food Losses and Food Waste.' *Food Safety -European Commission*, 7 May 2020; Scherhauser, Silvia, et al. 'Environmental Impacts.' *Food Loss and Food Waste*, 2019, p. 51; Canali, Massimo, et al. 'Food Waste Drivers in Europe, from Identification to Possible Interventions.' *Sustainability*, vol. 9, no. 1, 2016, p. 37; 1 'Sustainable Food.' *Sustainable Food -Environment -European Commission*, 2019,
- 4 Storup, K, et al. Combating Food Waste: an Opportunity for the EU to Improve the Resource Efficiency of the Food Supply Chain. European Court of Auditors. Curia Rationum, 2016, p. 23.
- 5 Knowles, T. 'Food Legislation and Enforcement in EU Member States.' *Food Safety in the Hospitality Industry*, 2002, p. 31; see
- 6 Ahn, Hyung Joo, et al. *Waste Management in Korea*. University of North Carolina, 2006, p. 12.
- 7 Kim, Mi-Hyung, et al. 'Evaluation of Food Waste Disposal Options by LCC Analysis from the Perspective of Global Warming: Jungnang Case, South Korea.' *Waste Management*, vol. 31, no. 9-10, 2011, p. 2115.
- 8 UN. 'Korea Environmental Policy Bulletin -Volume-Based Waste Fee System.' *UNEP -UN Environment Programme*, 2003, p. 3.
- 9 Yang, Won-Seok, et al. 'Past, Present and Future of Waste Management in Korea.' *Journal of Material Cycles and Waste Management*, vol. 17, no. 2, 2014, p. 210.
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Remote work: the impact of Covid-19 on marketing trends and networking in white collar fields

Introduction

The onset of Covid-19 has created seismic shifts in the American workforce, most notably among those working in ‘office jobs’. Today, many formerly office-bound professionals are working from home, with some employers reporting increased productivity and greater mobility for employees. This shift in the workforce is projected to continue even after Covid-19 is no longer a threat.¹

Remote work was already steadily increasing prior to the pandemic, owing mostly to technological advancements in the early 2000s that made working from home possible.² Remote work is expected to increase by 65 per cent within the next five years.³ There are many benefits resulting from this greater reliance on remote work, including increased opportunities for professionals who identify as minorities, increased mobility for mostly white collar workers, increased employee engagement, reduced real-estate costs and decreased immigration-related impediments for knowledge workers, such as lawyers, and other restrictions since they can work with a global client base without leaving their homes.⁴

However, there are many drawbacks associated with the abrupt shift to remote work, such as challenges in maintaining connectivity, decreased networking opportunities, and challenges in marketing to both existing and potentially new clients. Through my own research I was able to identify key changes in the way white collar professionals’ market themselves from the onset of the pandemic in March 2020 to November 2020.

New forms of marketing and networking during Covid-19

In the beginning months of the pandemic,

organisations had varied Covid-19 responses. Marketing during the onset of Covid-19 relied heavily on updating the user experience of their websites by creating resource pages specifically for Covid-19, providing alternative emails and even task groups that clients could contact. The webpages included relevant and engaging webinars and workshops on how white-collar organisations could network.

Lawyers were especially drawn to webinars and workshops on developments in their specific regions, allowing better online networking opportunities since they were in the same time zone and were undergoing similar challenges. My research also revealed that people found it easier to network with people who share distinct similarities, such as belonging to the same organisation, like the IBA, rather than holding networking events where everyone does different work and are not part of the same in-groups.⁵

Conferences are where most professionals network and how many organisations earn the most revenue. In April, conferences were either cancelled, postponed or rescheduled for 2021 or converted to online events, although many organisations did not shift to an exclusively virtual format until late in the summer. Since conference providers no longer had to pay for physical space, food, printouts, etc., many opted to offer webinars and conferences for free or significantly reduced fees, which increased accessibility in these spaces. They also began devising unique ways of selling their services or products. Through the creation of different rooms on larger webcast programs, there was an increase in engagement. This is especially seen in digital trade shows where users can create avatars or have different rooms for networking and selling to simulate an in-person event.⁶

Virtual conferences can be utilised to expand marketing and audience reach, as



it is less expensive, can be attended without incurring any travel costs and is the preferred way to network during the pandemic.⁷ IBA's own Virtually Together Conference, with over 12,000 delegates, expanded its audience, including law professors who typically are unable to attend annual conferences since they are held in the middle of the semester. Despite these benefits, there is concern that virtual events will lead to a loss in revenue and desirable networking scenarios.

Proposal to increase revenue, networking and diversity

The legal profession is known to be a laggard in terms of diversity, with one of the worst records for attracting and retaining women, minorities, LGBTQI+ individuals and the disabled. In fact, women minorities are the most dramatically underrepresented group within the legal profession, with gender parity not likely to be achieved until 2081.⁸ Further, among the top five firms on the American Lawyers 2020 Diversity Scorecard, only 0.64 per cent of their partners are Black.⁹

The new virtual format may be a way to increase inclusivity, and accessibility to these groups. Through this research on marketing trends, the effects of Covid-19 and new research that is being published outlining which formats are the most effective for virtual networking, the legal profession has the potential to shift. One way this can be done is through the creation of Employee Resource Groups (ERGs). ERGs are 'voluntary, employee-led groups that foster a diverse, inclusive workplace aligned with organisational mission, values, goals, business practices and objective.'¹⁰

ERGs have a record of bringing employees together and is the preferred form of networking for nearly half of professionals of colour. The IBA has a few ERGs established already, however establishing more ERGs that foster networking among group members could help the IBA to market itself to potential group members and increase networking opportunities within the organisation. ERGs are low-budget and usually volunteer-based and can be

incentivised by the organisation. For example, in order to incentivise participation in ERGs, the IBA could give members an ERG-discounted price on conferences, workshops or other resources. This would encourage more members to join the ERG and to network. It could also prove to be an effective way to advertise the IBA's services and generate revenue, while also creating a more diverse and inclusive environment.

The IBA has an opportunity to increase member recruitment, retention and revenue if virtual platforms are used to increase accessibility. Organisations need to evaluate themselves and the fields they work in within this virtual format. It is crucial to increase networking, diversity, revenue, and accessibility during the pandemic to enhance dynamism within a historically stagnant field.

Notes

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Digital colonialism and the exclusion of the African from the data debate

The use of data does not conjure the same imagery of colonialism as would the Berlin Conference which heralded a new age of European imperialism, nor of South Africa's diamond mines, all of which are owned by Cecil Rhodes' legacy, the De Beers Mining Company. But not seeing data as a tool for economic and political control against the countries that have largely been left out of the data debate is a fatal error that will mean the extension of exploitation, disempowerment and racism into the 2.0 digital age, with the added update feature of having bias AI dictate 'the data grab.'

The relationship between colonialism and the tech industry: acquisition, extraction and appropriation

It is firstly important to establish the link between colonialism and the way data extraction operates today. Colonialism relied on a system of economic exploitation of one society imposed upon another, utilising social, cultural and political coercion to achieve the ultimate aim of acquisition, extracting and appropriating resources under the guise of a civilisation mission. Historical colonialism provided the essential preconditions for the emergence of industrial capitalism that exacerbated global inequality by concentrating wealth in the north and it is this system from which the modern tech industry has emerged. Data colonialism combines the predatory extractive practices of colonialism with the abstract quantification methods of computing that has led us to the new stage of surveillance capitalism.¹

A central tenet of colonialism was divorcing any sense of proprietary rights over natural resources by the native population to control profitability. In the age of big data, not only can one not own their own data, but they're also unable to access it. This 'appropriated' data is then used to develop technological services in the Global North, such as facial recognition, through a 'beneficiation' process, which is then repackaged to the

Global South. These services are created with the explicit aim of increasing interactivity, extracting and owning more data to sell more ads to increase profit margins. This appropriation of data does not occur in a vacuum, particularly as governments increasingly become the buyers of big data to capitalise on surveillance. Citizens of the Global South have become subjects to a tech hegemony where the elites have far greater control of our economies, as well as political and cultural spheres of influence. The idea of a civilization mission, or 'connecting the unconnected,' is an agenda of wealth accumulation, rather than altruism.

Disparity in internet access and exploitation

Another dimension to consider is the simple fact that societies that produce more data are more valuable to tech firms and thus hold greater leverage in regulating the industry. However, the disparity in internet access between Africa and the Global North is massive and has led to less data of Africans available online, resulting in further exclusion and less cultural relativity in the creation of services and regulation. Internet access in North America sits at 90.3 per cent, 87.2 per cent in Europe and 39.3 per cent in Africa.²

As such, Africa is far less valuable to Google or Amazon not merely due to purchasing power, but rather internet access and data production. In turn, corporations have sought to increase internet access through free or cheaper accessibility, such as Facebook's Free Basics or Huawei's rapid development of internet infrastructure. However, the added catch is all internet activity goes through their gateways making it a data gold mine. There is little chance that corporations would behave in their home countries the way they behave in the developing world without the need for added checks and balances. In this ecosystem, forced acceptance of continued surveillance is likely to become a leading dimension of inequality,³ through the implicit acceptance

of subpar standards of digital rights for the Global South's citizens.

The double standard of digital rights

The elites of the tech hegemony have convinced users that society must proceed according to its own ruling class conceptions of the digital world.⁴ The centralisation of digital regulation in the Global North has increased data protection for certain groups with the expectation of rapid ascension to the same standard of protection for developing regions to gain access to digital markets. Simultaneously, predatory systems of exploitation are employed in regions with underdeveloped internet infrastructure, fragile democratic processes, weak judicial oversight/data protection authorities and lower enforcement of human rights. African states have resorted to merely rubber-stamping the GDPR into national legislation without actual enforcement, leading to a double standard of protection – the Global North is better equipped to prevent and remedy breaches of privacy in terms of local standards.

This accountability gap enables corporations to violate human rights in developing regions at higher rates and with less scrutiny. The violations are further compounded by imperial global surveillance, where Global North intelligence agencies partner with their own corporations to conduct mass/targeted surveillance in the Global South, forgoing their own standards in third countries because the accountability gap exists in intelligence sharing between national legislation and international cooperation.

⁵ A recent example is the discovery that EU development aid and cooperation programmes were used to train and equip security forces in authoritarian regimes with surveillance tools used to spy on journalists and human rights defenders.⁶

This is despite the EU Council's agreement on the new rules on the sale of cyber-surveillance technology,⁷ and a groundbreaking judgment at the CJEU confirming EU laws preclude national legislation from carrying out general and indiscriminate

transmission/retention of traffic/location data for the purposes of crime or national security.⁸

Conclusion

Those in control of the data debate have firmly established a culture of privatising the means of production (data) and its profits, while socialising its losses and impacts on society and democracy, disproportionately harming the Global South. Through control and ownership of the digital ecosystem, corporations and governments in the Global North have harnessed technology for economic domination, imperial control and state/global surveillance capitalism. Digital equality requires re-constructing technology for decentralisation and communal control,⁹ incorporating the values of human rights, critical legal and race theory into data collection. We need to view technology as a dimension of politics, incorporating critiques of its socio-economic effects to mitigate further inequality and discrimination.

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Why law firms must integrate human rights due diligence into their M&A practices

Introduction

In its Due Diligence Guidelines, the IBA's Corporate and M&A Law Committee notes that human rights due diligence is still only rarely integrated into the more conventional M&A due diligence process (ie, ascertaining outstanding lawsuits and other potential liabilities). Doing so would provide clients the opportunity to identify risks that, if left unchecked, might result in adverse legal, regulatory, financial or reputational risk to the acquiring company. Furthermore, the advent of a recent European Parliament Committee on Legal Affairs draft report and draft Directive, recommending a European Parliament motion on corporate due diligence and corporate accountability almost certainly ensures that corporations seeking to operate in Europe will soon face a legal duty to assess their human rights impacts as part of their diligence processes. By counseling clients today about the likely passage of the EU Directive, law firms may be helping their clients to avert liability or reputational harm, and at the same time positioning them as rights-friendly, socially responsible enterprises.

The business case for human rights due diligence

Traditional due diligence is effective at capturing more straightforward legal risks that might encumber a target. In contrast, exposures arising from human rights issues are not as easily captured in a target company's records, not least because they largely impact third party stakeholders rather than directly implicating the company. However, this does not mean that they do not present significant financial risk. Rather, it means that those risks may not be readily identifiable via standard M&A due diligence procedures.

There are numerous examples of M&A transactions that ultimately were abandoned

or cost the acquiring company significantly more because the acquiring company failed to factor in the costs associated with past human rights violations. One prominent example is Exxon's 1998 acquisition of Mobil. Failure to conduct thorough human rights due diligence put Exxon in a position where it was forced to rely on and support the Indonesian military to secure its assets from separatist rebels, who targeted the Mobil plant on the grounds that the gas revenues properly belonged to the Aceh province.² When the military proved brutal in its suppression of the area, families of its alleged victims sued ExxonMobil under the Alien Tort Statute and the Torture Victim Protection Act ('ATS').³ The ATS claim was finally dismissed in 2019.⁴ ExxonMobil, though ultimately not held liable, spent 17 years in litigation arising from its failure to properly assess the risk of acquiring Mobil.

Beyond short-term financial liabilities, human rights due diligence can help clients avoid severe reputational damage. The infamous Bhopal gas tragedy provides a sobering example of the dangers inherent in operating global supply chains. The introduction of water into a tank of methyl isocyanate gas caused a gas leak at the Union Carbide India Limited (UCIL) pesticide plant in Bhopal, India in 1984 that killed at least 3,787 people and injured over 500,000 (other casualty estimates were far higher).⁵ According to Bennett Freeman, a human rights advocate who worked on the Bhopal matter, the eventual \$487 million settlement paled in comparison to the company's forgone profits attributable to reputational damage arising from the explosion.⁶ This distrust eroded profits for years after the acquisition. Corporate clients and M&A attorneys would do well to conduct thorough human rights due diligence and factor in long-term reputational and social damages that they will inherit and how those might affect the valuation of the target company. In some cases, such due diligence will

lead inexorably to the conclusion that the acquisition should be aborted altogether.

The legal case and the role of law firms

If the EU Directive recommended by the European Parliament Committee on Legal Affairs is passed into law, there will be far-reaching effects, both in Europe and beyond. The draft Directive requires Member States to introduce ‘rules to ensure that undertakings carry out due diligence with respect to human rights’⁷ and impose penalties, both civil and criminal, on infringing enterprises.⁸ The scope of the legislation is intentionally broad – the draft Directive contemplates that Member State rules will apply to all EU businesses and to non-EU enterprises operating in the EU.⁹ There are potential exceptions for ‘micro-businesses,’¹⁰ based on certain factors, but any US entity wishing to engage in an M&A transaction involving an EU-based concern should anticipate having some obligation under the Directive.

Although human rights due diligence has become more prevalent in M&A in the ten years since the advent of the UN Guiding Principles on Business and Human Rights (UNGPs), it remains underutilised as a tool for protecting clients. The draft Directive cites a Commission study finding that only 37 per cent of business respondents currently conduct environmental and human rights due diligence, with only 16 per cent canvassing the entire supply chain.¹¹ Because this study did not focus specifically on human rights due diligence it is unclear what percentage of M&A transactions incorporate meaningful human rights due diligence. Nonetheless, it is clear that if this draft Directive becomes law, corporate clients contemplating M&A deals in the EU sphere will face drastically amplified risk if their diligence processes are inadequate. The role of law firms and in-house counsel will become increasingly important under this new paradigm, as businesses will need to rely on legal advice to comply with the directive.

Law firms with a robust business and human rights (BHR) practice have important insights on how to incorporate human rights

due diligence into M&A due diligence. A crucial focus among such firms is the development of capacity and knowledge in their M&A teams. Some accomplish this organisationally, embedding human rights specialists within M&A teams. Others focus more on professional development, creating and circulating toolkits to their M&A attorneys to assist them in identifying potential human rights issues and addressing them as necessary. Both approaches have merit, and as increased client demand drives law firms to further cultivate their human rights due diligence capabilities, aspects of both will no doubt be incorporated. The overarching challenge will be how to reconcile the ideal of human rights due diligence as a deliberate, transparent process with the realities of the notoriously fast-paced M&A process and the strict confidentiality requirements that must be respected. The EU draft Directive promises to force that reconciliation. Law firms should consider how they can enhance their own capacity in this emerging area, and how they can best prepare their clients to adapt to the new reality that the EU Directive will usher in.

Notes

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Decolonising human rights

The silent tragedy of any human rights discourse lies in the uncritical celebration of the development of human rights while brushing aside the colonial regimes that overshadow its creation.

This article asks: are international human rights instruments part of colonial legacies? Secondly, it looks at the challenges faced by human rights institutions located in the Global North when confronting colonial power structures. Finally, I reflect on my time at the IBAHRI against this backdrop.

Are international human rights instruments part of colonial legacies?

The Universal Declaration of Human Rights (UDHR) adopted in 1948 served as an ‘oath’ for the international community to never again be embroiled in World War.¹ Lest it be forgotten that this was a document produced by the winners despite both sides committing war crimes.² Following the Second World War, the Allied powers set up the Nuremberg and Tokyo tribunals to try senior officials from Germany and Japan for war crimes, crimes against peace and crimes against humanity.³ Yet up until today, no presidents or military generals from the United States have been successfully convicted of similar charges for the bombings in Hiroshima and Nagasaki, the Vietnam War or for their orchestration of conflicts in the Middle East.⁴ As recent as 2017, UK courts have also stepped in to prevent the prosecution of Tony Blair for his involvement in the 2003 Iraq War on the basis that there is no crime of aggression in English law despite incorporation into international law.⁵ It is evident that so-called Western liberal democracies have sold this virtuous document globally while simultaneously abandoning its core principles.

Shah notes that key drafters of the UDHR like Eleanor Roosevelt and René Cassin viewed state violence to forward imperialist interests as justifiable given the ‘circumstances’ and consistent with respecting human rights.⁶ She adds that the ‘right to self-determination’ was only later added in the ICCPR and ICESCR when ‘self-determination’ no longer threatened ‘*racial and economic subordination*’ benefitting France, the UK and the US.⁷ These are also the states that openly violate

the principle of ‘self-determination’ by continuing to exert ‘administrative power’ over a majority of the ‘non self-governing territories’ in the world.⁸

The unequal power relations as a result of colonialism that influenced our early human rights instruments continue to exert itself today. The US and the European Union have contributed to 47 per cent of global historical carbon emissions.⁹ Unfortunately, the Paris Climate Agreement 2015 places an equal responsibility on all states to work toward a single average temperature of 1.5 Celsius instead of allocating responsibility proportionately to states based on their historical carbon consumption.¹⁰ It is well documented that the UN Framework Convention on Climate Change talks were laden with ‘secret side deals’, bullying tactics, spying and manipulation of vulnerable states with aid by the US in order to centre the Agreement around Western interests.¹¹ India’s Chief Economic Adviser, Arvind Subramanian calls this ‘carbon imperialism’.¹²

Three points are worth making at this juncture:

1. More often than not, international human rights instruments are drafted by officials representing governments with track records of violence and not by oppressed communities seeking emancipation;
2. This is not a call to rid the world of human rights, but to be highly skeptical of colonial powers that bend human rights instruments and treaty making processes to its whims and fancies; and
3. Our efforts to promote and protect human rights must be combined with an active resistance of the legacy of colonialism that seeps through international law.

Human rights institutions in the Global North

Salil Shetty laments that for too long, there has been an over reliance on American and European guardianship of human rights with money, power and decision-making transferring to the South with a top-down approach.¹³ The lack of funding from governments in the Global South to their



local NGOs or civil society organisations is no justification to uphold existing power imbalances. Nonetheless, human rights institutions have to be vary of the following¹⁴:

1. Developing global campaigns with themes, goals and methodologies decided entirely by Northern-based organisations with ‘partners’ from the South recruited without any input on local movements and political circumstances;
2. Over prioritising performance measurement as the sole metric for accountability which increases the opportunity costs as more resources have to be allocated to bookkeeping and maintaining accounts; and
3. Extracting ideas and information from the South, analysing the data and repackaging it as your own instead of allocating credit to partners in the South.

Failing to account for these blind spots can lead to a lack of agency and disempowerment of communities fighting injustice.¹⁵ The danger of such dissonance can strengthen the rhetoric that human rights is not for all but merely an extension of ‘Western agenda’.

Looking to the IBAHRI

The IBAHRI is still viewed as a Northern human rights institution even if internally it is made up of people from across the globe. A majority of us have spent time in Western education institutions which undoubtedly colour our understanding of human rights law. We may not question as frequently the colonial power structures which shape international human rights law. It begs the following:

1. To what extent have we embedded in our organisational thinking, critical race theory, feminist theory, critical disability theory etc. to ensure that the work at IBAHRI does not exist for the legitimization of power but is at the praxis of emancipatory human rights?¹⁶
2. How do we ensure we do not situate ourselves as gatekeepers of human rights but centre the capacity building and advocacy work around the voices and leadership of our local partners?
3. How do we commit to an equal osmosis of knowledge between us and our local partners across the Global South and not rely on a top down approach?

In my time here, I have only met outstanding programme lawyers and coordinators that view seriously the importance of working in equal partnership with organisations based in the Global South. It is in these same individuals that I place the hope of having honest conversations on the ways the IBAHRI is challenging colonial power structures. As Salil Shetty puts it, ‘*the fight to decolonise human rights is a permanent one*’.¹⁷

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Between binding instrument and strategic litigation: the new business and human rights framework

For a long time, the issue of business and human rights has been confined to voluntary acts and commitments by transnational corporations, to work towards more transparency and to establish their own due diligence processes.¹ More recently, with the growth of awareness of the human rights abuses transnational corporations engage in, as well as their ability to escape liability due to their transnational nature, local advocates operating at a transnational level, and the international community have sought to end corporate impunity.

The following page will discuss the UN Human Rights Council Draft Treaty, followed by a discussion on strategic litigation. The purpose is to briefly examine the work achieved to date at the international level versus the transnational level, concluding that subject to political will, both together enrich and complement each other, forming a new framework that has the potential to thrive on paper and in action.

Towards a binding international treaty

The UN's draft treaty on business and human rights is the international community's latest steps towards the creation of an internationally binding instrument to regulate the activities of transnational corporations, bringing them towards being legally required to respect human rights. In August 2020, the Second Revised Draft was published.²

Applying to 'all business activities, including particularly but not limited to those of a transnational character', the (Legally Binding Instrument) applies to corporations of a multi-jurisdictional nature and works to establish victim access to remedy and justice, and the reinforcement of transparency and due diligence. The Draft Treaty also covers a large scope of human rights, as long as


there is harm, including those pertaining to the environment. More than merely legally problematising the actions of corporations and creating a pathway for remedies, it will enable victims of human rights violations to pursue justice against transnational corporations who may have exploited them through engaging in human rights violations.

The treaty promises a unifying framework that will guide the work of advocates for business and human rights. It clearly defines the scope as covering corporations operating at a multi-jurisdictional level, promising to create a link between the activities of transnational corporations and human rights violations.

Strategic litigation

In parallel, advocates have been pushing the issue of ending corporate impunity for human rights abuses through strategic litigation. Courts around the world are looking at whether there should be limits on the actions of corporations. Brought as cases by rights groups through creative litigation, violations occurring overseas are being addressed in jurisdictions where the headquarters of transnational corporations are based. For example, in the recent and ongoing case of *Nestlé USA v Doe*³, the US Supreme Court is looking into whether US corporations can be held liable for aiding and abetting forced child labour overseas. Similarly, redress has been sought through class actions, for example the lawsuit against Apple, Google, Tesla and others regarding child labour in the Democratic Republic of Congo through arguing that the companies are engaged in aiding and abetting child labour.⁴

The idea is to make a connection between an avenue of law that is accessible and a recognised violation of human rights. This is to then draw a connection to abuses or to



make supply chain less opaque. This is even if only as a side effect. An example of this would be to utilise Tort law as an accessible avenue of law, then connecting it to due diligence for the purpose of consumer protection to make it clear that a company knows what happens beyond its reach. One result is the ability to show how a company is complicit in the use of forced labour through sub-contracting, for example.

The main difficulty in tracing transnational corporations' liability for human rights violations linked to their activities is the capacity of companies to hide behind corporate structures to evade legal liability for the human rights impacts of their subsidiaries. Understood as piercing the corporate veil, the purpose of these actions are to poke holes at the corporate structures that enable them to stand.

Working through differing and sometimes conflicting legal frameworks (eg consumer law versus corporate law) and jurisdictions (eg a US trial for victims in Ecuador) has led to an inconsistent path. However, it also had the side effect of bringing human rights into a multitude of legal fields, and specifically that of an international nature. The Draft Treaty will therefore have to solve the biggest barrier that is currently faced by human rights litigators: the difficulty of establishing causation. This is because of the corporate veil, enabling transnational corporations to hide behind corporate vehicles, and because the actions are kept at arm's length through subsidiaries. There are attempts through various means, such as the ongoing case of Nestlé where assisting and abetting was the link chosen to be utilised as the causation link for liability.

Despite these attempts, the lack of a concrete framework, other than guiding principles and growing awareness of the size and influence of transnational corporations, with phrases like corporate accountability become buzzwords, has been the biggest roadblock to tracing holding multinational corporations accountable for human rights abuses.

The new framework

The work of strategic litigators will complement that of the Draft Treaty, if it makes its way towards its goal of becoming the legally binding instrument on business and human rights, while the Draft Treaty will establish a unifying framework by which the strategic actions of these actors may be informed, combined and solidified.

Moreover, from an attitude perspective, the landscape is changing with corporations becoming more aware of the need to have more sustainable supply chains that incorporate social and environmental considerations, in order to survive.⁵ A “framework” is not only the legal structure, nor is it a spread albeit dedicated effort to challenge attitudes, however, that has been the case up until now. Instead, a framework is a combination of concept and action working together. Subject to political will, a long process and the continued challenging of companies by rights groups, the new framework will materialise in the form of legal principles backed by years of strategic litigation to draw from.

Notes

1. See for example Guiding Principles on Business and Human Rights, United Nations Human Rights Office of the High Commissioner, https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf; A Guide for Integrating Human Rights into Business Management, Business Leaders Initiative, The Global Compact, <https://www.ohchr.org/Documents/Publications/GuideHRBusinessen.pdf>
2. Legally Binding Instrument to Regulate The Activities of Transnational Corporations and Other Business Enterprises (6 August 2020), OEIGWG www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf
3. Nestlé USA v Doe, <https://corpaccountabilitylab.org/calblog/2020/7/2/more-trouble-ahead-for-the-ats-scotus-grants-cert-in-nestle-case>
4. Lawsuit against Apple, Google, Tesla, and others (regarding child labour, DRC) www.business-humanrights.org/en/latest-news/lawsuit-against-apple-google-tesla-and-others-re-child-labour-drc
5. Clare Carlile, The rise and rise of the ethical consumer: UK ethical markets worth over £83bn (17 December 2018), Tridos Bank, <https://www.tridos.co.uk/articles/2018/the-rise-and-rise-of-the-ethical-consumer>



Targeted killings as first strikes: right to life, *jus ad bellum* and *jus in bello*

On 3 January 2020, a convoy leaving Baghdad's international airport carrying Iranian general Qasem Soleimani and Iraqi senior officials was hit by missiles fired from a United States ('U.S.') drone, resulting in the death of Soleimani and five others.¹ The academia has vastly commented on the legality of this strike,² the present article, therefore, will predominantly focus on the issue of international law that has emerged from this case. Namely, whether targeted killing as a first strike is a legitimate action taken by a State in conformity with the rules of IHL or it occurs outside the bounds of *jus in bello*³ and violates the right to life of a targeted individual. To this end, the right to life under Article 6 of the International Covenant on Civil and Political Rights ('ICCPR') is pertinent and discussed.⁴

Targeted killing is a lethal attack targeting an individual considered a serious threat by a State as a result of his/her activities.⁵ In limited cases when targeted killing can be considered lawful⁶ due consideration should be given to the principle of proportionality and necessity.⁷ Interestingly, the justification for targeted killings has often been the right to anticipatory self-defence under the doctrine of *jus ad bellum*.⁸ This is often contested as States who resort to it find it difficult to establish that the attack was absolutely necessary, showing that no other means other than lethal force were available (capture was impossible) and that the target presented an imminent danger to others.⁹ Furthermore, it has been maintained that an attack carried out in violation of *jus ad bellum*, might also violate the right to life of the targeted individuals.¹⁰ Targeted killings outside of or within the context of armed conflict may violate Article 6 of the ICCPR or the rules of IHL respectively if the principles of proportionality, necessity, and imminence are not observed.¹¹

The issue arises when a targeted killing is carried out as a first strike. The academia has not yet agreed on the character of such

first strike i.e. whether it is covered by IHL. Excluding the first strike from the protection of IHL may raise several questions. For instance, will a soldier who initiates the strike enjoy combatant immunity under IHL or would he be subject to conditions imposed by IHRL? Unlawful targeted killing carried out by a strike will not qualify as a war crime and depending on a situation at hand, may not constitute a crime against humanity, thus, rendering international criminal law inapplicable; last but not least, although IHRL provides great protection, specialized rules of IHL will not be applicable, including the obligation to take precautions to minimize civilian casualties prior to launching a strike.¹² On the other hand, in case of applicability of IHL, there is a risk that States will circumvent their international obligations under IHRL by claiming the strike to be under the umbrella of the former. It is argued by some that IHL does not apply to the first strike as it often does not prompt an international armed conflict.¹³ However, this would imply that the application of IHL to the attack is contingent upon the response of the targeted State, which would be inaccurate.¹⁴ On the other hand, some commentators maintain that IHL applies to the targeted killing as the first strike.¹⁵ International Committee of the Red Cross – has emphasised that unilateral use of force, an “*unconsented-to military operations by one State in the territory of another State should be interpreted as an armed interference in the latter's sphere of sovereignty and thus may be an international armed conflict under Article 2(1) [of the Convention]*”.¹⁶ Therefore, it may be concluded that depending on the individual circumstances of each case, IHL may cover first strikes.

Turning to the violation of the right to life during an international armed conflict. The Human Rights Committee has supported that even if IHL applied, the killing of individuals, who may have been legitimate military targets under IHL, would be unlawful as the violation of *jus ad bellum ipso facto* constituted the violation of the right to life enshrined in



Article 6 of the ICCPR.¹⁷ If we consider this statement to be true and combine it with the previous conclusion that IHL applies to the first strike, we arrive at an impasse. However, this can be easily solved by the application of the notion of *lex specialis*, according to which special law (in this case, international humanitarian law) takes precedence over the general law (international human rights law).¹⁸ This was elaborated by the International Court of Justice ('ICJ') by stating that although both regimes applied, as *lex specialis*, IHL took precedence over IHRL.¹⁹ The Court explained that the test of what was an arbitrary deprivation of life had to be interpreted in light of applicable *lex specialis*.²⁰ However, in its subsequent judgments, the ICJ provided rather ambiguous definitions. The Court stated that while some rights were exclusively matters of IHL and others of IHRL, there were rights that fell within the scope of both. Therefore, both had to be taken into consideration.²¹

Such an interpretation would create further confusion. As the issue is not that both regimes apply in the same situation,²² but rather, that this application leads to two different results. First – where the targeted killing as the first strike on a military object is lawful under IHL and Second – the same action is illegal under IHRL.²³

All in all, it is fair to say that IHRL and IHL prescribe strict standards when it comes to the right to life and compliance with the rules of *jus in bello*. However, targeted killings as a first strike have complicated the matter of applicability of these two legal regimes and depending on a perspective, one may be more desirable than the other. On the one hand, applying IHL to the first strike, *inter alia*, guarantees combatant immunity and the status of prisoner of war. On the other hand, the application of IHRL would suggest that a perpetrator of the killing will not be able to enjoy combatant immunity. It is unclear which legal regime takes precedence in the situation when they are both equally applicable. One can only assume that the answer to this question will depend on the interpretation and substance of every particular situation.

Notes

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- 3 *Jus in bello* regulates the conduct of parties engaged in an armed conflict and seeks to minimize suffering, see: Hans-Peter Gasser, 'Humanitarian Law, International' in Max Planck Encyclopedias of International Law, article last updated: December 2015, para. 1.
- 4 The United Nations Human Rights Committee ('UNHRC') and the International Court of Justice have established the extraterritorial application of the provisions of ICCPR, see: UNHRC, Concluding Observation of the Human Rights Committee: Israel, U.N. Doc CCPR/CISR/CO/4, 2014, para. 5; International Court of Justice, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, 19 December 2005, paras. 219-220.
- 5 They can occur both within and outside of armed conflicts. Under IHL, they pose a problem as generally, they are carried out geographically far from the hostilities, see: Louise Doswald-Beck, The right to life in armed conflict: does international humanitarian law provide all the answers?, International Review of the Red Cross 88, December 2006, p. 894; International Committee of the Red Cross, "Targeted killings", How does Law Protect in War?, available at: <https://casebook.icrc.org/glossary/targeted-killings>, accessed: 01.12.2020.
- 6 Celso Eduardo Faria Coracini, Targeted Killing of Suspected Terrorists During Armed Conflicts: Compatibility with the Rights to Life and to a Due Process?, III Anuário Brasileiro de Direito Internacional 2, 2011, 34-45.
- 7 UNHRC, Concluding Observations of the Human Rights Committee: Israel, UN Doc. CCPR/CO/78/ISR, 21 August 2003, para. 15.
- 8 *Jus ad bellum* establishes when it is lawful to use force in international law, see. Elias Al-Hihi, The Right to Life in Jus Ad Bellum Targeting: A Functional Approach to Extraterritorial Jurisdiction in Human Rights Law, 2

UCLA Journal of International Law and Foreign Affairs 24, 2020, p. 362.

- 9 Alonso Gurmendi, Raising Questions on Targeted Killings as First Strikes in IACs, *Opinio Juris* Blog, 9 January 2020, available at: <http://opiniojuris.org/2020/01/09/raising-questions-on-targeted-killings-as-first-strikes-in-iacs/>, accessed: 01.12.2020.
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- 14 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, Commentary of 2016, Article 2: Application of the Convention, para. 223.
- 15 Alonso Gurmendi, Raising Questions on Targeted Killings as First Strikes in IACs, *Opinio Juris* Blog, 9 January 2020, available at: <http://opiniojuris.org/2020/01/09/raising-questions-on-targeted-killings-as-first-strikes-in-iacs/>, accessed: 01.12.2020.
- 16 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, Commentary of 2016, Article 2: Application of the Convention, para. 237.
- 17 UNHRC, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36, 30 October 2018, para. 70.
- 18 ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Rep. 1996, 8 July 1996, p. 226, para. 25.
- 19 *Ibid.*
- 20 *Ibid.*
- 21 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Rep. 2004, 9 July 2004, p. 136, para. 106; ICJ, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, 2005 I.C.J. Rep. 168, 19 December 2005, para. 216.
- 22 It is generally accepted that IHL and IHRL continue to apply at the same time during an armed conflict, see: Louise Doswald-Beck, The right to life in armed conflict: does international humanitarian law provide all the answers?, *International Review of the Red Cross* 88, December 2006, p. 881.
- 23 This argument has been thoroughly discussed by academia, see: Alonso Gurmendi, The Soleimani Case and the Last Nail in the Lex Specialis Coffin, *Opinio Juris* Blog, 13 January 2020, available at: <http://opiniojuris.org/2020/01/13/the-soleimani-case-and-the-last-nail-in-the-lex-specialis-coffin/>, accessed: 01.12.2020.

Sophia Billias



International criminal law and climate change

Human activity is causing climate change. At the current rate, average global warming is likely to reach 1.5 degrees Celsius (above pre-industrial levels) between 2030 and 2052, and could far exceed this level by the end of the century. Climate change is already impacting human health and safety, and our world's ecosystems and biodiversity, with increased instances of irregular weather events, temperature extremes and the continued rise of mean global sea levels. Increasing average temperatures will magnify these damaging effects.¹ Current anthropogenic emissions are the primary factor driving climate change.²

In recent years, a movement advocating for the prosecution of climate crimes under

international law has grown.³ Activists, academics and political leaders are promoting the expansion of the International Criminal Court's jurisdiction to include 'crimes against the environment' or 'ecocide'.⁴ When evaluating the suitability of international criminal law to address climate change, there are a multitude of practical, doctrinal and theoretical considerations. The primary question is one of purpose: what would it accomplish?⁵ The use of international criminal law to address climate crimes could fulfill multiple objectives, including: ending impunity for those who bear the greatest responsibility for climate change; signaling that climate-harming behavior is wrong; deterring others from engaging in such



wrongful behaviour; shifting attitudes about individual and collective conduct; creating a historical record of responsibility for climate change; and increasing public awareness about the causes and consequences of climate change.⁶ If the use of international criminal law to address climate crime can make progress towards any of these goals, it is a valuable pursuit.

A second foundational question is how to define and distinguish ‘climate crime’ from other activity that harms the environment. All living people consume resources and produce waste, and therefore contribute to the anthropogenic emissions that drive climate change.⁷ Proponents of the prosecution of climate crimes delineate a multitude of environmentally harmful behaviors that could be criminalised, including excessive pollutive activities, environmental destruction and climate change denial. Opponents argue that criminalising responsibility for emissions would ‘mark every man, woman, child and even family pet a potential criminal.’⁸ If we all bear partial responsibility for the impending climate catastrophe, particularly those of us in the developed world, how can we single out a few individuals, corporations or states for criminal sanctions?

Whether because of formal statutory language or practical considerations, most international criminal tribunals focus their prosecutorial efforts on those who bear the greatest responsibility.⁹ While individual consumer choices are a factor in the level of anthropogenic emissions, corporate and state-sponsored entity activities are the primary force driving climate change. Research indicates that only 100 extant corporations and state-owned entities accounted for 71 per cent of global industrial greenhouse gas emissions between 1988 and 2015.¹⁰ Corporations, state actors and interest groups have engaged in misinformation campaigns to obfuscate the reality of climate change, often while internally acknowledging the consequences.¹¹ These actors likely ‘bear the greatest responsibility’ for purposes of climate crime.

There are other doctrinal questions that may arise in an international climate crimes case, including issues involving the legality principle, evidentiary and causation problems, and corporate liability.¹² However, before advocates can raise these doctrinal issues, a criminal tribunal must have jurisdiction over the case. Under its foundational treaty, the ICC has jurisdiction

over four crimes: genocide, crimes against humanity, war crimes and the crime of aggression.¹³ In 2016, the ICC Prosecutor wrote that her office would give ‘particular consideration’ to prosecuting Rome Statute crimes committed by or resulting in the destruction of the environment.¹⁴ Successfully arguing that climate crimes are admissible under the ICC’s current jurisdiction would be extremely difficult and controversial. The existing categories of crimes either have prerequisite conditions that climate-related criminal conduct would likely not satisfy, or intent requirements that would be extremely difficult to prove. While climate change will inevitably cause great human suffering and injury,¹⁵ these effects are incidental to the acceleration of anthropogenic emissions, which themselves are a byproduct of industrialisation.

Many advocates now push for a formal amendment to the Rome Statute to create a fifth category: ecocide.¹⁶ In 2010, UK lawyer Polly Higgins proposed an amendment that defined ecocide as ‘the extensive damage to, destruction of or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory has been severely diminished.’¹⁷ In December 2019, representatives from Vanuatu and the Maldives made statements to the ICC Assembly of States Parties, relaying the threats that climate change poses to the island nations, and advocating for the consideration of an ecocide amendment.¹⁸ No formal amendment has been introduced. A potential ecocide amendment faces a host of practical and political challenges. The ICC is premised on state consent. States may be unwilling to take on increased prosecutorial obligations, or to subject their citizens to criminal sanctions for climate-harming activity. The ICC has finite resources, and is already facing an abundance of governance, budgetary, public relations issues.¹⁹ Adding an additional category of crime to its mandate could further overburden the system.

These practical considerations are not necessarily fatal to the project of prosecuting climate crimes internationally. If the ICC is truly to fulfill its purpose of presiding over ‘the most serious crimes of international concern,’²⁰ it should have jurisdiction over climate crimes. An international criminal tribunal is an imperfect mechanism for addressing climate crimes, but could help shift global attitudes and behaviour. Climate

change is a part of our shared human destiny. It affects everyone, without regard to borders or culpability, and it ultimately presents an existential threat to the human species. No single individual, organisation or nation can prepare for the looming disaster alone. Combatting climate change requires unprecedented commitment and cooperation among people and nations, and the international community should use every tool at its disposal, including international criminal law.

Notes

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- 4 *See id.*; Polly Higgins et al., *Protecting the Planet: A Proposal for a Law of Ecocide*, 59 CRIME L. & SOC. CHANGE 251 (2013); H.E. John H. Licht, Statement by Ambassador of the Republic of Vanuatu to the European Union at the General Debate of the 18th Session of the Assembly of State Parties to the Rome Statute of the International Criminal Court (Dec. 2–7, 2019); Ahmed Saleem, Written Statement of the Republic of Maldives by Mr. Ahmed Saleem, Member of Parliament (Dec. 3, 2019).
- 5 Patrick J. Keenan, *International Criminal Law and Climate Change*, 37 B.U. INT'L L.J. 89, 92 (2019).
- 6 *See id.* at 96–99, 104.
- 7 Mark Byrne, *Climate Crime: Can Responsibility for Climate Change Damage be Criminalized?*, 2010 CARBON & CLIMATE L. REV. 278, 279 (2010).
- 8 *Id.* at 278–79.
- 9 Joseph Rikhof, *Who Are Most Responsible in International Criminal Law?*, 3 PKI GLOB. JUST. J. 77 (2019), available at <https://globaljustice.queenslaw.ca/news/who-are-most-responsible-in-international-criminal-law>.
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- 12 Keenan, *supra* note 5, at 111–13.
- 13 Rome Statute of the International Criminal Court arts. 1, 5, July 17, 1998, 2187 U.N.T.S. 90.
- 14 Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation (Sept. 15, 2016).
- 15 INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014 SYNTHESIS REPORT 67–73 (2015).
- 16 Higgins et al, *supra* note 4.
- 17 *Id.*
- 18 Licht *supra* note 4; Saleem, *supra* note 4.
- 19 *See generally*, INDEPENDENT EXPERT REVIEW OF THE INTERNATIONAL CRIMINAL COURT AND THE ROME STATUTE SYSTEM FINAL REPORT (2020) (identifying problems in the Rome Statute system and making hundreds of recommendations).
- 20 Rome Statute, *supra* note 13, at art. 1.