

International Bar Association



the global voice of
the legal profession®

IBA Interns' Newsletter

JUNE 2023



IBA Interns' Newsletter

IN THIS ISSUE

'Brave new world': the chilling effect of private, corporate prosecutions on public interest litigation	3
<i>Christian Boffa</i>	
CBAM: game changer or conversation ender? Exploring the challenges and potential impacts of the EU Carbon Border Adjustment Mechanism	6
<i>Anna Rizzardi</i>	
A call to action: treaty on crimes against humanity	9
<i>Baleigh Brown</i>	
The ongoing systemic inequality and discrimination against Lebanese women	11
<i>Aya Osman</i>	
The United Kingdom and Hong Kong on protest 'nuisance'	13
<i>Sum Chuen Li</i>	
From the shadows: the Wagner Group in Africa	15
<i>Lusa Tshibangu</i>	



'Brave new world': the chilling effect of private, corporate prosecutions on public interest litigation

This is a new type of proceeding [...] we are in a brave new world now', admitted Judge Preska in *United States v Donziger*,¹ as she presided over the first private, corporate prosecution in US history.² The proceedings would see environmental lawyer Steven Donziger held for two years in pretrial detention, disbarred and eventually jailed in federal prison.³ Unfortunately, this prosecution is just one example in a growing trend whereby powerful corporations bring baseless, retaliatory suits against public interest lawyers to thwart the course of justice.⁴

Since daring to hold Chevron Corporation accountable for illegal polluting, Donziger has endured a sustained campaign of legal and non-legal harassment, intimidation and, ultimately, deprivation of liberty that has provoked condemnation from all corners of the legal world.⁵ Donziger's treatment violated numerous core tenets of international law – inter alia, the right to liberty and the right to a fair trial.⁶ The onslaught targeting Donziger constitutes a lawyer-directed variant of 'strategic lawsuits against public participation (SLAPPs)', traditionally aimed towards journalists.⁷ Still, Donziger refused to betray his professional duty to his clients.

Clearly, we are entering frightening, uncharted terrain for public interest law. Less clear is whether her honour was consciously invoking the hellish, dystopian future conjured by Aldous Huxley in *Brave New World*.⁸ If she was, it was certainly apt.

'Amazon Chernobyl'⁹

Donziger, representing 30,000 mostly indigenous plaintiffs in Ecuadorian court, won a record 2011 settlement of \$9.5bn against Chevron for majorly polluting their Amazonian home, causing cancer and birth

defects.¹⁰ To escape payment, Chevron brought manufactured racketeering charges against Donziger personally in federal civil court in the US.¹¹ Judge Kaplan, a former 'Big Tobacco' lawyer,¹² heard the civil case. Kaplan made plain his sympathies, referring in court to Chevron as 'a company of considerable importance to our economy', and the Ecuadorian lawsuit as a 'cynical con'.¹³

Based on the since-recanted testimony of an Ecuadorian judge (who admitted to receiving Chevron money)¹⁴ that the original settlement had been obtained through fraud, Donziger lost the case.¹⁵ Kaplan issued injunctions, freezing the settlement funds in constructive trust and ordering the handover of privileged documents to Chevron.¹⁶ Donziger explained he would appeal the order, rather than break legal privilege for his clients.¹⁷

For this, criminal contempt charges were laid. However, the US Attorney – constitutionally empowered to file criminal charges – refused to prosecute.¹⁸ Undeterred, Kaplan appointed private firm, Seward & Kissel, to act as prosecutor, notwithstanding the firm had represented Chevron in 2018.¹⁹ More egregious, Kaplan hand-picked Judge Preska to hear the case, bypassing the established rules of allocation.²⁰ Donziger was convicted and received the maximum six months imprisonment.²¹ In addition, Donziger spent two years in pretrial house arrest (unheard of for misdemeanours).²² Donziger's bail applications were repeatedly denied – once, with a single-sentence judgment.²³

'A staggering display of lack of objectivity and impartiality'²⁴

Alarmed, the United Nations Working Group on Arbitrary Detention (UNWGAD) authored an opinion, declaring Donziger's detention



arbitrary.²⁵ For lack of reasoned decisions and the harshness of bail conditions, the UNWGD found Donziger's pretrial detention breached Article 9(3) of the International Covenant on Civil and Political Rights (ICCPR).²⁶

The UNWGD further found a 'staggering display of lack of objectivity and impartiality' in Kaplan denying Donziger a jury in his trial, under the pretext of Covid-19.²⁷ This, coupled with Kaplan drafting the criminal contempt charges himself, amounted to a violation of due process under Article 14(1) of the ICCPR.²⁸

In addition to the right to liberty, the UNWGD found Donziger's treatment violated Articles 2, 7, 10 and 11 of the Universal Declaration of Human Rights and Articles 2(1) and 26 of the ICCPR.

The Supreme Court

On 27 March 2023, the US Supreme Court had a chance to definitively repudiate overt, corporate manipulation of the justice system through private prosecutions.²⁹ Instead, they denied Donziger's petition of certiorari, declining to quash his conviction for criminal contempt.³⁰ Donziger argued that, under the separation of powers doctrine, the US Constitution empowers only the executive to bring criminal charges through public prosecutors. The majority shrugged.

Surprisingly, a lone but vociferous dissent came authored jointly by the conservative Justices Gorsuch and Kavanaugh. Aghast, they railed that the Constitution 'does not tolerate what happened here', adding that the prosecution 'broke a basic constitutional promise fundamental to our liberty'.³¹ In lamenting the Court's 'failure to intervene', Gorsuch foreshadowed the reality that overzealous or biased judges will now see appointing private prosecutors as a legitimate option.³²

The chilling effect

The UNWGD found the lack of due process and judicial bias was only compounded by the fact that Donziger was targeted for his status as a 'human rights defender' and lawyer.³³ Internal Chevron memos obtained by *The Intercept* leave little doubt: '[our] strategy is to demonize Donziger'.³⁴

In 2022 alone, Chevron paid out \$22bn in dividends and share buy-backs.³⁵ They could presumably pay this settlement. However,

by prosecuting Donziger, Chevron can simultaneously freeze the settlement and pre-emptively ward off any similar suits from other potential claimants.

Marking a worrying trend, ExxonMobil has engaged in similarly menacing, retaliatory litigation towards lawyers investigating their activities – targeting state attorney-generals.³⁶

Conclusion

Multi-national corporations are rapidly becoming more powerful than states. But they are *not* states. The state, for all its imperfections, derives its mandate to prosecute crime from the people and the Constitution. Multi-national corporations hold no mandate other than money.

Already, a chill has been cast through the legal profession. Lawyers may be dissuaded from bringing legitimate claims for people harmed by corporate malfeasance, which occurs invariably in the poorest and remotest regions. Without remedy, the result will be a substantial degradation in access to justice for all manner of vulnerable claimant groups. Furthermore, the independence of the legal profession will be substantially compromised.

International law already requires governments to protect lawyers from this kind of intimidation.³⁷ Special legislation, in the model of an expanded *Anti-SLAPP* law,³⁸ could shield lawyers as well as journalists from baseless, retaliatory suits, both criminal and civil.

In the short-term, President Biden must pardon Donziger.³⁹

Notes

1. *United States v. Donziger*, No. 19-CR-561 (LAP) (S.D.N.Y. May 7, 2021)
2. Adam Klasfeld, 'When Feds Demur, Judge Charges Ecuador Crusader Himself' *Courthouse News Service* (13 August 2019) <<https://www.courthousenews.com/when-feds-demur-judge-charges-ecuador-crusader-himself/>> accessed 9 June 2023
3. Erin Brockovich, 'This Lawyer Should be World-Famous for his Battle with Chevron – but he's in Jail' *The Guardian* (London, 8 February 2022) <<https://www.theguardian.com/commentisfree/2022/feb/08/chevron-amazon-ecuador-steven-donziger-erin-brockovich>> accessed 9 June 2023
4. Jackie Kushner, *United States v. Donziger*: How the Mere Appearance of Judicial Impropriety Harms Us All [2022] 30 J. L. & Pol'y 533 <<https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1628&context=jlplp>> accessed 20 September 2023
5. United Nations Human Rights Council, *Opinions adopted by the Working Group on Arbitrary Detention at its ninety-first session: Opinion No. 24/2021 concerning Steven Donziger (United States of America)* (1 October 2021) UN Doc A/HRC/WGAD/2021/24, [20] <https://www.ohchr.org/sites/default/files/2021-11/A_HRC_WGAD_2021_24_

- AdvanceEditedVersion.pdf> accessed 9 June 2023
6. Ibid, [88]
 7. Business and Human Rights Resource Centre, 'USA: Activists Argue Lawsuits and Criminal Proceedings against Steven Donziger are a Form of SLAPP: Chevron Refutes Qualification' (11 August 2020) <<https://www.business-humanrights.org/en/latest-news/usa-activists-argue-lawsuits-and-criminal-proceedings-against-steven-donziger-are-a-form-of-slapp-chevron-refutes-qualification/>> accessed 9 June 2023
 8. Aldous Huxley, *Brave New World* (New York: Harper Brothers, 1932)
 9. Poynter Seminar with Khadija Sharife, 'Chevron's 'Amazon Chernobyl' Disaster in Ecuador: Lessons from the Frontline' *Global Justice Program* (21 February 2021) <<https://globaljustice.yale.edu/news/chevrons-amazon-chernobyl-disaster-ecuador-lessons-frontlines>> accessed 9 June 2023
 10. The pollution was committed by Texico, which was later acquired by Chevron
 11. Klasfeld, above (n 2)
 12. Myron Levin, 'Tobacco Case Judge Had Industry Ties' *Los Angeles Times* (Los Angeles, 9 September 2002) <https://www.latimes.com/archives/la-xpm-2002-sep-09-fis-smoke9-story.html> accessed 9 June 2023
 13. *Chevron Corp. v. Donziger*, 833 F. 3d 74., 80 (CA2 2016); United Nations Human Rights Council, above (n 5) [9]
 14. Eva Hershaw, 'Chevron's Star Witness Admits to Lying in the Amazon Pollution Case' *VICE News* (26 October 2015) <https://www.vice.com/en/article/neye7z/chevrons-star-witness-admits-to-lying-in-the-amazon-pollution-case> accessed 9 June 2023; Brockovich, above n iii; Adam Klasfeld, 'Ecuadorian Judge Backflips on Explosive Testimony for Chevron' *Courthouse News Service* (26 October 2015) <https://www.courthousenews.com/ecuadorean-judge-backflips-on-explosive-testimony-for-chevron/> accessed 9 June 2023
 15. Brockovich, above (n 3)
 16. Ibid
 17. Ibid
 18. United Nations Human Rights Council, Above (n 5), [14]
 19. Candice Bernd, 'Ecocide – Not Eco Activism – is a Crime Against Humanity, says Steven Donziger' *Truthout* (21 February 2023) <https://truthout.org/articles/ecocide-not-eco-activism-is-a-crime-against-humanity-says-steven-donziger/> accessed 9 June 2023
 20. Craig Murray, 'Donziger: A Tale for our Times' *Brave New Europe* (29 April 2022) <https://braveneweuropa.com/craig-murray-donziger-a-tale-for-our-times> accessed 9 June 2023; United Nations Human Rights Council, above(n 5), [74]
 21. Ibid, [81]
 22. Nate Raymond, 'U.S Supreme Court Lets Chevron Foe Donziger's Contempt Conviction Stand' *Reuters* (27 March 2023) <<https://www.reuters.com/legal/us-supreme-court-lets-chevron-foe-donzigers-contempt-conviction-stand-2023-03-27/#:~:text=Donziger%20was%20sentenced%20to%20six,a%20lawsuit%20filed%20by%20Chevron>> accessed 9 June 2023
 23. United Nations Human Rights Council, above (n 5) [73]
 24. Ibid [81]
 25. Ibid [77]
 26. Ibid [80]; International Covenant on Civil and Political Rights (ICCPR) (4 April 4 1968) 999 UNTS 170 (ratified by the United States in 1992)
 27. Ibid [81]
 28. Ibid [81]
 29. *Donziger v United States* 598 U.S. ____
 30. Ibid
 31. *Donziger v United States* 598 U.S. ____, 5 (Gorsuch J dissenting)
 32. Ibid
 33. United Nations Human Rights Council, above (n 5) [86]
 34. Sharon Lerner, 'Steven Donziger v Big Oil' *The Intercept* (17 April 2022) <<https://theintercept.com/2022/04/27/deconstructed-steven-donziger-chevron-ecuador/>> accessed 9 June 2023; view the actual internal email here: <<https://www.documentcloud.org/documents/6661647-Demonize-Donziger.html>> accessed 9 June 2023
 35. Chevron Corporation, 'Annual Report – 2022' available at <<https://www.chevron.com/-/media/chevron/annual-report/2022/documents/2022-Annual-Report.pdf>> , [iv] accessed 9 June 2023
 36. David Halperin, 'Judge's Radical Exxon Ruling Could Turn the Legal System Upside Down' *Republic Report* (1 December 2016) <<https://www.republicreport.org/2016/judges-radical-exxon-ruling-could-turn-the-legal-system-upside-down/>> accessed 9 June 2023; Business and Human Rights Resource Centre, 'USA: Massachusetts' High Court Rejects ExxonMobil's Bid to Dismiss Climate Change Lawsuit Using Anti-SLAPP law', (30 May 2022) <<https://www.business-humanrights.org/en/latest-news/usa-massachusetts-high-court-rejects-exxonmobils-bid-to-dismiss-climate-change-lawsuit-using-anti-slapp-law/>> accessed 9 June 2023
 37. United Nations, *Basic Principles on the Role of Lawyers* (adopted 7 September 1990) article 16
 38. National Union of Journalists, 'UK Government must take urgent action on SLAPPs' (29 November 2022) <<https://www.nuj.org.uk/resource/uk-government-must-take-urgent-action-on-slapps.html>> accessed 9 June 2023
 39. Candice Bernd, 'Ecocide – Not Eco Activism – is a Crime Against Humanity, says Steven Donziger' *Truthout* (21 February 2023) <<https://truthout.org/articles/ecocide-not-eco-activism-is-a-crime-against-humanity-says-steven-donziger/>> accessed 9 June 2023



CBAM: game changer or conversation ender? Exploring the challenges and potential impacts of the EU Carbon Border Adjustment Mechanism

As part of the 'Fit for 55' package,¹ the European Union's (EU) new Carbon Border Adjustment Mechanism (CBAM) has recently come into force.²

The CBAM aims to equalise the carbon price of goods by imposing a tax on imports based on the amount of CO₂ emitted from the time of production until the importation of specific goods into the EU's customs territory.³ As of 2026, importers in the cement; iron and steel; aluminium; fertilisers; and electricity sectors will need to submit a CBAM declaration, obtain authorisation from the competent national authority, purchase CBAM certificates and surrender the number of certificates corresponding to the embedded emissions declared.

The rationale of this mechanism is strictly connected to the internal EU Emission Trading System (ETS) and rests on two main aspects. First, the EU aims to enhance its climate ambitions while mitigating adverse aftermaths on the European market and economy. Momentum has come to gradually reduce the availability of free emission allowances within the ETS.⁴ This will eventually increase the carbon price in the EU, thus accentuating the difference in terms of production costs between domestic and foreign goods. The CBAM seeks to level this difference by ensuring a common playing field, without compromising industrial competitiveness. Second, the EU intends to drive global efforts towards climate neutrality not only by preventing carbon leakage that undermines its actions, but also by attempting to positively encourage other countries to adopt climate reforms.⁵ This pioneering initiative is the first of its kind and holds significant interest due to the important challenges and contradictions it entails, such as trade distortion, as well

as legal and political conflicts with third countries and potential retaliatory measures.⁶ Other critics argue that the measure is protectionist⁷ and unfair because of the geographically uneven distribution of its impacts.⁸

This article provides a concise review of the hypothesis regarding the outcomes of this measure in light of the newly approved final text of the CBAM.

On international trade

The CBAM has been designed in strict adherence to World Trade Organization (WTO) rules. First, since the ETS functions as a product-related tax, it qualifies as border adjustable under Articles II:2(a) and III:2 of the General Agreement on Tariffs and Trade (GATT). Second, the CBAM does not impose a heavier burden on imports compared to similar domestic products, not even de facto, as it imposes on imports the average carbon price levied on EU goods.⁹ Third, the differentiation based on the origin of goods resulting from the price already paid in the country of origin may contradict the most-favoured-nation principle enshrined in GATT Article I, but is justified on environmental grounds, as per GATT Article XX.¹⁰ Therefore, the newly established CBAM should not raise significant issues regarding compliance with WTO rules.

Conversely, other challenges relevant to business and trade remain. These include maintaining the international competitiveness of EU industries. While the CBAM levels the playing field in terms of effective carbon prices within the European market, the parallel phase-out of free emission allowances weakens the competitiveness of EU producers in foreign markets, due to the higher carbon price

they will have to bear.¹¹ The CBAM may also disrupt supply chains, with certain sectors highly impacted by an increase of their primary raw materials supply costs due to the CBAM.¹² Finally, despite the European Commission's assessment,¹³ the CBAM is likely to have an impact on consumers, who will ultimately bear its cost.¹⁴

On climate change

The inclusion of indirect emissions in the newly established CBAM is expected to effectively curb carbon leakage.¹⁵ However, since the mechanism solely focuses on imports, it does not avoid leakage resulting from the loss of market shares abroad.¹⁶ The mechanism may also distort the international competition in favour of producers not subject to a carbon price, thereby stimulating consumption leakage.¹⁷ Additionally, the path towards decarbonisation is capital-intensive and multifaceted, with certain new technologies not yet available.¹⁸ Overall, there is a risk of global markets segregation, with clean products heading to Europe and emissions-intensive production supplying other markets.¹⁹

Notwithstanding the above, the phased reduction of free emission allowances and the introduction of CBAM provide a strong message from the EU regarding climate change, which will still have beneficial effects. It is expected to spur industries interested in conducting business with the EU to implement greener solutions, and promote technology transfers by changing prices in favour of cleaner technologies.²⁰ It will also serve as an impetus for foreign governments to enhance more ambitious climate action.²¹ For instance, the United States Congress has begun serious discussions about what a similar policy in the US might look like,²² and Singapore and Taiwan have signalled that the CBAM proposal would be a key driver for adopting carbon pricing schemes.²³

On developing and least developed countries

Scholars and politicians point out that the mechanism will shift the burden of decarbonisation to developing countries and least developed countries (LDCs), against the principle of common but differentiated responsibility under the Paris Agreement.²⁴ Particularly, the Global South and non-EU Eastern Europe face the highest risks of

being negatively impacted because of their level of exposure and vulnerability.²⁵ These regions will suffer not only from losses of market shares, incomes and, in some cases, employment,²⁶ but also because producers that cannot afford the new costs might redirect dirtier products there.

These concerns are exacerbated by the fact that the CBAM does not include any exemptions for LDCs, nor differentiation in reporting obligations based on country capabilities. The likely future expansion of the CBAM – in the EU, as well as in other developed countries – might also aggravate the existing gap. Furthermore, revenues from the CBAM will contribute to the EU budget, and not directly compensate poorer countries.²⁷

The EU is trying to mitigate these downsides through technical assistance and financial support precisely through the EU budget, as well as other initiatives.²⁸

Conclusions

There is still a long way to go before the CBAM is fully implemented and operational. While the possible effects have been outlined above, the real impact will only be visible ex post. From this analysis we can draw the importance of adopting a long-term and holistic approach to assess carbon reduction and carbon leakage measures. Although the CBAM – if considered in isolation – could cause competition issues, have a limited effect on cutting global emissions and/or violate the ethos of common but differentiated responsibilities to the detriment of LDCs, it is coordinated with numerous other measures, notably the ETS, and should be assessed accordingly.

Notes

1. See www.consilium.europa.eu/en/policies/green-deal/fit-for-55-the-eu-plan-for-a-green-transition accessed 16 September 2023.
2. Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32023R0956> accessed 16 September 2023.
3. This notion is a combination of the definitions given by André Sapir, 'The European Union's carbon border mechanism and the WTO' (Bruegel, July 2021) www.bruegel.org/blog-post/european-unions-carbon-border-mechanism-and-wto accessed 16 September 2023, and Global Training Center, 'Carbon Border Adjustment Mechanism: What It Is and How It Affects International Trade and Climate Change' (May 2023) www.globaltrainingcenter.com/carbon-border-adjustment-mechanism-what-it-is-and-how-it-affects-international



- trade-and-climate-change accessed 16 September 2023.
4. In recent years, there have been multiple appeals on ending the free allocation of emission allowances to better align with climate objectives; see for example: European Court of Auditors, The EU's Emissions Trading System: free allocation of allowances needed better targeting (2020) www.eca.europa.eu/Lists/ECADocuments/SR20_18/SR_EU-ETS_EN.pdf accessed 16 September 2023; Carbon Market Watch, The Phantom Leakage: Industry windfall profits from Europe's carbon market 2008-2019 (June 2021) https://carbonmarketwatch.org/wp-content/uploads/2021/06/Phantom_leakage_WEB.pdf pp 9–10 accessed 16 September 2023; and Thomas Pellerin-Carlin and others, 'No more free lunch: Ending free allowances in the EU ETS to the benefit of innovation' (Jacques Delors Institute, February 2022) www.e3g.org/wp-content/uploads/No-more-free-lunch-Ending-EU-ETS-free-allowances.pdf accessed 16 September 2023. Even the European Commission acknowledged that free allocation of emission allowances has financial and climate costs – see Commission, Impact Assessment Report Accompanying the document Proposal for a regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism, SWD (2021) 643 final, part 1 and 2 [https://ec.europa.eu/transparency/documents-register/detail?ref=SWD\(2021\)643&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=SWD(2021)643&lang=en) accessed 16 September 2023.
 5. See recital 14 of Regulation 2023/956, n 2, above; and Henrique Morgado Simões, EU carbon border adjustment mechanism (European Parliamentary Research Service, June 2023) [www.europarl.europa.eu/RegData/etudes/BRIE/2022/698889/EPRS_BRI\(2022\)698889_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/698889/EPRS_BRI(2022)698889_EN.pdf) accessed 16 September 2023.
 6. See André Sapir, n 3, above.
 7. See André Sapir and Henrik Horn, *Political Assessment of Possible Reactions of EU Main Trading Partners to EU Border Carbon Measures* (European Parliament Committee on International Trade, April 2020) [www.europarl.europa.eu/RegData/etudes/BRIE/2020/603503/EXPO_BRI\(2020\)603503_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/603503/EXPO_BRI(2020)603503_EN.pdf) p 9 accessed 16 September 2023; Anne Gläser and Oldag Caspar, *Less confrontation, more cooperation, Increasing the acceptability of the EU Carbon Border Adjustment in key trading partner countries* (Germanwatch, June 2021) <https://www.germanwatch.org/sites/default/files/Less%20confrontation%20%20more%20cooperation%20%28EN%29.pdf> pp 11, 13 and 25 accessed 16 September 2023; Jonathan L. Ramseur and Brandon J. Murrill and Christopher A. Casey, *Border Carbon Adjustments: Background and Developments in the European Union* (Congressional Research Service, February 2023) <https://crsreports.congress.gov/product/pdf/R/R47167> p 11 and bibliography in note 65 accessed 16 September 2023; the European Parliament in its Briefing, n 5, above, p 5, recognised that 'EU producers of the five product categories could potentially see their output increase as competing imports from third countries fall under the CBAM'.
 8. See Anne Gläser and Oldag Caspar, n 7, above, pp 11 and 25; UNCTAD, *A European Union Carbon Border Adjustment Mechanism: Implications for developing countries* (2021) https://unctad.org/system/files/official-document/osginf2021d2_en.pdf accessed 16 September 2023.
 9. See Article 21 of Regulation 2023/956, n 2, above.
 10. In any case, potential violations of WTO rules did not constitute a real obstacle per se, provided that challenges to the CBAM before the WTO dispute settlement body are only open to other member states, and even so, possible remedies are limited, let alone that the WTO Appellate Body is currently inoperable.
 11. Stuart Evans, Michael A. Mehling, Robert A. Ritz and Paul Sammon, *Border carbon adjustments and industrial competitiveness in a European Green Deal* (Climate Policy, December 2020) <https://www.tandfonline.com/doi/full/10.1080/14693062.2020.1856637> accessed 2 June 2023.
 12. Sébastien Wagemans, Nik Bollons and Jean-Louis Genest, 'What You Need To Know About CBAM, The EU's New Carbon Tariff' (ENGIE Impact, 2023) <https://www.engieimpact.com/insights/cbam-eu-carbon-tariff> accessed 16 September 2023.
 13. Commission, 'Proposal for a Regulation of the European Parliament and of the Council establishing a carbon border adjustment mechanism' COM (2021) 564 final, 2021/0214(COD) <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A52021PC0564> accessed 16 September 2023: 'the application of the CBAM on material industrial products is likely to have limited impact on consumer prices because the measure is targeted at products upstream in the value chain and affects goods for final consumption only indirectly'.
 14. Adrien Assous, Thomas Burns, Byford Tsang, Domien Vangenechten and Belinda Schäpe, *A storm in a teacup, Impacts and geopolitical risks of the European carbon border adjustment mechanism* (Sandbag, August 2021) <https://sandbag.be/wp-content/uploads/E3G-Sandbag-CBAM-Paper.pdf> p 36 accessed 16 September 2023; Ewa Manthey and Warren Patterson, 'How the EU's carbon border tax will affect the global metals trade' (ING Think, May 2023) <https://think.ing.com/articles/how-will-the-eus-carbon-border-tax-affect-global-metals-trade> accessed 16 September 2023.
 15. George Mörsdorf, *A simple fix for carbon leakage? Assessing the environmental effectiveness of the EU carbon border adjustment* (ifo Institute, April 2021) <https://www.ifo.de/DocDL/wp-2021-350-moersdorf-eu-carbon-border-adjustment.pdf> accessed 16 September 2023.
 16. Christoph Böhringer, Carolyn Fischer, Knut Einar Rosendahl and Thomas Fox Rutherford, 'Potential impacts and challenges of border carbon adjustments' (Nature Climate Change, January 2022) <https://www.nature.com/articles/s41558-021-01250-z> p 26 accessed 2 June 2023.
 17. Timothé Beaufils, Hauke Ward, Michael Jakob and Leonie Wen, 'Assessing different European Carbon Border Adjustment Mechanism implementations and their impact on trade partners' (Communications Earth & Environment, April 2023) <https://www.nature.com/articles/s43247-023-00788-4> p 3 accessed 16 September 2023.
 18. See n 12, above.
 19. This risk is envisaged by Emily Benson, Joseph Majkut, William A. Reinsch and Federico Steinberg, *Analyzing the European Union's Carbon Border Adjustment Mechanism* (Center for Strategic and International Studies, February 2023) https://csis-website-prod.s3.amazonaws.com/s3fs-public/2023-02/230217_Analyzing_EU_CBAM.pdf?VersionId=IFMwWnLo1VQ8xbBUx7lwn6RVNj8.Ck_t_p5 accessed 16 September 2023.
 20. Elena Ianchovichina and Harun Onder, 'Carbon border taxes: What are their implications for developing countries?' (Brookings, October 2021) <https://www.brookings.edu/articles/carbon-border-taxes-what-are-their-implications-for-developing-countries/> accessed 16 September 2023.
 21. Michael Copley, 'How a European law might get companies around the world to cut climate pollution' (NPR, May 2023) <https://www.npr.org/2023/05/17/1171238285/how-a-european-law-might-get-companies-around-the-world-to-cut-climate-pollution> accessed 16 September 2023; Irene Lauro, 'The EU's "stick approach" to climate action: CBAM' (Schroders, April 2023) <https://www.schroders.com/en/global/individual/insights/cbam-and-the-eus-stick-approach-to-climate-action/#:~:text=Recent%20modelling%20from%20the%20EC,nearly%2030%25%20in%20CBAM%20sectors> accessed 16 September 2023.
 22. Michael Copley, n 21, above; Tori Smith, 'U.S. carbon border adjustment proposals and world trade organization compliance' (American Action Forum, February 2023) <https://www.americanactionforum.org/insight/u-s-carbon-border-adjustment-proposals-and-world-trade-organization-compliance/> accessed 16 September 2023.

23. Irene Lauro, n 21, above.
24. See Guilherme Magacho, Antoine Godin and Etienne Espagne, *Impacts of CBAM on EU trade partners: consequences for developing countries* (Agence Française de Développement, March 2022) <https://www.afd.fr/sites/afd/files/2022-03-08-23-26/Impacts-of-CBAM-on-EU-trade-partners.pdf> p 7 accessed 17 September 2023; see also the statement from the 30th Brazil, South Africa, India and China Ministerial Meeting on Climate Change on 8 April 2021 www.gov.za/speeches/joint-statement-issued-conclusion-30th-basic-ministerial-meeting-climate-change-hosted accessed 17 September 2023.
25. Laima Eicke, Silvia Weko, Maria Aperi and Adela Marian, 'Pulling up the carbon ladder? Decarbonization, dependence, and third-country risks from the European carbon border adjustment mechanism' (Energy Research & Social Science, October 2021) <https://www.sciencedirect.com/science/article/pii/S2214629621003339?via%3Dihub> p 8 accessed 17 September 2023; see also UNCTAD, n 8, above, p 12.
26. Concerning potential impacts on employment, see UNCTAD, n 8, above, p 22.
27. European Commission, 'Questions and Answers: Carbon Border Adjustment Mechanism (CBAM)' (July 2021) https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_3661 accessed 17 September 2023.
28. See n 27, above; Recital 73 of Regulation 2023/956, n 2, above; and European Commission, 'How the EU supports climate action in developing economies across the world' https://climate.ec.europa.eu/eu-action/international-action-climate-change/international-climate-finance_en accessed 17 September 2023.

Baleigh Brown

A call to action: treaty on crimes against humanity

The United Nations General Assembly is moving forward with drafting a treaty on crimes against humanity.¹ There has been a recent push to create a new treaty to address these crimes after multiple violations have occurred in the past year.² Most notably, the Russian invasion of Ukraine has driven the movement towards drafting an entirely new treaty to prevent and punish crimes against humanity.³

The Rome Statute of the International Criminal Court (ICC) defines crimes against humanity as:

- '[...] any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
- (a) Murder;
 - (b) Extermination;
 - (c) Enslavement;
 - (d) Deportation or forcible transfer of population;
 - (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
 - (f) Torture;
 - (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or and other form of sexual violence of a comparable gravity;
 - (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural,

religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health'.⁴

While crimes against humanity are defined across multiple facets of international law, such as the Rome Statute, there is no comprehensive treaty that addresses these offenses.⁵ The goal of a crimes against humanity convention is to provide and strengthen legal tools for states to prevent and punish crimes against humanity in national courts.⁶

Repeat offenses in recent months

When Russia invaded Ukraine in 2022, it arguably committed multiple crimes against humanity, most notably the core crime of aggression.⁷ Russian forces have attacked Ukrainians and killed thousands of civilians since the invasion began.⁸ Evidence has also shown that Russians have committed acts of torture, sexual violence and unlawful killings against Ukrainians.⁹ Civilian infrastructure has been attacked and



damaged, leading to further violations on the rights to housing, health and education.¹⁰ Additionally, Russian officials have been tied to the forced deportation of Ukrainian children¹¹ – approximately 16,000 children have been removed from Ukraine, according to a UN report.¹² An ICC report from The Hague found that Russian forces carried out ‘indiscriminate and disproportionate’ attacks on Ukraine,¹³ based on evidence gathered from more than 500 interviews, and including satellite imagery and visits to detention sites and graves.¹⁴ The report also provided that at least 13 waves of Russian attacks on Ukraine’s energy infrastructure, as well as the use of torture, ‘may amount to crimes against humanity’.¹⁵

In February 2021, there was a military coup in Myanmar that led to a major human rights catastrophe within the country.¹⁶ There is evidence that a widespread and systematic attack on women and children is being committed by security forces and other armed groups.¹⁷ The Independent Investigative Mechanism for Myanmar (IIMM) has gathered more than three million pieces of evidence from approximately 200 sources that reveal how children in Myanmar have been tortured, conscripted and arbitrarily detained.¹⁸ The IIMM report also indicated that sexual- and gender-based crimes are among some of the main violations that have occurred in the country.¹⁹

As of November 2020, a major outbreak of conflict has occurred in Ethiopia’s Tigray region which has led to numerous crimes against humanity.²⁰ Multiple reports composed by UN bodies, such as the Human Rights Council-mandated International Commission of Human Rights Experts on Ethiopia, show evidence of indiscriminate bombings; ethnicity-based killings; sexual violence; forced displacement; conscription of child soldiers; destruction of cultural heritage; and the systematic destruction of food, water and health infrastructure.²¹ Over three million people have been internally displaced, and there are at least 13 million in need of immediate aid.²² The United States determined that armed forces on all sides are guilty of committing crimes against humanity, war crimes and ethnic cleansing.²³

The need for a new convention

Article 7 of the Rome Statute defines crimes against humanity but does not establish a broad scope for criminal responsibility

beyond individual accountability.²⁴ There is an urgent need for states to recognise their obligations under international law in preventing and punishing crimes against humanity.²⁵ State courts lack the legal framework to tackle crimes of this nature, but a treaty would provide the proper foundation needed to prosecute these crimes.²⁶ A new convention on crimes against humanity would close a major gap in international law and facilitate the strengthening of legal tools designed to meet the needs of national courts.²⁷

Notes

1. Human Rights Watch, ‘UN Decision to Advance Crimes Against Humanity Treaty,’ www.hrw.org/news/2022/11/18/un-decision-advance-crimes-against-humanity-treaty, accessed 31 May 2023.
2. Ibid.
3. Ibid.
4. UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, Art 7, www.icc-cpi.int/sites/default/files/RS-Eng.pdf.
5. Human Rights Watch, ‘UN Decision to Advance Crimes Against Humanity Treaty.’
6. Ibid.
7. Human Rights Watch, ‘Ukraine,’ www.hrw.org/europe/central-asia/ukraine, accessed 31 May 2023.
8. Amnesty International, ‘Ukraine 2022,’ www.amnesty.org/en/location/europe-and-central-asia/ukraine/report-ukraine, accessed 31 May 2023.
9. Ibid.
10. Ibid.
11. Reuters, ‘Some Russian abuses in Ukraine may be crimes against humanity – UN inquiry finds,’ www.reuters.com/world/europe/russia-has-committed-wide-range-war-crimes-ukraine-un-inquiry-finds-2023-03-16, accessed 1 June 2023.
12. Ibid.
13. Ibid.
14. Ibid.
15. Ibid.
16. Human Rights Watch, ‘Myanmar (Burma),’ www.hrw.org/asia/myanmar-burma, accessed 2 June 2023.
17. United Nations, ‘Myanmar: Crimes against humanity committed systematically, says UN report,’ <https://news.un.org/en/story/2022/08/1124302>, accessed 2 June 2023.
18. Ibid.
19. Ibid.
20. Human Rights Watch, ‘Ethiopia,’ www.hrw.org/africa/ethiopia, accessed 2 June 2023.
21. Global Centre for the Responsibility to Protect, ‘Ethiopia,’ www.globalr2p.org/countries/ethiopia, accessed 2 June 2023.
22. Ibid.
23. Ibid.
24. *Opinio Juris*, ‘Draft Convention on Crimes Against Humanity: A Window of Opportunity,’ <http://opiniojuris.org/2022/11/22/draft-convention-on-crimes-against-humanity-a-window-of-opportunity>, accessed 2 June 2023.
25. Ibid.
26. Ibid.
27. Human Rights Watch, ‘Q&A: Towards a Crimes Against Humanity Treaty,’ www.hrw.org/news/2022/10/06/qa-towards-crimes-against-humanity-treaty, accessed 2 June 2023.

The ongoing systemic inequality and discrimination against Lebanese women

Lebanon continues to face many problems at the hands of its corrupt government. According to Human Rights Watch's World Report 2022, 'over 80 percent of residents did not have access to their basic human rights, including health, education, and an adequate standard of living, such as adequate housing and electricity'.¹ With no access to food, water, education and healthcare, Lebanese people continue to struggle every day due to politicians that don't have their citizens' best interests at heart. Amid the struggles of the country's residents, the women of Lebanon continue to deal with systematic oppression and discrimination, for example, to date, Lebanese women cannot pass on their nationality to their foreign husbands and children.² The outdated nationality law and the various religion-based personal status laws contribute to the systemic violence and discrimination against Lebanese women.³

Discriminatory nationality law

The nationality legislation – which the French High Commissioner of the Levant, Maurice Sarraïl, enacted via Decision No 15 on 19 January 1925 – is one of the most notable examples of gender discrimination in Lebanon.⁴ The law acknowledges the right of Lebanese men who marry foreign women to pass down to their children and wives their nationality, but it does not recognise the same right for Lebanese women who marry foreign men.⁵ As a result, the children of Lebanese women who marry foreigners have several practical and legal challenges since they are denied the privileges associated with having Lebanese nationality, such as the right to work, join syndicates, own land and get social benefits, among many others.⁶

Afraid to obstruct its irrational sectarian balance, Lebanese politicians have continued to allow this unfair policy to proceed without any change. This rationalisation is unreasonable as the nationality law only

applies to Lebanese women. According to Human Rights Watch, these explanations are blatantly discriminatory because they do not apply to males who marry foreign women – sometimes up to four for Muslim men.⁷ Lebanon discriminates against Lebanese women who marry foreigners, as well as their children, by denying them the right to citizenship on an equal basis with the children and wives of Lebanese men.⁸

Lebanon's discriminatory nationality law is a violation of international law and as a party to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Lebanon must put an end to this unjust legislation. Article 9, paragraph 2 of CEDAW states that states parties must give women the same rights as men with respect to the nationality of their children.⁹

Discriminatory religion-based personal status law

Lebanon doesn't have a civil code that governs issues relating to personal status, such as marriage, inheritance and child custody; instead, it depends on 15 different laws and courts that govern such things based on a person's religious affiliation.¹⁰ These personal status laws that are based on religion discriminate against women from all religious backgrounds and do not uphold their fundamental rights. These laws are applied by independent religious courts that operate with little to no government control and frequently make decisions that violate women's human rights.¹¹

Regardless of religious affiliation, personal status laws create greater obstacles for women who want to end unpleasant or abusive marriages, file for divorce, protect their parental rights after a divorce or get financial support from a former spouse.¹² Human Rights Watch examined 243 divorce cases and discovered persistent discrimination against women, due to their limited access to divorce



or judicial processes that put financial strains on women and made it difficult for them to dissolve their marriages and defend their rights.¹³ Because these laws don't protect a women's financial rights and custody rights, often times women are silenced and forced to endure abuse at the hands of their spouse.

Women who wished to divorce their husbands said to Human Rights Watch that they did not go to religious courts because they could not pay the fees associated with the legal process or they were afraid of losing custody of their children.¹⁴ Religious courts do not recognise joint custody of children, instead, they often give the mother custody up to a particular age, after which the father is granted custody.¹⁵ Religious courts tend to focus on the woman's behavior in ways that reflected social prejudice or stereotypes while rarely considering the father's actions when determining custody disputes.¹⁶ Due to these discriminatory laws and practices, women almost always lost custody of their children after seeking divorce.

Article 16, paragraph 1, section C of CEDAW states that states parties must take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and shall ensure, on a basis of equality of men and women the same rights and responsibilities during marriage and at its dissolution.¹⁷ Furthermore, section D states that states parties shall ensure, on a basis of equality of men and women the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount.¹⁸

Conclusion

These laws have long been ongoing, and it is time for Lebanon to put an end to them as they have only harmed women and

violated international law. Women deserve and have the right to be given the same protections men have. Without immediate change, Lebanese women's human rights will continue to be violated as they will continue to suffer abuse and discrimination. Lebanon must take action to put an end to its discriminatory nationality law and create a unified civil law that all citizens can enjoy regardless of their religion or gender.

Notes

1. Kenneth Roth, World Report 2022 (Human Rights Watch 2022) 415.
2. Ibid 419.
3. Ibid.
4. Nizar Saghie and Shehrazade Yara El-Hajjar, 'Denying Lebanese Women the Ability to Pass On Nationality' (The Legal Agenda, 14 October 2020) <<https://english.legal-agenda.com/denying-lebanese-women-the-ability-to-pass-on-nationality/>> accessed 30 May 2023.
5. Ibid.
6. Ibid.
7. 'Lebanon: Discriminatory Nationality Law' (Human Rights Watch, 3 October 2018) <<https://www.hrw.org/news/2018/10/03/lebanon-discriminatory-nationality-law>> accessed 30 May 2023.
8. Ibid.
9. Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 9
10. 'For an Equal Personal Status Law in Lebanon' (United Nations) <<https://www.un.org/democracyfund/news/equal-personal-status-law-lebanon#:~:text=Lebanon%20lacks%20a%20civil%20code,for%20the%2018%20recognized%20categories.>> accessed 31 May 2023.
11. 'Lebanon: Laws Discriminate Against Women' (Human Rights Watch, 19 January 2015) <<https://www.hrw.org/news/2015/01/19/lebanon-laws-discriminate-against-women>> accessed 31 May 2023.
12. Ibid.
13. Ibid.
14. Ibid.
15. Ibid.
16. Ibid.
17. Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 16
18. Ibid.

The United Kingdom and Hong Kong on protest 'nuisance'

In June 2022, Section 78 of the UK Police, Crime, Sentencing and Courts Act 2022 (PCSCA) codified the common law offence of public nuisance.¹

Statutory public nuisance should be lauded in some respects.

1. Section 78(1)(b) clarifies the public element of the offence as either causing serious harm to 'the public or a section of the public' or infringing rights 'exercised or enjoyed by the public at large'. This grounds the offence in the unifying concept of 'common injury' and prevents public nuisance from becoming a catch-all offence of general misbehaviour.²
2. It increased the fault element from negligence to the requirement of intention and recklessness (s78(1)(c)). This provides legal certainty, which crucially counterbalances the broad and flexible nature of the offence.
3. The person charged has a defence of reasonableness (s78(3)). The Law Commission report provided a specific example of exercising the freedom of expression and assembly as a possible defence and is endorsed by the Court of Appeal.³

There are also concerning developments:

1. The rationale behind retaining the public nuisance offence is for 'minor misbehaviour not covered by specific offences or procedures [...] [and] serious deliberate or irresponsible misbehaviour for which the specific offences and procedures are not adequate.'⁴ However, Section 78 is placed under 'Part 3: Public Order', which may encourage prosecutors or police officers to use the offence in protest-related situations.
2. Statutory sentencing provisions (s78(4)) do not (yet) benefit from the guidance of years of judgments.⁵ Whereas judges in previous public nuisance cases decided against a prison sentence by

considering the 'conscientious motives of protestors'.⁶

3. The phrase 'creates a risk of, or causes, serious harm' in s78(1)(b)(i) is vague. The level of risk required to be proven by the prosecution is uncertain.⁷ Moreover, according to the definition provided in s78(2), 'serious harm' includes unqualified 'loss of, or damage to, property' and, somewhat subjectively, 'serious annoyance' and 'serious inconvenience'.

The impact of the public nuisance offence on protests cannot be understated. On Coronation Day (6 May 2023), half of the 64 arrests and 20 out of 21 cases referred to the Crown Prosecution Service were for conspiracy to cause a public nuisance.⁸

The use of the public nuisance offence in the protest context is not new, including in the former British colony, Hong Kong. In 2014, the 'Occupy Central with Love and Peace' non-violent civil disobedience campaign was launched to advocate for universal suffrage. It was grounded in Article 45 of Hong Kong's mini-constitution, the Basic Law, which provides, 'The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance to democratic procedures.'⁹ The leaders were ultimately convicted of conspiracy to commit public nuisance, incitement to commit public nuisance, and incitement to incite public nuisance.¹⁰ The *HKSAR v Tai Yiu Ting* judgments on common law public nuisance are of particular interest.

Chan J recognised the motive of civil disobedience on the part of the defendants and quoted Lord Hoffmann in *R v Jones (Margaret)* that protestors should 'behave with a sense of proportion and do not cause excessive damage or inconvenience'.¹¹ He decided that the defendants had misconceived the proportionality test by merely considering whether the financial hub would be paralysed; instead, 'the obstruction



does not have to be severe enough to paralyse a district or financial hub, the test is a much lower threshold of reasonableness'.¹² Chan J determined that the defendants caused 'excessive inconvenience [...] as result of the large-scale occupation'.¹³ Moreover, the defendants' actions were unreasonable because they could have called for the occupation of part of, but not the entire carriageway of Chater Road'.¹⁴

This judgment demonstrates how protests can easily be determined as causing 'excessive inconvenience' under the public nuisance offence and, therefore, the significance of proper application of the defence of reasonableness. It also shows the difficulty of the defendants proving the reasonableness of their actions. In this case, the proportionality assessment was contradictory: the judge dismissed the defendants' intention not to paralyse the financial hub and, later, deprived them of the reasonableness excuse because he determined that the conspiracy would result in the obstruction of the entire road. More importantly, the Hong Kong court failed to recognise Lord Hoffmann's latter sentence that police and prosecutors should behave with restraint. All courts should examine the proportionality of the protestors' behaviour and the intrusions to their freedom of expression and assembly. The stringency of the assessment should be commensurate to the importance of the freedom of expression and assembly in a democratic society, as opposed to 'a much lower threshold of inconvenience'. In addition, Lord Burnett opined that if there were prosecutions of criminal damage (a serious offence) for minor infractions (ie, minor or temporary property damage arising out of a protest), 'there would need to be a case-specific assessment of the proportionality of the conviction'.¹⁵ UK courts should also initiate a proportionality assessment in public nuisance cases when appropriate, even where the defendant does not rely on the defence of reasonableness.

The codification of common law public nuisance into Section 78 of the PCSC increases legal certainty and incorporates a defence of reasonableness. However, there is concern that Section 78 encourages the arrest and prosecution of protestors and does not provide sufficient safeguards for freedom of expression and assembly. The full effects of Section 78 depend on its implementation by the UK courts. With respect, the *HK Tai Yiu Ting* case provides a negative example of the criminalisation of a civil disobedience campaign owing to an improper proportionality assessment.

Notes

1. Police, Crime, Sentencing Act 2022, s 78
2. *R v Rimmington and Goldstein* [2005] UKHL 63, s 37
3. Law Commission, *Simplification of Criminal Law: Public Nuisance and Outraging Public Decency* (Law Com No 358, 2015) [Law Commission], s 3.61; Attorney General's Reference (No 1) [2022] EWCA Crim 125 [AG Ref 1]
4. Law Commission, s 3.31
5. Joshua Rozenberg, 'More than a nuisance' (*A Lawyer Writes*, 14 March 2021) <rozenberg.substack.com/p/more-than-a-nuisance> accessed 18 September 2023
6. *R v Roberts* [2018] EWCA Crim 2739, s 34
7. Rabah Kherbane, 'The use of the new statutory public nuisance offence to prosecute political and environmental protest' (*Doughty Street Chambers*, 15 March 2023) <insights.doughtystreet.co.uk/post/102iagn/the-use-of-the-new-statutory-public-nuisance-offence-to-prosecute-political-and-e> accessed 18 September 2023
8. Metropolitan Police, 'Updates on arrests made by officers at the Coronation' (*Metropolitan Police*, 30 August 2023) <news.met.police.uk/news/update-on-arrests-made-by-officers-at-the-coronation-471492> accessed 18 September 2023
9. Basic Law of the Hong Kong Special Administrative Region, art 45
10. *HKSAR v Tai Yiu Ting and others* [2019] HKDC 450 [Tai Yiu Ting], endorsed by *HKSAR v Tai Yiu Ting and others* [2021] HKCA 630.
11. [2007] 1 AC 136, s 112.
12. *Tai Yiu Ting*, s 264.
13. *Ibid*, s 271.
14. *Ibid*, s 357.
15. AG Ref 1, s 116.

From the shadows: the Wagner Group in Africa

Mercenaries – also known as private military companies (PMCs) – have been used to bolster military forces during times of conflict throughout ancient times and into the present day. Many are motivated by personal financial gain and offer their services to governments, corporations and other groups in times of urgent need.¹ Their presence impacts different conflicts throughout the world.

Today, although their involvement often sparks controversy, mercenaries continue to operate in regions where local forces are insufficient and frail. While international law does not outrightly ban mercenaries, their activities are widely viewed with concern due to the ethical and legal dilemmas their involvement triggers. Mercenaries can potentially undermine state sovereignty, prolong conflicts and contribute to human rights abuses.² This piece will centre on the Wagner Group and its activities in various African countries, shedding light on the impact and implications of their presence in the region.

Wagner Group

The Wagner Group ('Wagner') is a private military company that has served the interests of Russia since its first appearance in 2014.³ Based in Russia, this group is filled with former military personnel, prisoners promised freedom, job seekers, and other individuals driven by financial gain and/or ideological motivations. Wagner has been accused of participating in the annexation of Crimea and of supporting separatist forces in eastern Ukraine.⁴ Its involvement in the current conflicts in Syria and Ukraine drew international attention with accusations of human rights abuses and violations of international humanitarian law. Traces of their involvement change the trajectory of these conflicts as they contribute to war crimes and crimes against humanity. Until recently, the Russian government denied its affiliation with Wagner, asserting no official connection despite mounting evidence to

the contrary. This denial persisted even in the face of their involvement in conflicts, including the situation in Ukraine.

As the group continues to grow, so does its involvement throughout the world – one continent, one country at a time.

'Wagner is not here to defend the country'⁵

Wagner Group in Africa

Many mineral-rich African nations have experienced conflicts that have highlighted the need for heightened security measures, and reports suggest the involvement of Wagner in these regions. With an expanding footprint, Wagner has been reportedly or is alleged to have been found in various countries including the Central African Republic, Libya, Mali, Mozambique and Sudan. Through disinformation and violence, Wagner has been able to exacerbate the cycle of violence and impunity prevailing in the country, while pushing pro-Russian ideology.⁶

Central African Republic

It has been reported that since 2018, if not before, Wagner has been in the Central African Republic committing atrocities while promoting themselves as heroes.⁷ In Bangui, the country's capital, a statue stands in honour of Wagner for its perceived contributions.⁸ Additionally, a movie based in the Central African Republic portrayed these mercenaries as saviours protecting the country from rebel groups committing atrocities against civilians in their efforts to seize control. International organisations, however, paint a vastly different picture. According to Human Rights Watch, Wagner mercenaries have committed 'grave abuses against civilians with complete impunity' as it supports the government's fight against rebels.⁹ Reports of 'extrajudicial killings, torture and sexual violence' have been documented by international organisations through interviews and investigations.



Additionally, it is noteworthy that Wagner's involvement in the region is closely tied to securing mineral rights within the country.

Mali

In Mali, Wagner has used disinformation and dissatisfaction to exploit an already vulnerable security situation.¹⁰ It has garnered support from the local government and communities by aligning with their rejection of French interventions and neocolonialism concurrently orchestrating strategic actions, including the alleged falsification of graves.¹¹

Wagner, along with local armed forces, has been accused of human rights abuses throughout the country. A report by the United Nations suggests the killing of 'several hundred people who [were] rounded up in Moura, a village in central Mali'.¹² Further reports of torture, rape, pillaging, arbitrary detentions and enforced disappearances continue to highlight the destructive nature of Wagner.¹³

Libya

In Libya, it has been reported that Wagner has given its support to Khalifa Haftar, a prominent commander of a rebel group who harbours aspirations to assume leadership in the country. Similar to the allegations in the Central African Republic and Mali, Wagner has been accused of committing 'war crimes, including the intentional killing of civilians'.¹⁴

Lack of accountability

While exploiting the existing security challenges, Wagner not only amplifies them but also strategically extends its influence by acquiring ownership of various mines within the affected countries. This aggressive approach, in essence, echoes another form of colonisation, contributing to the destabilisation of countries and governments. Furthermore, the lack of accountability for the reported 'grave abuses against civilians' underlines the urgent need for international attention and intervention in addressing the far-reaching implications of Wagner's actions.

Many of those victimised by Wagner find themselves deprived of access to justice, facing significant hurdles in seeking accountability for the crimes committed against them.¹⁵ The limited avenues for legal recourse exacerbate the challenges

faced by victims, creating an environment where obtaining justice becomes a difficult endeavour.

Conclusion

Wagner's operations in different African countries epitomise the ethical and legal dilemmas associated with the use of mercenaries in contemporary conflicts. Its presence is marked by severe human rights abuses, strategic mineral acquisitions and a glaring lack of accountability, spotlighting a troubling trend requiring immediate global attention. With victims often silenced and bereft of justice, the urgent need for global attention and accountability becomes imperative. Only through collective efforts can we hope to curtail the impact of mercenary activities and safeguard the rights and dignity of those affected by Wagner's actions.

Only steadfast and cooperative endeavours can mitigate the impact of mercenary activities and safeguard the fundamental rights and dignity of those ensnared in the turmoil.

Notes

1. 'International Convention against Recruitment, Use, Financing, and Training of Mercenaries'. (Office of the United Nations High Commissioner for Human Rights (OHCHR)). www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-against-recruitment-use-financing-and. Accessed 22 December 2023.
2. Ibid.
3. The Wagner Group, founded by former Russian military officer Dmitry Utkin and Russian oligarch Yevgeny Prigozhin, is known for its involvement in various conflicts and is widely believed to have close ties to the Russian government. It gained prominence for its alleged participation in the annexation of Crimea in 2014 and subsequent operations in Eastern Ukraine, aligning with Russia's geopolitical objectives.
4. 'What is the Wagner Group, Russia's mercenary organisation?' (*The Economist*, 7 March 2022). www.economist.com/the-economist-explains/2022/03/07/what-is-the-wagner-group-russias-mercenary-organisation. Accessed 22 December 2023.
5. Sarah Carter and Debora Patta, 'How Russia's Wagner Group funds its role in Putin's Ukraine war by plundering Africa's resources'. (*CBS News*, 16 May 2023). www.cbsnews.com/news/russia-wagner-group-ukraine-war-putin-prigozhin-africa-plundering-resources/. Accessed 22 December 2023.
6. Ibid. See also United Nations, 'Mali: Independent rights experts call for probe into Wagner Group's alleged crimes'. (*UN News*, 20 January 2023). <https://news.un.org/en/story/2023/01/1133007>. Accessed 22 December 2023.

7. *See generally* Declan Walsh, 'Russia's Mercenaries: Are They in the Central African Republic?' (*The New York Times*, 27 June 2021). www.nytimes.com/2021/06/27/world/asia/russia-mercenaries-central-african-republic.html. Accessed 28 February 2024.
8. *See* n 5.
9. Human Rights Watch, 'Central African Republic: Abuses by Russia-Linked Forces'. (3 May 2022). <https://www.hrw.org/news/2022/05/03/central-african-republic-abuses-russia-linked-forces>. Accessed 28 February 2024.
10. Catrine Doxsee and Jared Thompson, 'Massacres, Executions, and Falsified Graves: The Wagner Group's Mounting Humanitarian Cost in Mali'. (Center for Strategic and International Studies, 11 May 2022). www.csis.org/analysis/massacres-executions-and-falsified-graves-wagner-groups-mounting-humanitarian-cost-mali. Accessed 22 December 2023.
11. *Ibid.*
12. United Nations, 'Mali: Independent rights experts call for probe into Wagner Group's alleged crimes'. (*UN News*, 31 January 2023). <https://news.un.org/en/story/2023/01/1133007>. Accessed 22 December 2023.
13. *Ibid.*
14. Ilya Barabanov and Nader Ibrahim, 'Wagner: Scale of Russian mercenary mission in Libya exposed'. (BBC News, 11 August 2021). www.bbc.com/news/world-africa-58009514. Accessed 22 December 2023.
15. *See* 'Mali: UN Experts Call for Independent Investigations into Possible International Crimes'. (OHCHR, 31 January 2023). www.ohchr.org/en/press-releases/2023/01/mali-un-experts-call-independent-investigation-possible-international-crimes. Accessed 28 February 2024.