State Bar of Texas International Law Section

INTERNATIONAL NEWSLETTER

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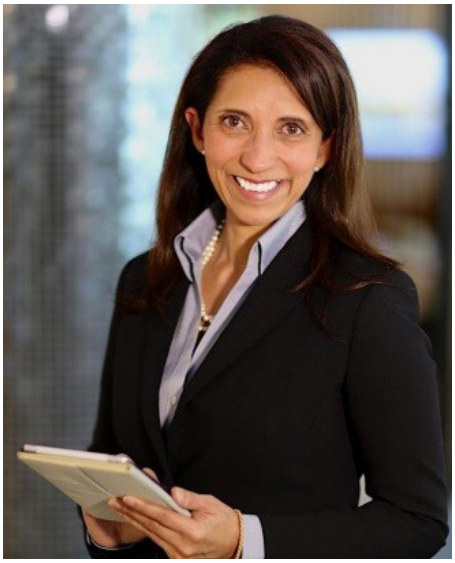
This fourth issue of the International Newsletter contains a collection of six articles related to international human rights law issues.

INTERNATIONAL LAW SECTION
THE STATE BAR OF TEXAS

IN THIS ISSUE

DEPARTMENTS

ARTICLES



GABRIELA N. SMITH

ILS Chair of the State Bar of Texas

KARLA PASCARELLA

International Human Rights Committee Chair

JOINT MESSAGE FROM GABRIELA N. SMITH AND KARLA PASCARELLA

At the risk of stating the obvious, we start this message by noting that we are living in interesting times where crises abound and access to real time information brings a heightened sense of responsibility. While all crises require attention and an urgent need for us to come together as a community of lawyers to develop solutions, there is no question that one of the most pressing is the humanitarian crisis. Perhaps it is hyperbolic to characterize the many forms of human rights violations around the world as one humanitarian crisis, and yet the fundamental thread that ties each of them into one is the fact that they can all be reduced to humans perpetrating wrongs against other humans.

These wrongs range from unintended consequences of "normal" business activity to some of the most egregious and widespread violations of basic human rights and it may be the varied nature of these wrongs that engenders an attitude of apathy or paralysis. It may be that we simply do not know what to do or how we can possibly effect change or develop solutions to problems such as alleged harms caused to civilians during military operations, denial of healthcare to women in various countries, or the ongoing issues arising from multiple migrant populations seeking asylum or entry into other countries, among many others.

Some of the articles featured in this special edition of the International Law Section's Newsletter highlight some of the wrongs that practitioners may not become aware of if we were not treated to the writings of the three winners of this year's International Human Rights Writing Contest, plus several others.

Are our clients aware of how changes in the geopolitical landscape are leading to an effective hardening of soft laws that may affect their operations in unanticipated ways? Beyond the hardening of some laws, the knowledge that uncertainties are lurking around various corners and could result in serious damages to our client's reputation is not farfetched given the headlines over the last few years, along with access to immediate information and "viral" news that gets millions of views in a matter of minutes.

Who could anticipate that a failure in mining operations might erase entire villages and place a company in the public eye for years? Or the recent decision by the English courts confirming that there is a duty of care between a parent company and those affected by the operations of its subsidiaries *(Vedanta Resources PLC and another (Defendants/Appellants) v Lungowe and others (Claimants/ Respondents)* [2019] UKSC 20) stemming from alleged pollution and environmental

damage to local waterways caused by mining operations? Or the response of certain governments in adopting laws that increasingly require companies' compliance with internationally recognized human rights principles in the performance of their operations?

As outlined in our statement of purpose, "the SBOT International Law Section's International Human Rights Committee is charged with providing information and guidance on this topic for practicing lawyers in Texas" whose clients are involved in international business and may be confronted with the human, legal, and reputational risk associated with violations of internationally recognized human rights. We hope to be of service to you in assisting your clients with these issues. We also hope that you now know that you can do something and join us in making a small difference in reducing the number of wrongs by humans against other humans (intended or unintended).

As we all learned in law school, "ignorance of the law is no excuse." Let us be part of the solution. ●

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Editor-in-Chief
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EDITOR-IN-CHIEF MESSAGE

This fourth issue of the International Newsletter of the International Law Section is my last as Editor-in-Chief. It has been my honor and privilege to serve as the EIC for the past year, and I want to thank Tom Wilson for giving me this opportunity. Tom has played an extremely crucial role in the process of upgrading the ILS, doing everything from leading the effort to establish the International Human Rights Committee of the ILS and serving as the Chair of the IHRC for two years, and then serving as the Chair of the ILS itself for the past year. Tom will become the next EIC for Volume 2 of the International Newsletter, which means this publication will be in very good hands going forward. I've offered to serve on his editorial team.

This fourth issue of the International Newsletter was intended to be dedicated to topics related to international human rights law issues, and we have accomplished that goal. In fact, six of the ten articles in this issue address international human rights matters, including domestic liability for corporate human rights violations, Afghan women's identity rights, how public health methodology can prevent human trafficking, modern slavery in supply chains, the applicability of universal jurisdiction to torture in Iran, and the trend in the practice of prevention detention. The first three topics listed above are covered by the articles written by the three winners of the ILS' International Human Rights Writing Contest, all of whom are students from the University of Houston Law Center. The other four articles cover a variety of legal topics, including indigenous problems in Mexico, immigration and minor criminality in Canada, a labor law amendment in Mexico, and the anatomy of a technology transaction.

In addition to their articles, each author has provided a brief synopsis of the article, an "about the author" summary regarding the author and his/her practice, and an image suggestion using key words or a photo or drawing that reflects the theme of the article. You'll find the synopsis in the table of contents, while the about the author piece and image suggestion will be included with the article.

The International Law Section's International Newsletter is committed to providing international lawyers in Texas and elsewhere with insights into as many aspects of international legal issues as possible. We have been fortunate to publish many timely topics thus far, and we welcome any comments or suggestions you may have. ●

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The International Law Section invites you, your company or firm to support the Section's activities and be recognized for your support at numerous ILS events and publications. As a member, please encourage your company or firm to step forward and become a supporter. For those of you in-house, you can also ask your outside counsel firms to support ILS. Only through such support will the ILS be able to provide several CLE presentations, a two-day Annual Institute, a quarterly International Newsletter, and opportunities to travel to a foreign country for CLE, cultural exchange, and entertainment. *12 months rolling . For sponsorship info, please contact Gabriela Smith at gsmith@gnslawpllc.com or call 214.901.2010.

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International Human Rights Committee Notice

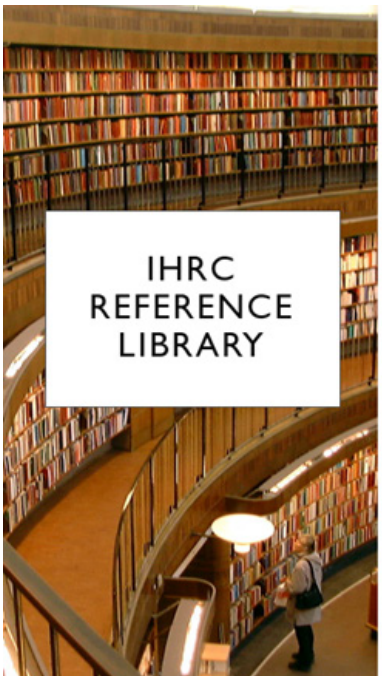
Dear ILS members and readers of the International Newsletter:

1. If you are an in-house counsel and haven't responded to the Committee's survey yet, please see our website (https://ilstexas.org/human-rights-committee) and submit your opinions on the issues presented in the survey; and

2. Please submit any ideas you may have regarding possible collaboration on the Committee's reference library (e.g., updates, articles, new documents, etc.).

You may send your collaborative ideas by email to Karla Pascarella, Committee Chair at kpascarella@pecklaw.com.

Members of the library subcommittee (Ariel Dulitzsky, Corrine Lewis, Marianne Ibrahim, and Rosemary Hambright) have been working extensively on updates and their work is worth a look. If you have not yet done so, please view the library at https://ilstexas.org/human-rights-committee.



Focus of State Bar Meetings: International Human Rights and Doing Business in Canada

BY THOMAS H. WILSON
Immediate Past Chair, Partner Vinson & Elkins, Houston

During the ILS meetings at the Texas State Bar Annual meeting in Austin, the Section sponsored two CLE presentations and held officer elections. In the first CLE presentation, Karla Pascarella, Chair of the ILS International Human Rights Committee, made a presentation on the issues for Texas lawyers caused by violations of international human rights norms and the role of the Committee in educating Texas lawyers on these issues.

In the second presentation, Brad Gold, Entrepreneur-In-Residence and Business Law Faculty at the McCombs School of Business, University of Texas, addressed doing Business in Canada. The discussion began with an examination of ethics and unconscious biases, and how we can all benefit from understanding our similarities, instead of focusing upon our differences. The discussion continued with a series of market-based case studies, intended to focus upon the similarities of doing business in Texas (and specifically Austin), and in Canada (specifically in Ontario). Case studies in the sale of alcohol, the workings of provincial politics, Kawhi Leonard and the Raptors, and the emergence of startup companies, revealed that there are striking similarities between the markets and interesting opportunities in both regions. However, some obvious differences between the markets came to light in the discussion around cannabis businesses, given the stark difference in legal landscape around this business market.

Tom Wilson, the immediate Past Chair of the ILS, finished the presentation by providing a comparison between employment and immigration law issues in Canada and highlighted the differences between these areas of the law in Texas in comparison to Canada. This presentation was the start of the ILS concentration on Canada for the new Bar year set to culminate with a trip to and meetings in Toronto in May 2020. ●

The following new Officers and Council members were also elected at these meetings:

Gabriela N. Smith
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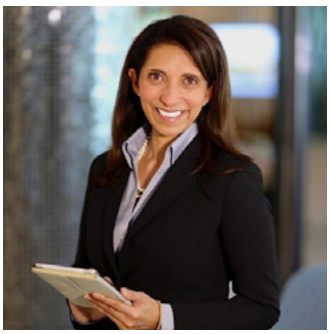

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Mind the Gap: Domestic Liability for Corporate Human Rights Violations in the US and Abroad

BY CHANTAL CARRIERE
University of Houston Law Center*
** First-place winner of the ILS' International Human Rights Writing Contest for 2019*

Introduction

Extraterritorial human rights violations are a global collective action problem. When subsidiaries of multinational corporations engage in tortious conduct in countries with weak legal systems or unenforced human rights legislation, victims are often unable to vindicate their rights in local courts. By contrast, parent corporations tend to be incorporated/headquartered in jurisdictions with robust legal systems, such as the United States, Canada, and European countries, but courts in these jurisdictions have circumscribed the circumstances in which foreign litigants can bring such claims. This is particularly true in the United States, where the Alien Tort Statute requires a significant degree of connection between the actions of the parent corporation and the alleged torts committed abroad.

Reticence in the United States to open up courts to foreign litigants contrasts with global efforts, at both international and national levels, to create both legislative and judicial solutions to the problem of liability for human rights abuses. Nations and corporations alike are implementing the United Nations Guiding Principles on Business and Human Rights.[1] The United Kingdom and France have both passed laws deterring human rights violations through diligent risk identification and management, which coincides with increased efforts

to facilitate access to court systems, as evidenced by recent case law out of Canada and the United Kingdom. In response to changing laws and norms, corporations are also implementing human rights due diligence throughout their operations, which could expose corporations to additional legal liability.

This snap-shot of the global response suggests that U.S. inaction does not unduly protect corporate interests at the expense of victims, who can target members of a corporate group by shopping for more favorable forums. U.S. corporations, therefore, are more exposed than U.S. jurisprudence would suggest.

The Alien Tort Claims Act

The United States is a logical forum for lawsuits against parent corporations for the tortious conduct of foreign subsidiaries. Foreign litigants must file suit under the Alien Tort Statute[2] ("ATS"), which provides the district courts have original jurisdiction over civil actions brought by an alien for a tort committed in violation of the law of nations or a treaty of the United States.[3] Despite broad language, as noted below, the United States Supreme Court has restricted ATS jurisdiction, making it commensurately more difficult for foreign litigants to bring suit.

Two recent cases are noteworthy. In *Kiobel v. Royal Dutch Petroleum Co.*,[4] a 2013 decision, the Supreme Court

held that the presumption against extraterritorial application of U.S. laws applied to the ATS. Plaintiffs must rebut the presumption by adducing conduct that sufficiently "touches and concerns" the United States, and mere corporate presence is insufficient.[5] The Supreme Court again addressed the ATS in the 2017 decision *Jesner v. Arab Bank*.[6] Although the real issue in *Jesner* was whether the ATS applies to corporations at all, Justice Kennedy dismissed the case by narrowly holding that the ATS does not grant jurisdiction over foreign corporations.[7] As a result of these two cases, plaintiffs may only file suit against domestic corporations that have engaged in sufficient conduct abroad that sufficiently touches and concerns the United States; foreign corporations and parent corporations that act solely within the United States are insulated. This result frustrates access to justiciable remedies for victims of human rights abuses committed abroad by subsidiaries of American corporations. By contrast, international efforts are driving corporate accountability initiatives, including access to remedy.

International Momentum to Hold Parent Corporations Liable

The most notable international corporate accountability initiative is the United Nations Guiding Principles ("UNGPs"). The UNGPs were developed by John Ruggie and adopted by the UN Human Rights Council in 2011. They consist of 31 principles within a three-pillar framework, which implements the UN's "protect, respect, and remedy" framework and provides a guide for corporations to address human rights in their business operations.[8]

The first pillar is the state's duty to protect against human rights abuses, thereby affirming state obligations under the United Nations Declaration of Human Rights.[9] The second principle provides: "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations."[10] The commentary to this principle recognizes that while countries are not required under international law to regulate the extraterritorial activities of businesses incorporated within their borders, there are strong policy and rule of law reasons to do so. States can do so through reporting requirements, implementing the Guidelines for Multinational Enterprises of the Organisation for Economic Co-operation and Development,[11] by encouraging adoption of the Voluntary Principles on Security and Human Rights,[12] or through extraterritorial legislation and enforcement of either criminal law or by extending jurisdiction for civil causes of action.[13]

The second pillar is the corporate responsibility to respect human rights, "which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved."[14] It sets out a societal expectation that corporations will comply with and uphold human rights standards in their operations: "[t]he responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of a state's abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights."[15]

Human Rights Due Diligence ("HRDD") is comprised of three main elements: corporations must avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur, and seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.[16]

In order to meet these obligations, Principle 15 requires corporations have policies and processes in place that outline the corporation's commitment to human rights; a due diligence process that identifies, prevents, mitigates and accounts for the corporation's impact on human rights; and a process to remediate any adverse impacts.[17] Principle 13 states that a company is not only responsible for assessing the likely impact of its own actions, but also the actions of third parties in the business relationship and value chain, including suppliers, consumers, and distributors.[18] Principles 17 through 21 define and solidify the elements of HRDD. They establish a contextual approach to HRDD, but stipulate that HRDD must be ongoing and the corporation must take all reasonable measures to reduce risks, particularly those deemed most severe. The process must involve consultation with affected stakeholders, and the corporation must objectively monitor their human rights impacts in a positive feedback cycle based on objective indicators to ensure the measures they undertake reduce risk.[19]

The third pillar is providing greater access to remedy for victims of human rights abuses, both judicial and non-judicial. Principle 25 is the foundational principle, and provides that "[as] part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy."[20]

Principle 26 speaks directly to state-based judicial remedies: "States should take appropriate steps to ensure the effectiveness of domestic judicial

mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy."[21] The commentary suggests that states should act to remove barriers to legitimate claims where a judicial remedy is a necessary part of the solution, or other judicial and non-judicial remedies are not available. The commentary also identifies the following legal and practical barriers. Legal barriers include laws that allow corporations to avoid liability, when claimants cannot access home-state courts and face a denial of justice in a host state, and discriminatory levels of legal protection for marginalized and vulnerable populations, including indigenous peoples and migrant workers. Practical barriers include the costs associated with litigation, unavailability of lawyers, procedural barriers to aggregating claims, and inept criminal justice systems. Systemic problems include judicial corruption.[22]

While the text of the UNGPs suggests that host states (states in which corporations with overseas activities are incorporated) are under no obligation to open their courts, that is logically inconsistent with the underlying goals of the UNGPs. The UNGPs recognize corporations may act in countries with corrupt, inaccessible or inadequate legal systems. In these situations, host states are incapable of policing corporations and protecting human rights, and plaintiffs are forced to find other forums in which to vindicate their rights. More to the point, these problems are often at the heart of the collective action herein described. To say that the solution is domestic reform of legal systems to ensure all countries have functional judicial branches that facilitate access to justice and deter human rights violations merely restates an optimal conclusion. Facilitating access to judicial remedies in the interim requires the necessary inference that countries in which corporations with overseas activities are incorporated should also provide access to judicial remedies where appropriate or remedies would be otherwise impossible.

Based on this inference, ATS jurisprudence is inconsistent with the UNGP's pillar 3 goal of facilitating access to remedy. Although this conclusion is concerning, U.S. practical nonobservance of pillar 3 does not undermine global efforts. Countries are implementing legislation that addresses corporate responsibility for human rights violations. Moreover, incremental changes in Canadian and English common law are facilitating access to courts.

Implementing Pillar 1: Implementing the State's Duty to Protect Human Rights

Some countries in which corporations are incorporated have enacted legislation requiring corporations to identify actual and potential human rights violations, as well as develop human rights violation prevention plans. Corporations that do not comply may be exposed to legal liability and administrative penalties. This section briefly surveys efforts in the UK, France, Switzerland, and Australia.

To support the UNGPs, the UK has amended the UK Companies Act and passed the Modern Slavery Act,[23] discussed further below. The UK also commits to the following actions: lobbying foreign governments to implement the UNGPs, and working with the International Code of Conduct Association to monitor compliance with "the code."[24]

The UK Companies Act 2006 requires all medium and large companies in the UK to prepare a strategic report along with their annual report. It also obliges directors to consider company success in light of the corporate impact on employee and community welfare.[25] The regulations to the UK Companies Act were amended in 2013 to require disclosures of the company's position on human rights issues in the strategic report.[26]

The UK Modern Slavery Act 2015 (the "Act") requires that companies with over 36 million British Pounds of revenue must publish the steps they take to ensure that human trafficking and slavery are not a part of their business or supply chain. The Act requires that all commercial organizations include a "Slavery and Human Trafficking" statement each financial year setting out the steps taken to insulate the business supply chain from slavery and human trafficking. The statement must include specific information about the business structure and supply chain, corporate policies and due diligence, and employee training. Additionally, the corporation must identify parts of the company most exposed to the risk of human trafficking and slavery, and outline steps taken to manage that risk, as well as an assessment of the effectiveness of its efforts.[27] The Secretary of State is empowered to enjoin non-compliant corporations,[28] but the Act itself does not require that the organization take any actions pursuant to its statement. The effectiveness of the legislation is yet to be determined.

France passed a law in March 2017 imposing a duty of care on companies to exercise vigilance. The law has two stated goals: to prevent violations of human rights by encouraging multinational corporations to act responsibly, and to allow remediation for victims who are injured[29] by companies incorporated or registered in France that employ either 5000 employees in France or 10,000 through their subsidiaries for a period of at least two years. Companies must have a "vigilance plan" that identifies potential impacts on human rights, fundamental freedoms, health and safety caused by parent and subsidiary actions, as well as other companies with which it has an established commercial relationship. Companies must implement the plan and prevent violations, and then monitor and report on their actions. Non-

compliance can expose the company to sanctions and civil liability; a victim may sue if their human rights or fundamental freedoms are harmed because the corporation failed to adhere to the obligations stated in the vigilance plan.[30]

Switzerland has also proposed a similar law.[31] A coalition of Swiss civil society organizations called "The Responsible Business Initiative" is trying to amend the Swiss constitution in order to create a binding framework to protect human rights and the environment abroad. A vote is expected in 2019. If successful, the amendment would oblige that companies who are registered in or have their principal place of business in Switzerland, as well as their subsidiaries, carry out a human rights due diligence impact assessment, and take measures to prevent harm. Companies that are within the scope of the amendment could be sanctioned for non-compliance, unless they prove they exercised due care. Subject companies would be liable for damage caused by companies under their control where they have, in the course of business, committed violations of recognized human rights or environmental standards, unless they can show that they exercised due care.[32]

In December 2018 Australia passed modern slavery legislation modeled after the UK Modern Slavery Act.[33] A joint parliamentary committee released a report in 2017 suggesting that the government should consider enacting mandatory reporting legislation. The report was followed up with a consultation paper. At present, it isn't clear which corporations will be subject to the regime, the scope of reporting requirements, or the amount or types of sanctions for non-compliance.

As these examples demonstrate, many countries are introducing legislation that forces corporations to develop and publicize due diligence plans, which has a role to play in paving the way for access to remedy, as will be described below.

Implementing Pillar 3: Providing Greater Access to Remedy

In the absence of a statutory cause of action, judges are accommodating new causes of action through incremental developments in common law. Litigants have traditionally had to overcome two challenges: *forum non conveniens* and failure to state a claim.

Under the doctrine of *forum non conveniens*, courts have liberally dismissed extraterritorial human rights litigation because the parties and evidence are located in a foreign jurisdiction, suggesting the issues are better litigated elsewhere. However, in two recent Canadian cases, *Garcia v. Tahoe Resources*[34] and *Araya v. Nevsun Resources Ltd*,[35] judges have declined to dismiss cases because of significant corruption in the alternative forum.

Even when the court accepts jurisdiction, however, often the connection between the plaintiffs and the parent corporation is too attenuated to maintain a successful cause of action. In a tort theory of liability, either the corporation asserts the doctrine of separate legal entity (the corporate veil) as a defense, or plaintiffs fail to establish that the parent owed them a duty of care. However, recent cases suggest that the courts are more willing to entertain creative tort theories that impose liability directly against the parent corporation, rather than through an agency theory. For example, in *Nevsun* the British Columbia Court of Appeal allowed claims based on customary international law to go forward. The decision was appealed to the Supreme Court of Canada, which has yet to rule on the matter.

Courts are also allowing duty of care theories to proceed based on representations that the company adheres to internationally recognized social corporate responsibility policies like the UNGPs. This was one of the theories of liability in *Nevsun*, and also in a 2013 Ontario case called *Choc v. Hudbay Minerals*,[36] which is proceeding to trial. The UK courts have also allowed claims based on similar tort theories to proceed on the merits in *Okpabi and others v Royal Dutch Shell Plc and another*[37] and *Vedanta Resources PLC and anor. v Lungowe and others*.[38] In *Vedanta*, the UK Supreme Court allowed a claim to proceed against the parent corporation because the parent corporation held itself out as exercising a degree of control and care over its subsidiaries, which is consistent with corporate implementation of the second pillar of the UNGPs.

These cases are particularly interesting because, rather than solely argue that the court should pierce the corporate veil, they focus on the corporate acceptance and promulgation of codes of conduct and public statements supporting corporate social responsibility, including standards such as the 2006 IFC standards on social and environmental performance and the Voluntary Principles on Security and Human Rights. The question that remains is whether, at trial, public statements about their diligence and monitoring activities and adoption of voluntary CSR standards can create public expectations and evidence sufficient proximity to give rise to legal liability. Because these cases have not yet been heard on the merits, it is unclear how these arguments will be received in court.

Conclusion

Despite changes and recent judicial improvements, pursuing a claim and enforcing a judgment in a foreign state is an uphill battle. Victims of human rights abuses committed by a subsidiary face numerous procedural and substantive challenges to vindicating their rights. These challenges are particularly acute in the United States. Under the ATS, district courts only have jurisdiction over lawsuits against domestic corporations to clear conduct in the U.S. that brings

forth violations in the foreign jurisdiction, and such conduct is unlikely.

These challenges are more apparent when compared with the goals and actions outlined in the UNGPs, which recognize the challenge posed by human rights violations committed by transnational corporations, and affirms that states and corporations have a role to play in preventing abuses, enacting effective legislation and facilitating access to justice.

In contrast to the United States, however, other countries such as the UK and France are enacting legislation that imposes positive obligations on corporations to manage their risk of violating human rights. These laws will require parent companies, and their subsidiaries, to manage their human rights responsibilities. Courts are also engaged in creative law-making, in some cases permitting foreign litigants access to courts, and also allowing for creative causes of action that permit the direct imposition of liability. The precise role corporate promotion of and adherence to human rights due diligence will play in these new causes of action remains undetermined; however, these examples demonstrate the countries are acting to solve the collective action problem posed by transnational human rights violations, and are ultimately providing greater access to judicial remedy. Therefore, although litigating in the United States poses significantly greater challenges, U.S. corporations may face the same types of law suits in other jurisdictions.

●●●

Chantal Carriere graduated with law degrees from both the University of Houston Law Center and the University of Calgary in May 2019. ●

Endnotes

1 UNHRC, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework—Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, 17th Sess., Agenda Item 3, UN Doc A/HRC/17/31, 21 March 2011 [hereinafter *Ruggie*].

2 The Plaintiffs also relied on the Torture Victim Protection Act of 1991 28 USC ch. 85 § 1350 but those claims were dismissed and irrelevant for the purposes of this memo.

3 28 U.S.C. § 1350 (2012).

4 133 S. Ct. 1659, 1665 (2013).

5 *Kiobel*, 133 S. Ct. at 1669 (internal citation omitted); this meaning of "touch and concern" has split the circuit courts, and given rise to much academic commentary. *See, for example*, Harvard Law Review Notes: "Clarifying Kiobel's 'Touch and Concern' Test", 130 Harv. L. Rev. 1902.

6 John Bellinger, Andy Wang, "Jesner v. Arab Bank: The Supreme Court Should Not Miss the Opportunity to Clarify the "Touch and Concern" Test", Lawfare, October 10, 2017, https://www.lawfareblog.com/jesner-v-arab-bank-supreme-court-should-not-miss-opportunity-clarify-touch-and-concern-test. *In re Arab Bank, PLC Alien Tort Statute Litig.*, 808 F.3d 144 (2d Cir. 2015), as amended (Dec. 17, 2015).

7 *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018).

8 These principles are echoed in and supported by the UN Global Compact. United Nations Global Compact, "The Ten Principles of the UN Global Compact," https://www.unglobalcompact.org/what-is-gc/mission/principles.

9 Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

10 Ruggie, *supra* at 5.

11 OECD, *OECD Guidelines for Multinational Enterprises* (2011 ed.), http://mneguidelines.oecd.org/guidelines/.

12 Voluntary Principles on Security and Human Rights, http://www.voluntaryprinciples.org/what-are-the-voluntary-principles (last visited Jul. 5, 2019).

13 Ruggie, *supra* note 1.

14 *Id.* at 10.

15 *Id.* at 13.

16 *Id.* at 4.

17 *Id.* at 15.

18 *Id.* at 14.

19 *Id.* at 17.

20 *Id.* at 27.

21 *Id.* at 28.

22 *Id.* at 28-29.

23 Companies Act, 2006, c.46; Modern Slavery Act, 2005, c. 30; HM Government, Good Business: Implementing the UN Guiding Principles on Business and Human Rights, (September 2013), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/236901/BHR_Action_Plan_-_final_online_version_1_.pdf; HM Government, Good Business: Implementing the UN Guiding Principles on Business and Human Rights May 2016 Update 8 (May 2016), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/236901/BHR_Action_Plan_-_final_online_version_1_.pdf [hereinafter *National Action Plan 2016*].

24 National Action Plan 2016 at 10.

25 Companies Act, s. 172.

26 *Id.*, s. 414(c)(7)(iii).

27 *Id.* at s. 54(5).

28 Additional guidance to s. 54(9) is available at Transparency in Supply Chains: A Practical Guide 2017, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/649906/Transparency_in_Supply_Ch ains_A_Practical_Guide_2017.pdf.

29 Sandra Cossart, Jerome Chaplier and Tiphaine Beu De Lomenie, "Developments in the Field, the French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All", 2 Business and Human Rights J. 317, 320 (2017); Stéphane Brabant, Elsa Savourey, "Loi relative au devoir de vigilance, des sanctions pour prévenir et réparer?", Revue Internationale de la Complianceet de l'Éthique des Affaires (2017).

30 The French constitutional court has declared some of the fines unconstitutional; however, an in-depth treatment of how fines can arise and the elements required to impose fines are beyond the scope of this paper. *See* Cossart, *supra*.

31 *Id.* at 20.

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Where is My Name? The Struggle for Afghan Women's Identity Rights and the Need for International Intervention

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Introduction

The past year has proved to be revolutionary for women around the world. From Hillary Clinton on the brink of presidency,[1] to Saudi Arabian women finally getting the right to drive,[2] women are conquering social, cultural, and political norms. But for every ground-breaking stride made in furtherance of equality lurks the inevitable shadow of inequality and marginalization. In Afghanistan, a woman is never identified by her given name, nor is she recognized on legal documents such as her child's birth certificate or even her death certificate. For Afghan women, the lack of identity and recognition is tied to deep historical, social, political, and religious roots. In this article, I address the identity crisis that Afghan women have faced for centuries, and the legal remedies that can be implemented to curtail the crisis.

#WhereIsMyName social media campaign poster in Afghanistan. (taken from the New York Times article https://www.nytimes.com/2017/07/30/world/asia/afghanistan-womens-rights-whereismyname.html)

Background: #WhereIsMyName Campaign

"My Goat" or "My Chicken"—these are names that Afghan women often respond to.[3] A woman's name does not appear on her child's birth certificate, on the invitation to her wedding, nor on her own tombstone.[4] Eight out of ten internally displaced Afghan women do not have proper identity papers.[5] Only 38 percent of Afghan women possess a *tazkera*, the primary national identity document, compared to the 90 percent of Afghan men with access to such documents.[6] In an effort to call attention to the inequality Afghan women face regarding their identities, activists from across the country started the #WhereIsMyName campaign.[7] The campaign's mission is to encourage women to speak up about the right to be addressed by their given names and to "break the deep-rooted taboo that prevents men from mentioning their female relatives' names in public."[8]

The campaign has garnered the attention of thousands of people across the country, including people in positions of power, such as members of Parliament and celebrities.[9] Bahar Sohaili, women's rights activist and prominent member of the #WhereIsMyName campaign, has

explained that the aim of the campaign is to put the identity issues at the forefront of the Afghan government's to-do list and "enact laws to protect women's rights."[10] Throughout the development of the campaign, Afghan men have also begun to participate in the conversation.[11] In a telling account of the taboo of calling an Afghan woman by her name, Farhad Darya, a famous Afghan singer, shared that his male fans would express disdain anytime Darya would refer to his wife or mother by their names in public.[12]

A member of the Afghanistan High Court has also spoken out in response to the attention the campaign has attracted, stating that implementing legal safeguards for listing women's names on documents is not the problem, but rather the social sentiment in allowing women's names to be mentioned.[13] "It may invite unwanted chaos," he stated.[14] Taking into account the campaign's mission with the support behind it, against the long-standing tradition of treating women as second-class citizens, the need for legal action in the form of safeguarding women's rights in Afghanistan is apparent and imperative.

Afghan Women's Organizations: Revolutionary Association of the Women of Afghanistan

A. RAWA's Inception

The Revolutionary Association of the Women of Afghanistan (RAWA) was formed in 1977 by Meena Kishwar Kamal when she realized there was a need for an independent women's organization in the social and political climate of Afghanistan at the time.[15] What began as a group that supported opposition to Soviet occupation while helping women and children impacted during that era has evolved into a revolutionary organization that aids women throughout the changes that face Afghanistan.[16] The organization's mandate includes nine key points:

1. Seeking women's emancipation;
2. Advocating for the separation of religion and politics;
3. Supporting equal rights of ethnic groups;
4. Encouraging economic democracy;
5. Drawing women into social and political activity;
6. Providing service to women and children in the education, healthcare and financial areas;
7. Establishing relations with other national and international pro-democracy and pro-women's groups;
8. Supporting other worldwide global freedom and women's movements; and
9. Committing to "struggle against illiteracy, ignorance, reactionary, and misogynistic culture."[17]

> "Only 38 percent of Afghan women possess a tazkera, the primary national identity document, compared to the 90 percent of Afghan men with access to such documents."

B. RAWA's Methodology

What is important to understand about RAWA is its novel approach to the role of a feminist-nationalist organization.[18] Rather than creating a forceful opposition to the Afghan patriarchy, RAWA embraces negotiation and reworking the gender roles and norms in the setting of smaller, grassroots groups to create change within the Afghanistan social and political system.[19] RAWA believes in the power of clandestine work and exclusion, therefore limiting membership to its privately run programs where the feminist-national vision can be best experienced and understood.[20] RAWA's projects and members protect their identities through aliases to avoid government sanction or retaliation from Afghan fundamentalists.[21] The organization's overarching goal is "for a secular democratic Afghanistan" because it believes "that this provides the best opportunity for women's equality and the respect of human rights."[22]

In tackling the issue of women not being identified by their names, and consequently being referred to by degrading "nicknames" or simply having their names go unknown, the RAWA model for creating change is to target the family unit.[23] Working within domestic spaces is "an essential element of RAWA's political project to alter men's and women's epistemologies of gender relations and increase the value of women within the family and household and, ultimately, as part of social and political spheres outside the home."[24] It is RAWA's belief that using the traditional Afghan family structure as a focal point and negotiating and reworking gender relations within this structure "has the potential to destabilize patriarchal structures and to re-construct gender equitable systems."[25]

Another notable aspect of the way that RAWA functions is its decision not to allow male members, but "actively including men as supporters."[26] This reflects RAWA's overall goal to continue to create safe-spaces for women to deconstruct social and political norms that marginalize them, all the while embracing the benefits that positive relationships with men can bring.[27] This method of male involvement in RAWA's female-driven efforts "helps to diminish patriarchal notions of women's inabilities and limited capacity in the Afghan family and larger social structures."[28]

C. RAWA in the United States

In an effort to garner American support, RAWA launched its sister organization, the Afghan Women's Mission.[29] This organization aims to raise funds for RAWA's cause and build awareness by disseminating information in the United States.[30] As the co-director for the Afghan Women's Mission, Sonali Kolhatkar explains that the work of the organization is essentially "subverting U.S. policy in Afghanistan by the simple act of funding women-led projects there and helping Americans make donations to causes that are very far reaching that aren't just about band-aids and short-term change, but are about long term political change."[31]

Maintaining Islamic Roots While Pushing for Liberalization

More often than not, Western feminists use religion to justify subordination and oppression of women, rather than using it to help women liberate or actualize themselves.[32] It is important to explore this facet of feminism in understanding how Western feminists want to aid the Afghan women in their lack of identity, while also maintaining a sense of respect for the religion to which their entire existence has been tied. This issue with feminism and religion is that traditional liberal feminists view religion as "unchangingly patriarchal" and therefore form arguments strictly against it.[33] But this limiting view prevents liberal feminists from truly understanding the role of Islam in the everyday life of Muslim women living in non-liberal societies.[34] Viewing religion through this lens only helps to paint a picture of Muslim women as ignorant, and therefore in an effort to help these women, feminists must put aside their liberal judgments and aim to understand the value of religion in Afghan women's culture.[35] The omnipresence of Islam in the lives of Afghan women reflects "a complex reality in which religion plays a much more multifaceted role, where it coexists with the demand for rights that overlap with liberalism but may not come from a liberal understanding of self or society."[36] Muslim women, however, use this victimization that Westerners have ingrained regarding Muslim women to their advantage in garnering support from the West.[37] A chief example of this exportation of the victim narrative is seen through the work of RAWA.[38]

At its inception in the 1980s, the organization distributed photos of Afghan women under dire circumstances and facing brutality as a means of establishing awareness and financial support.[39] These representations appealed to the first world feminists as an urgent cause that needed immediate support.[40] This external portrayal stood, and continues to stand, in contrast to RAWA's internal strategy of empowering Afghan women to "redress their own problems," one of the organization's key goals.[41] In the movement for establishing identity rights for Afghan women, a parallel method can also yield Western support for change. If Afghan women and groups such as RAWA continue to disseminate the narrative of the powerlessness they face, they are more likely to build a stronger international alliance that can trickle down and create change at the local level in Afghanistan. Though the effects of a lost identity do not seem to have as strong of a sensory impact as do images of physical brutality, the same result is possible. Western women are in an era of speaking up about the way society has failed them,[42] and their receptivity to other women facing similar or worse circumstances is high. RAWA and Afghan women can continue their local efforts in encouraging women to create change for themselves, all the while appealing to Westerners who have the resources, both financial and social, to make a greater impact.

Reasons Why Afghan Women Have Difficulty Securing Their Own Rights

One of the key factors in why women struggle to establish their rights and admonish those who violate them is the lack of justice afforded to them.[43] When women seek the help of the Afghan justice system, the result is usually a slap on the wrist for the person who may have abused them or violated their fundamental rights, or the report is outright overlooked.[44] As the UN Assistance Mission put it, "women are denied their most fundamental human rights and risk further violence in the course of seeking justice for crimes perpetrated against them."[45] This lack of responsiveness from the justice system is also tied to women's lack of identification.[46] "Without civil documentation, women are particularly at risk when it comes to the judicial system and inheritance or familial disputes."[47] The identity problem puts Afghan women in a circular problem of not being able to secure their own rights because of their lack of proper identity, which in turn leads to their continued suppression of rights in other aspects of their lives.

Conclusion

The role of identity in both the social and political contexts is powerful. A person's perception of the world and their place in it is undeniably made up of how the world in turn sees them. For Afghan women, the power of identity has succumbed to the country's deep cultural roots and taboos. The social factors in pushing for reform in Afghan women's rights, particularly in the area of recognition and identity, are endless. But the legal factors are marked and substantial. Simple rights such as listing her name on her child's birth certificate, or on her own deathbed, should no longer be a topic of mere social taboos, but instead a movement for legal change.

Afghan women and their allies have to explore the toolkit that is currently at their disposal. The grassroots work of RAWA is essential to a successful campaign for women's identity rights because it starts at the most local level and educates women on how to challenge the traditional constructs of their communities and families. Second, Afghan political leaders at the forefront of women's liberalization policies, along with supportive international parties, should educate themselves on the procedures available through the various international treaties and laws to which Afghanistan is bound. These procedures provide for tedious, but hopefully successful routes to pressuring Afghanistan into creating laws that protect women's identity rights and give women greater access to the political process. These procedures exist to keep countries like Afghanistan in check, and it is imperative that other countries use them to do just that. From the international human rights perspective, to know there are women in Afghanistan who go to their grave without ever being truly identified or known apart from their roles as homemakers, mothers, and wives, is staggering, and must therefore be addressed and changed at an international level.

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Armed with Data: How Public Health Methodology Can Move U.S. Human Trafficking Law from Punishment to Prevention

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Introduction

In 2015, the U.S. Department of Health and Human Services announced its intention to address human trafficking as a public health problem and encouraged state health departments to do the same.[1] This official recognition of the opportunities, indeed the imperatives, of applying public health methodologies to address human trafficking coincided with concrete efforts by some states and private entities. This article will explore why and how public health methodologies are essential to addressing gaps in U.S. policy to better comply with international protocols and global human rights laws.

At the heart of almost every federal legal or regulatory scheme for human trafficking is a fundamental misunderstanding of the concepts of consent and coercion, conflicting with international protocols. Whereas the UN Protocol explicitly declares the consent of the victim as irrelevant, the Trafficking Victims Protection Reauthorization Act ("TVPRA") does not address consent. Statutory silence on consent results in a number of practical disadvantages for trafficked persons who cross our borders: from lack of access to court remedies for labor fraud, to the threat of criminal penalties for sex trafficking victims, and the difficulty and subjectivity

of T-Visa[2] eligibility, American legislation and jurisprudence wrongly focuses on the innocence of trafficked persons as a prerequisite for protection. The result is a system that criminalizes victims and favors prosecution over protection, prevention, and partnerships.

Trafficking is a Public Health Problem

Approaching the fight against human trafficking as a public health problem makes sense because of the unique health and legal issues trafficking engenders, both among its victims and the public at large.

In general, trafficking victims suffer physical and psychological health issues stemming from inhumane living conditions, poor sanitation, inadequate nutrition, physical and emotional violence, dangerous workplace conditions, and general lack of quality healthcare.[3] More specifically, certain risk factors and health impacts uniquely correlate

with different types of trafficking. For example, sex trafficking victims commonly report mental health disorders including depression, flashbacks, and memory loss; they also experience physical symptoms related to STD/STIs, malnutrition, and violent injuries.[4] Meanwhile, labor trafficking victims most commonly report exhaustion, dehydration, heat stroke/hypothermia, repetitive motion injuries, respiratory disorders, and skin infections.[5]

Given the increasing numbers of trafficked persons and the lack of access to adequate healthcare, it follows logically that this significant yet discrete cohort, left untreated, presents population-level health impacts. For example, in recent years media attention focused on the links between international sex trafficking and the spread of tuberculosis and SARS.[6]

In addition to these practical considerations, applying public health principles to human trafficking law makes theoretical sense. At least one legal scholar has understood and clearly articulated the intuitive parallels between our legal and public health systems, asserting that the two share a foundation of normative values, which should guide lawmakers in determining the proper scope of trafficking legislation.[7]

> "Population health norm lies deep within the common law, as exemplified by the maxims of *salus populi suprema lex* and, less obviously, *sic utere,* as well as in tort law's emphasis on injury prevention. The norm is also deeply rooted in the constitutional concept of the police power and formative conceptions of federalism and due process. Even more fundamentally, the protection of population health may be viewed as one of the motivating justifications for a legal system. In effect, we have laws in part to ensure our collective health and well-being, goods that we value and that we cannot achieve alone in a state of nature. Thus public health's normativity aligns with law's normativity."[8]

What, then, is public health normativity? In 1988, the Institute of Medicine defined public health as "what we, as a society, do collectively to assure the conditions for people to be healthy."[9] The hallmarks of any public health methodology are evidence-based research, prevention, behavior modification, and partnerships. Policy makers should understand the distinct principles underlying these overlapping components, identify challenges and existing opportunities to apply those principles to trafficking interventions, and evaluate programs that exemplify these methodologies.

Evidence-based Research

As public awareness around human trafficking grows, lawmakers feel pressured to demonstrate their willingness to respond. Unfortunately, few existing studies provide sufficient data to inform effective solutions.[10] All too often the criminal law model fails to base interventions on proven strategies, relying instead on a piecemeal approach.

In developing a scientific approach to domestic violence prevention (an analogous problem), public health experts identified four steps that resonate in the context of human trafficking: (1) defining the problem by not merely counting cases but also collecting "information on the demographic characteristics of the persons involved, the temporal and geographic characteristics of the incident, the victim/perpetrator relationship, and the severity and cost of the injury"; (2) identifying risk factors; (3) developing and testing interventions based on that data; and (4) implementing proven interventions and assessing cost-effectiveness.[11]

Closely linked to the idea of evidence-based research, public health methodologies also incorporate epidemiological processes that could inform effective policies, such as public health surveillance. Public health surveillance is the "ongoing, systematic collection, analysis, and interpretation of health data essential to the planning, implementation, and evaluation of public health practice, closely integrated with the timely dissemination of these data to those who need to know."[12] For more than a century, state laws and regulations have required physicians to track and report contagious diseases in order to prevent major outbreaks.[13] Similarly, public health surveillance in the trafficking context could identify geographic areas with high incidence of trafficking, allowing governments to focus program resources on those areas. Building this system of data collection, analysis, and dissemination could inform prevention strategies, identifying at-risk individuals before they are exploited.

Challenges to Data Collection

Given the clandestine and multifarious nature of human trafficking, paltry data exists on the distribution of victims, traffickers, buyers, and exploiters. What little data does exist can be inaccurate, incomplete—or worse—false. Because data on victims and traffickers typically come from multiple sources and jurisdictions, collection and analysis is often hampered by disparate ownership, legal privacy concerns, unwillingness to share, or simply ignorance of what data is available.[14] Criminal data is collected by law enforcement, while data on victims is collected by community groups and service providers; the result is fragmentation. Synthesizing these disparate sources would provide a fuller picture of the trafficking cycle.[15]

Similar issues plague data collection around risk factors and, while copious information about *correlates* of human

trafficking exists, not all factors *correlated* with trafficking are true risk factors.[16] Multiple agencies have developed their own tools for identifying trafficking victims, however, their predictive validity is largely untested.[17] Widespread use of screening protocols, in the absence of more sensitive data, misses entire subclasses of victims, or burdens clinicians and health systems with tools that inaccurately identify victims. Furthermore, even if clinical screening tools prove reasonably predictive, clinicians and agencies may be unable to assist the trafficked patients they identify, if victim services are not available.[18] To identify or expose someone as a trafficking victim, without a plan to adequately address her complex rehabilitative needs, can further endanger the patient. To ensure that treatment for trafficked persons ultimately improves health outcomes, researchers should engage in systems-level research to identify best practices.[19]

On a fundamental level, the potential for synthesized methodology of data collection and classification is hampered by the above discussed ambiguities around what defines a trafficked person.[20]

There are also legal and policy obstacles to the efficacy and ethics of data collection. For example, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), which limits and regulates the use and disclosure of certain protected health information by covered healthcare entities, presents serious barriers to the kind of data gathering and research necessary to develop effective strategies to combat human trafficking. A recent report found the complexity and ambiguity of the law generates widespread confusion and misinterpretations about its mandates among providers.[21] These impacts especially hamper community research and collaboration, which are essential tools to gather meaningful data.[22]

Opportunities for Coordinating Data Collection

Because human trafficking is a particularly acute issue within complex global economic supply chains, data analytics can provide a platform to uncover sensitive situations that pose human rights risks.[23] The need for more data was recognized by Congress as early as 2003, when legislators authorized then-President George W. Bush to create an interagency task force to oversee federal efforts to combat human trafficking.[24]

> "Given the clandestine and multifarious nature of human trafficking, paltry data exists on the distribution of victims, traffickers, buyers, and exploiters. What little data does exist can be inaccurate, incomplete—or worse—false."

One idea to streamline some of the gaps in data collection would be for the CDC to include questions related to human trafficking risk factors on its annual Behavioral Risk Factor Surveillance System Survey ("BRFSS"). The largest ongoing survey in the world, BRFSS collects information regarding population health indicators annually, and is used by state health departments to prevent pandemics.[25] Adding questions regarding human trafficking indicators would force state health officials to collect measurable data across a uniform set of factors.

Another opportunity exists in laws that preempt HIPAA by exempting reporting of suspected abuse. Some legal scholars have advocated for amending the federal rules to explicitly include a HIPAA trafficking exemption, while others advocate for including trafficking in state statutes that already mandate reporting abuse. As of 2016, ten states had added child sex and labor trafficking to their mandatory reporting schemes, while an additional four state statutes now solely provide for reporting sex trafficking in children.[26] None of the statutes require reporting of adult victims.[27] Meanwhile, the federal government in 2017 proposed amendments to its Title X funding scheme for healthcare organizations that provide family planning services, which would require grantees to report suspected trafficking incidents.[28]

While mandatory reporting laws have rarely received judicial review, the few Supreme Court decisions on Fourth and Fifth Amendment challenges to such laws have granted substantial deference to state legislatures to compel reporting.[29] As such, legal scholars have argued for a reassessment of the constitutional parameters of health information privacy. Conditions now are ripe for such a reassessment, with recent federal earmarks for digitizing health information and a general excitement in policy circles around the potential for big data to solve population health problems.[30] Beyond making trafficking a reportable act, such mandates should be part of larger public health framework.[31]

Prevention

A criminal law approach, even when effective, only confronts human trafficking after the harm occurs. Meanwhile, public health defines success in the context of prevention, such as a well-prepared and coordinated response team acting

quickly to limit the spread of infectious disease, preventing a pandemic.[32] Similarly, prevention must be the goal of effective human trafficking response. The arrest and conviction of a trafficker might garner positive news coverage, but it also signals a collective failure to prevent victimization in the first place.[33]

Nationwide violence prevention measures present a framework appropriate for application to human trafficking. The CDC's violence prevention model considers the complex interplay between individual, relationship, community, and societal factors, demonstrating that effective interventions require action across multiple levels of the model simultaneously.[34]

At the individual level, human trafficking prevention strategies might include education and life skills training.[35] Combined with recent research about trafficking victims, this could include programs that empower vulnerable individuals to reduce their risk of exploitation.[36] Relationship-level prevention might include mentoring and peer programs, which promote high school matriculation and the development of positive relationships that trafficking victims often lack. Community-level prevention measures may include programs "designed to impact the climate, processes, and policies in a given system."[37] Social norm and social marketing campaigns often foster "community climates that promote healthy relationships."[38] Finally, societal-level prevention measures include confronting "the health, economic, educational, and social policies that help maintain economic or social inequalities between groups in society."[39] Addressing the root causes of trafficking—including poverty, lack of economic and social rights, discrimination, and other factors—is essential to making meaningful progress.

An example of the type of community-level approach described above is contemplated by a California statute, Chapter 558.[40] The measure would require school districts to provide sex-trafficking prevention education to students and teachers.[41] True to public health methodology's focus on evidenced-based policy action, the statute was informed by a three-year study exposing the prevalence of human trafficking solicitation in middle schools and high schools, based on interviews with students, teachers, school administrators, and incarcerated traffickers.[42] The program used this empirical data to teach vulnerable students tactics to avoid being caught up in trafficking, while also training teachers to identify at-risk students and recognize the signs before intervention is too late.

Behavior Modification

While a law enforcement model is predicated on the assumption that criminal sanctions deter traffickers, research shows that criminal law is not an effective tool for changing behavior.[43] At the heart of any public health campaign is a focused effort to understand social attitudes underlying risky, unhealthy behavior and how to effectively position responders to help transform them."[44]

Public health campaigns are most successful when education and awareness initiatives are woven into an existing legal/policy framework, as exemplified by successful campaigns against smoking, drunk driving, and promoting seatbelt use.[45] Law and policy makers should draw upon this extensive body of public health experience to develop effective strategies for addressing the underlying views and behaviors that facilitate human trafficking.

Challenges

In the context of human trafficking, the general population is bombarded with pervasive messaging that counteracts the deterrent effect of criminal sanctions and fosters tolerance for sexual exploitation and labor exploitation.[46]

Perhaps the biggest challenge is the deeply entrenched profit motives of traffickers themselves. Human trafficking is considered one of the most profitable and fastest growing criminal enterprises in the world. The UN Global Initiative to Fight Human Trafficking reported an estimate of $31.6 billion global annual profits made from the exploitation of all trafficked forced labor.

Moreover, the root of the harm here is the demand of one cohort for another—their bodies, and their labor. This dynamic creates a very different set of issues than those addressed by campaigns like smoking or seatbelts, where behavior modification efforts are directed at individuals inflicting self-harm. Therefore, while the methodology is still relevant, traditional public health models for addressing social behaviors correlated to human trafficking might have limited utility because of the unique relational dynamics inherent in the trafficking cycle.[47]

Many sex and labor trafficking victims are exploited by their own families, often blurring the lines between consent and coercion. Other barriers to rehabilitation, include victims' unwillingness or inability to disclose their status as trafficked persons based on mistrust of service providers and law enforcement.

In addition to changing behaviors of consumers, victims, and perpetrators, real progress in eradicating human trafficking depends on changing the attitudes of law enforcement. Just as the structure and practical application of the TVPRA breeds tension between law enforcement and undocumented victims, so do immigration laws such as the 287(g) program, that seek to extend ICE responsibilities to state and city police. While the program is voluntary,[48] its application, combined with the growing trend of militarization of local police forces, can further exacerbate conditions that make communities vulnerable to trafficking in the first place.[49] The sharing of training and technology

between the military and local police is producing a shared mindset—but the mindset of the soldier is not appropriate for the civilian police officer.[50] While soldiers confront an enemy, police officers engage a population they are sworn to serve and protect.

Many cities and counties around the country have attempted to address demand for sex workers, for instance, by focusing law enforcement efforts on the buyers. Generally, this means sting operations that yield highly publicized arrests, most of which do not lead to prosecution. In Harris County for example, 95 percent of arrested sex buyers avoid conviction by participating in pre-trial diversion programs.[51] Arrestees spend an average of 3 to 20 days in jail and, unlike the women they purchased, have their records expunged.[52] These and similar programs have been described as "defensive driving for johns", taking a scared-straight approach that usually amounts to an afternoon of lectures and a 15-minute video focusing on STDs, in exchange for six months of probation. This approach can hardly be expected to address the root causes that drive men to exploit women.

Partnerships

Public health campaigns focus substantial effort on identifying essential partners, engaging affected communities, and fostering community coordination and preparedness.[53]

In the context of human trafficking, a broad spectrum of partnerships are required to address a complexity of needs, which vary according to each individual victim. A person kept for a length of time in a state of complete dependence, once liberated from their trafficker, is left with virtually no resources on which to productively engage society and become whole. Legal scholars have noted that the creation of locally based joint task forces that connect service providers with law enforcement are key to better victim identification and perpetrator prosecution.[54] In fact, a recent study of county-level human trafficking arrest data across Florida indicated that the strongest predictor of human trafficking arrests is the presence of such a task force.[55]

Conclusion

Rather than militarizing our borders and local police forces, we should arm all service providers with the necessary data to accurately identify and efficiently connect vulnerable communities to support services that can prevent and protect them from falling prey to traffickers.

Ultimately, what makes public health framework such an attractive model for potential success in eradicating human trafficking is a more intangible factor than can be addressed in this article. More than any other field, the concepts embedded in the fabric of this methodology take for granted ideas that a criminal or regulatory law framework dare not contemplate: that life can improve, that behaviors can change, that the disempowered themselves hold the answers to preventing their own oppression, and that these strategies may yet overcome even the most entrenched and powerful interests. Applying this methodology can functionally eclipse the definitional problems with TVPRA and limit the moralizing that separates criminals and victims in the minds of those who claim to seek an end to the evils of modern slavery.

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"'We were treating johns in a much more gingerly fashion than the prostitute or seller,' said JoAnne Musick, division chief of sex crimes for the district attorney's office.").

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Applicability of Universal Jurisdiction to Torture of Peaceful Freethinkers in Iran

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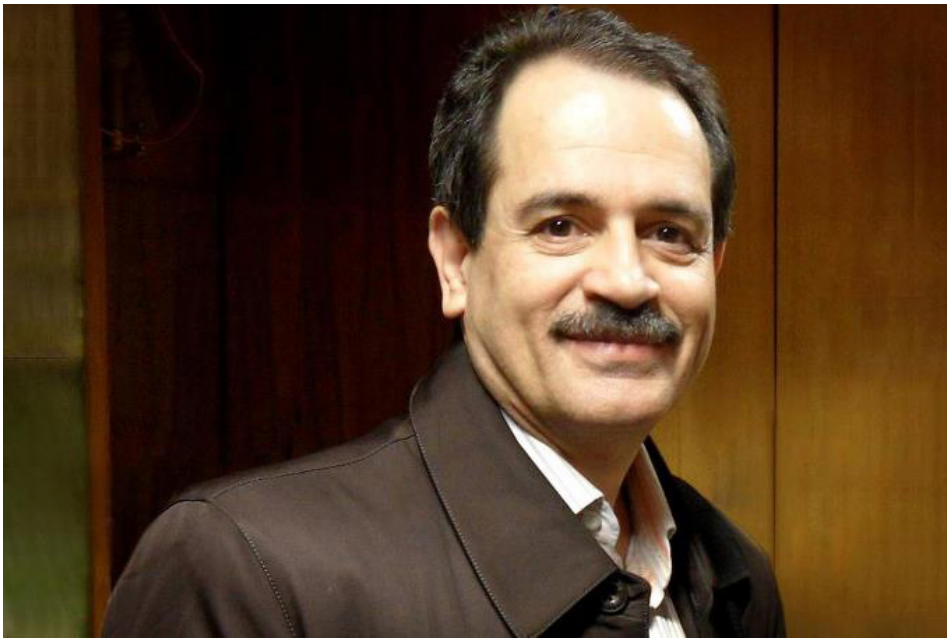
Introduction

The right to freedom from torture is a peremptory human right and *jus cogens* norm.[1] However, countries like Iran practice torture on civilians, including peaceful freethinkers, daily. Such violations of *jus cogens* norm raises important questions: Where to find justice for Iranian victims of torture and how to hold public officials in Iran accountable for committing such heinous crimes?

Torture in Iran

Between 2017 and 2018, authorities in Iran heavily suppressed civilians' rights of expression, association, peaceful assembly, and freedom of religion and belief. Dissenters were imprisoned and "Trials were systematically unfair."[2] Torture and other ill-treatment against detainees were committed with impunity and punishments included flogging and amputations. Authorities allowed discrimination and violence based on "gender, political opinion, religious belief, ethnicity, disability, sexual orientation, and gender identity"[3] extensively. The Ministry of Intelligence and the Revolutionary Guards kept the detainees in prolonged solitary confinement.[4] Detainees were subjected to cruel and inhumane conditions of overcrowding, inadequate food, insufficient beds, poor ventilation, and insect infestations in detention facilities–amounting to torture per the European Commission of Human Rights.[5] Torture and death penalty were maintained arbitrarily and for vaguely worded offenses such as "insulting the prophet," "enmity against God," and "spreading corruption on earth."[6]



Mohammad Ali Taheri

On August 1, 2017, "spiritual teacher and prisoner of conscience, Mohammad Ali Taheri was sentenced to death, for the second time, for 'spreading corruption on earth' through establishing the peaceful spiritual group Erfan-e Halgheh."[7] On March 11, 2019, Nasrin Sotoudeh, the human rights lawyer and women's rights defender, was sentenced to 33 years in prison and 148 lashes for her peaceful human rights work.[8]

The Iranian and revolutionary courts regularly fail to provide fair trials, using confessions obtained under torture as evidence.[9] Subsequently, judges in Iran often apply Article 134 of Iran's Penal Code, which gives them discretion to apply a punishment beyond the maximum otherwise prescribed.[10]

Torture as an International Crime

Per the Universal Declaration of Human Rights ("UDHR") and the International Covenant on Civil and Political Rights ("ICCPR"), "[n]o one shall be subjected to

torture or cruel, inhuman or degrading treatment or punishment."[11] However, ICCPR's definition of torture is especially important since Iran is a party to ICCPR.[12] Expanding on Article 7 of ICCPR, the UN General Assembly adopted the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1984 ("CAT").[13] "The definition of torture in the Convention against Torture reflects customary international law."[14] The definition has four elements: (1) intention of the perpetrator; (2) acts and omissions that inflict severe physical or mental suffering; 3) the involvement of a public official; and (4) for one of several specific enumerated purposes.[15]

For the "purpose" of an act to meet the requirements of establishing torture, it must be one of the indicative, yet not exhaustive, items in the list provided by CAT:[16] (1) extracting a confession; (2) obtaining information from the victim or a third party; (3) punishment; (4) intimidation and coercion; or (5) discrimination.[17] Even though Iran is not a party to the CAT, it has ratified ICCPR.[18] However, it continuously breaches its contractual obligation through arbitrary detention and torture of peaceful citizens.

The freedom from torture is an absolute human right, and neither war, terrorism and similar public emergency threatening the life of the nation, nor an order of a superior officer can justify it.[19] Therefore, the Iranian public officials cannot justify torture of peaceful civilians. Hence, the prosecuting states party to CAT may exercise universal criminal jurisdiction against such perpetrators.

Universal Jurisdiction and its Application to Torture

Universal jurisdiction is a legal doctrine that allows states to prosecute individuals in their domestic courts for certain heinous crimes such as genocide, war crimes, crimes against humanity, and torture—also known as core international crimes—regardless of where the crime took place or the nationality of the parties.[20] The principle of universal jurisdiction is based on the idea that such crimes are so severe that the perpetrators are considered enemies of all humankind and therefore should not be given a safe haven or impunity.[21] States exercising universal jurisdiction are regarded as agents of the international community with a universally accepted obligation of enforcing international law.[22] Universal jurisdiction's legal basis is in treaties and customary international law ("CIL"), and, unlike the international criminal tribunal created by the UN Security Council, it is an entirely decentralized system.[23] Universal jurisdiction may be asserted by a particular state or an international tribunal.[24] According to CAT,[25] states party to the convention have a duty to exercise jurisdiction over suspected perpetrators of torture found in their territory, extradite them to states able and willing to prosecute, or surrender them to an international criminal court. Other states may exercise universal jurisdiction over perpetrators as a matter of CIL.[26]

The application of universal jurisdiction as a viable criminal remedy has faced many challenges and limitations throughout the years and was considered dead by some international critics. However, universal jurisdiction has been revived and applied successfully in many cases during the last decade.[27]

Challenges and Limitations of Universal Jurisdiction

Nevertheless, one of the challenges to the application of universal jurisdiction is the immunity of foreign officials against civil or criminal jurisdiction of other nations' courts. Such immunity is distinguished according to, (1) the status of the public official, includes public or private acts and acts that took place during the official's time in the office, and (2) the subject matter of the public official's conduct as part of his or her job function even as a former official.[28] The formation of a CIL abrogating official's conduct immunity in criminal procedure is likely in the future. International courts and treaty bodies have consistently upheld the exercise of criminal jurisdiction in domestic courts over former public officials committing torture.[29] Moreover, CAT implicitly abrogates immunity in criminal cases by authorizing universal jurisdiction. Thus, it is likely for the international tribunals and conventions to form a CIL regarding abrogation of official's conduct immunity in criminal procedures.[30]

Another challenge facing the application of universal jurisdiction has been the geographical limitation of it to Western Europe. However, this limitation has changed with its expansion in both developed and developing countries,[31] providing more venues for litigation and more completed trials.[32]

Contributing Factors to the Recent Success of the Universal Jurisdiction

Contributing factors to universal jurisdiction's expansion include: more states implementing the International Criminal Court's framework containing the universal jurisdiction provision in their domestic law; special units, created within the domestic law enforcement entities, investigating and prosecuting international crimes; an increased number of dedicated NGOs documenting and advocating for the prosecution of international crimes; improved investigation and litigation strategies; technology lowering evidentiary costs; and an increased number of refugees and migrants, coming to Western states, bringing reports of international crimes committed in countries like Iran.[33]

The following cases are successful examples of the prosecuting states applying universal criminal jurisdiction

to perpetrators of torture for crimes committed outside the prosecuting state: the Crown Prince and deputy prime minister of the Kingdom of Saudi Arabia, in Argentina and in France; the high ranking Al-Assad regime officials, in France; the Commander-in-chief of the Libyan National Army, in France; alleged former member of Ghurabaa al-Sham, in Germany; the former Algerian Minister of Defense, in Switzerland; the Ethiopian "Red Terror" suspect, in the Netherlands; and the ex-wife of former Liberian president Charles Taylor, in the United Kingdom.[34]

Proper Venue to Prosecute Iranian Public Officials for Committing Acts of Torture

Since Iran has not ratified the Rome Statute, the treaty that established the ICC, the courts can obtain jurisdiction over crimes in Iran only if Iran voluntarily accepts the jurisdiction of the court or if the Security Council refers a case to the court's prosecutor.[35] Since both of these options are highly unlikely, the ICC is not a possible venue for prosecution. Besides, except as to ICCPR,[36] since Iran is not a party to any other treaty prohibiting torture nor the Statute of the International Court of Justice,[37] currently, there can't be a claim against the country itself for inhumane acts of torture. As a result, the application of universal jurisdiction, by prosecuting states, remains one of the most feasible options for criminal prosecution of Iranian public officials. There are two approaches to universal jurisdiction, pure and custodial.[38] Germany, Sweden, and Norway are the only countries in Europe with "pure" universal jurisdiction. They do not require a link between their state and the crime before their authorities exercise jurisdiction or start the investigation, even when the suspect is not a resident nor present on their territory. Other countries practice custodial jurisdiction and require the suspect to be present on their territory or be a resident before exercising universal jurisdiction.[39] Moreover, not all countries are equally situated to invoke universal jurisdiction against public officials in Iran.

The U.S. has a formal statute authorizing universal jurisdiction,[40] and it is a party to CAT and IACPPT. Thus, it is obliged to either prosecute or extradite perpetrators found within its territory and may practice universal jurisdiction over torture under CIL.[41] Torture under U.S. Code § 2340[42] is only applicable to persons committing or attempting to commit torture outside of the United States.[43] Unlike Germany,[44] the U.S. requires the alleged offender to be either a U.S. national or present in the U.S., before applying jurisdiction.[45] Even though the U.S. has the authority to invoke universal criminal jurisdiction, so far, it has chosen to handle cases involving violations of core international crimes, such as torture, in civil court.[46] The Torture Victim Protection Act ("TVPA") of 1991 allows U.S. citizens and non-citizens to bring a civil claim for torture committed in foreign countries. "The Alien Tort Statute (ATS) gives U.S. federal courts jurisdiction to hear lawsuits filed by non-citizens for torts committed in violation of international law", such as torture.[47] Thus, the U.S. can provide a civil remedy for victims of torture in Iran and has the authority to exercise universal criminal jurisdiction if the perpetrators are U.S. nationals or found within U.S. territory.

Germany and Sweden are the first two countries to prosecute individuals for international crimes committed in Syria in recent conflicts. However, in both jurisdictions, torture is not a standalone crime under their laws yet, but can be charged as a war crime or a crime against humanity.[48] Crime against humanity, unlike war crimes, can be committed during peace and war; therefore, torture may qualify as a crime against humanity if committed as part of a widespread or systematic attack directed against any civilian or an identifiable part of a civilian population.[49] Since acts of torture committed by Iranian officials are practiced systematically against the civilian population including persecution of political and religious grounds,[50] it may be considered a crime against humanity and prosecutable in both Germany and Sweden.

Other states such as Canada,[51] France,[52] and Spain[53] have implemented the principle of universal jurisdiction in their national legislation and have invoked it in several cases. Therefore, each can be considered a venue to pursue claims against Iranian public officials in connection to the torture of free thinkers in Iran.

Conclusion

According to the international definition of torture per CAT, acts committed by Iran's public officials against civilians, including peaceful thinkers, are considered torture, an internationally recognized core crime. Although Iran is not a party to CAT, it is contractually obligated under ICCPR to refrain from and prohibit acts of torture. Since the ICC is an unlikely venue for the prosecution of Iranian public officials, the application of universal jurisdiction by individual countries remains the best remedy.

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Endnotes

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16 Article 2, Convention Against Torture, *supra* note 12.

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21 *See id.*

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25 Articles 2 and 4, Convention Against Torture, *supra* note 12. *See* Universal Jurisdiction, *supra* note 13, at 4.

26 *See* Universal Jurisdiction, *supra* note 13, at 4–14.

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29 In *Pinochet*, the national and international courts abrogated the immunity of a former head of state's conduct from criminal investigation and prosecution for violation of a *jus cogens* norm and practiced universal jurisdiction over the violator. In a case in the Netherlands where the Netherlands amended its criminal code, not to recognize conduct immunity and a former head of Afghan intelligence and his deputy and a former army colonel were tried and convicted of torture. Also, in *Ould Dah v. France*, the defendant, a Mauritanian ex-army officer, challenged the French court's authority to exercise universal criminal jurisdiction over his acts of torture and the authority was upheld. *See* "A proposed multilateral treaty endorsed by General Assembly in 2004." Curtis Bradley & Laurence Helfer, *International law & the U.S. Common law of Foreign Official Immunity*, Supreme Court Review 213, 237 (2011), http://SSRN.com/abstract=1719707.

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31 *See* Langer & Eason, *The Quiet Expansion of Universal Jurisdiction*, at 2–3 (forthcoming 2019) (manuscript at 9 and 11) (on file with European Journal of International Law).

32 Such as Argentina and several Scandinavian states. *See id.* at 2, 4, 11 and 12.

33 *Id.* at 3.

34 *See* Trial International, *supra* note 26, at 15, 23, 29, 30, 47, 65, 71, and 74.

35 Human Rights Watch, "These are the Crimes We Are Fleeing": Justice for Syria in Swedish and German Courts (Oct. 2017), at 14.

36 As a party to ICCPR, Iran has a contractual obligation, however, since it has not signed or ratified ICCPR's Option Protocol, an individual cannot lodge a complaint against Iran to Human Rights Committee. *See* United Nations Human Rights, Office Of The High Commissioner, *Option Protocol for ICCPR*, https://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx.

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38 The Custodial Universal Jurisdiction requires a nexus between the crime, criminal, or victims and the prosecuting state. Human Rights Watch, *supra* note 34, at 16.

39 *See id.*

40 *See* 18 U.S.C.A. § 2340.

41 *See Universal Jurisdiction*, *supra* note 13 at 4.

42 Per 18 U.S.C. Section 2340, "in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the sense or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the sense of personality."

43 18 U.S.C.A. § 2340A.

44 Germany has implemented the principles of universal jurisdiction for crimes against humanity, war crimes and genocide in its statute through international criminal code or "*Völkerstrafgesetzbuch*" or *VStGB*. E.g., trial of Rwandan rebel leader Ignace Murwanashyaka. Section 1 of the 2002 Code of Crimes Against International Law.

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48 *See id.* at 24.

49 Per Article 6(c) of the Nuremberg Charter, crime against humanity is a constellation of prohibited acts: "Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated." *See* van Schaack, International Criminal Law, at 420.

50 *See* Amnesty International Report, *supra* note 2.

51 *Criminal Code*, R.S.C., 1985, c. C-46, Article 269.1, https://laws-lois.justice.gc.ca/eng/acts/C-46/section-269.1.html; Crimes Against Humanity and War Crimes Act, SC 2000, c. 24, https://www.canlii.org/en/ca/laws/stat/sc-2000-c-24/latest/sc-2000-c-24.html.

52 Per article 689 of the penal code of France, infractions such as torture can be judged in France even if the act was committed outside the French territory either by French citizens or foreigners.

53 Article 23.4 of the Judicial Power Organization Act (LOPJ) of Spain recognizes the principle of universal jurisdiction.

Modern Slavery in Modern Supply Chains

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Holland & Knight LLP

Introduction

In today's connected economy, it is easy to take for granted the global span of business supply chains. Even a simple t-shirt might involve a supply chain spanning Mississippi (where cotton is grown), Indonesia (where the cotton is spun into yarn), and Bangladesh (where garment is sewn).[1] As supply chains become more diverse and further removed geographically from customers, the risk of non-compliance with laws and regulations multiply, especially given the varying laws that apply to different parts of a company's supply chain.

One particular risk companies with global supply chains face is the risk of forced labor, also referred to as modern slavery, creeping into the supply chain. Governments, including U.S. federal and state governments, are increasingly acting to address the issue of modern slavery. This article highlights some legal requirements to promote transparency in supply chains, and some steps businesses can and should take to proactively manage the risk modern slavery poses.

Managing the Risk of Modern Slavery

Company A is a multinational corporation with nearly 100,000 employees working in regional headquarters and manufacturing plants in different countries. Company A produces widgets which it sells to customers around the world. Company B is a medium-sized company that sells similar widgets. But Company

B's operations are based entirely in Texas and require approximately 1,000 employees. All of Company B's customers are based in Texas. Which company has a risk of forced labor (also referred to as "modern slavery") in its supply chain?

Modern slavery is forced servitude or labor,[2] and it is a consequence of human trafficking. Modern slavery is a tragic yet unfortunate reality for almost 21 million men, women, and children around the world.[3] In Texas alone, an estimated 234,000 people are victims of human labor trafficking.[4] This presents a significant risk to businesses because even if forced labor is utilized by an *indirect* supplier, a company may still incur significant costs ranging from harm to its reputation to civil and criminal actions.

As a company's supply chain increases in complexity, the risk of modern slavery creeping into a company's supply chain also increases. Both Company A and Company B in the hypothetical above may have robust ethics and compliance programs within their respective companies. However, their suppliers may or may not have similar ethics and compliance programs. Often, businesses are unaware that products they sell are produced using forced labor. Without proper due diligence and periodic audits of their supply chains, Company A and Company B would likely not discover any use of modern slavery by one of their suppliers.

One method Company A and Company B could adopt to manage the risk of modern slavery entering their supply chains would be, at a minimum,

to consider implementing the American Bar Association's ("ABA") Model Business and Supplier Policies on Labor Trafficking and Child Labor. The ABA Policies state that businesses should prohibit labor trafficking and child labor in their operations; conduct a risk assessment of the risk of labor trafficking and child labor, and continually monitor implementation of this policy; train employees, engage in continuous improvement and maintain effective communication mechanisms with its suppliers; and lastly, devise a remediation policy and plan that addresses remediation for labor trafficking or child labor in their operations.[5] The ABA Policies could help both Company A and Company B develop their compliance programs with respect to various applicable laws since the ABA Policies target the right issues in the supply-chain arena.[6]

By adopting the ABA Policies, companies manage growing compliance requirements as international and local governments increasingly act to address the problem of modern slavery. For example, the state of California, the United Kingdom and Australia have enacted legislation aimed at eliminating modern day slavery and human labor trafficking. The laws enacted in those jurisdictions are transparency laws that require companies to define and disclose what efforts, if any, they are taking with respect to supply chain management to address human trafficking and modern slavery.[7] Transparency laws are not intended to end human trafficking, forced labor, child labor or other human rights abuses in supply chains; rather, they are intended to promote accountability. Transparency laws "make it easier to hold companies accountable if they fail to develop strategies to address these issues."[8]

Existing Transparency Legislation

Enacted in 2010, the California Transparency in Supply Chain Act requires large retailers and manufacturers doing business in California to disclose their "efforts to eradicate slavery and human trafficking from [their] direct supply chain for tangible goods offered for sale."[9] In essence, the California law requires companies to disclose to the public the extent of the company's efforts to ensure that the goods they sell were not produced by workers who are enslaved, coerced or otherwise forced into service, or who have been the victims of human trafficking.[10] The key is to disclose any internal procedures used to determine whether employees or contractors are complying with company standards regarding modern slavery and human trafficking, such as audits to evaluate supplier compliance, or any trainings to mitigate risks within the supply chain of products.[11]

> "Modern slavery is a tragic yet unfortunate reality for almost 21 million men, women, and children around the world. In Texas alone, an estimated 234,000 people are victims of human labor trafficking."

The UK Modern Slavery Act entered into force in 2015. Section 54 of the Act requires companies to publish an annual "Slavery and Human Trafficking Statement" and to disclose the steps they are taking to address modern slavery in their supply chains.[12] Similar to the law in California, the Modern Slavery Act does not require that companies take any affirmative steps to eradicate forced labor from their supply chains. Instead, the Act calls for companies to prepare and publish a statement describing any company policies, trainings, due diligence, and other measures that address the issues of modern slavery and forced labor.[13]

Most recently, the Australian Modern Slavery Act took effect on January 1, 2019. Similar to the laws in California and the United Kingdom, the Australian Modern Slavery Act requires companies in Australia to produce an annual public statement describing any steps taken to respond to the risks of human labor trafficking and modern slavery in their operations and supply chains,[14] such as auditing suppliers to investigate working conditions and labor practices, maintaining internal accountability standards, and evaluating the risks of forced labor.[15]

Status of U.S. Legislative Efforts

Currently, the United States does not have a federal law that is comparable to the transparency laws in California, the UK and Australia. However, the Congressional Human Trafficking Caucus has introduced transparency legislation at least five times since 2011.[16] In fact, in October 2018, the Caucus introduced legislation in the U.S. House of Representatives that would require companies to file annual reports with the U.S. Securities and Exchange Commission ("SEC") to disclose their efforts to identify and address specific human rights risks in their supply chains.[17] More specifically, the reports would include "all policies and measures a company is taking to identify, address, and remedy human trafficking, forced labor, and child exploitation occurring within its supply chain."[18]

The bill, H.R. 7089, if enacted into law, would be referred to as the "Business Supply Chain Transparency on Trafficking and Slavery Act of 2018."[19] It would apply to "any public or private company currently required to submit annual reports to the SEC."[20] Such a law would impact thousands of companies across the United States. While the law would not require these companies to implement any policies or engage in any efforts with respect to their supply chains, it would require them to disclose publicly if they do nothing to identify or address modern slavery in their supply chains.[21] Although H.R. 7089 is currently stalled and may not ultimately pass the House, it demonstrates the continued attention that this issue is receiving in the United States and around the world.

Conclusion

Lawyers can and should encourage their clients to be proactive in adopting and implementing policies and procedures to manage the risk of modern slavery in supply chains.[22] Proactive companies should examine their current policies, contracts, training and due diligence involving their supply chains to be in a position to comply with what could be the new law of the land if H.R. 7089 is enacted. Lawyers should recommend that their clients implement and comply with the ABA Policies. Not only will complying with the ABA Policies mentioned above help clients to manage the risk of liability related to the issue of modern slavery, it will also help and protect a company's reputation and brand. That way, Company A and Company B can both be confident in knowing they have done all they can to manage the risk of using forced labor in their supply chains.

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Development of Exceptions to the Prohibition Against Preventive Detention

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Introduction

Much has changed since I wrote an article about the standards of procedural due process and the practice of preventive detention in several countries in Africa in 1980.[1] At that time, it appeared that some of the developing countries were the main practitioners of preventive detention, and, therefore, some of the main violators of international human rights law. Since then, however, the world has changed dramatically, and the prohibition against the practice of preventive detention has been damaged to some extent by the development of more extensive exceptions thereto by many of the more developed and democratic nations in the world, whose loyalty to the rule of law appears to have eroded somewhat in reaction to the spread of international terrorism.

As discussed more fully below, the practice of preventive detention constitutes the exercise of power by a government to detain persons without trial in circumstances less dangerous than those that threaten the life of the nation. The principle that preventive detention may only be permitted under circumstances that constitute a threat to the life of the nation has not fared well as measured against the increase in the number and scope of exceptions to this principle that have been enacted in new legislation and executive action taken under the guise of constitutional authority related to conditions that may or may not actually threaten the life of a nation.

The article referred to above examined the practice of preventive detention in several African nations, and concluded that, rather than using it to protect state security, preventive detention was used to suppress legitimate opposition to the existing political order.[2] While this article discusses the violations of basic international human rights law caused by the practice of preventive detention, it will focus on the ways in which exceptions, both legislative and administrative, to such prohibition have developed by analyzing what has occurred in nations such as India, Great Britain, Israel and the United States. Some trends will be recognized and observations will be made about the various circumstances that led to the increase in the types of exceptions utilized in the practice of preventive detention.

The Foundation Documents

The prohibition against governments detaining persons without trial in circumstances less dangerous than those that threaten the life of the nation is based on several important declarations, laws and treaties, some of which were promulgated long before the modern concepts of international human rights were developed. For instance, the Magna Carta of 1215 contained the following statements: "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land. To no one will we sell, to no one deny or delay right or justice."[3] This

concept of the Magna Carta is reflected in the United States' Bill of Rights, which, among other things, provides that no person shall "be deprived of life, liberty, or property without due process of law,"[4] and "nor shall any State deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."[5]

In 1948, these basic tenets of human rights were clearly set forth in the Universal Declaration of Human Rights,[6] which the U. S. representative, Eleanor Roosevelt, proclaimed to be "a declaration of basic principles of human rights and freedoms … to serve as a common standard of achievement for all peoples of all nations."[7] Articles 9 and 10 of the Universal Declaration set out the basic standards of the prohibition against preventive detention, as follows: "No one shall be subjected to arbitrary arrest, detention or exile;" and, "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal."[8]

Although these principles were mainly associated with basic common law concepts before World War II, they took on a significant international character through the Universal Declaration. In fact, they have become part of customary international law as a result of various international declarations, the actual practice of states and the recognition that such norms are general principles of international law.[9]

The Universal Declaration became the first part of what Professor Lauterpacht had envisioned in 1947 as an International Bill of Human Rights,[10] however, it wasn't until 1966 that the other two parts were promulgated: the International Covenant on Civil and Political Rights[11] and the International Covenant of Economic, Social and Cultural Rights.[12] These two international treaties codified almost all of the provisions of the Universal Declaration, and Article 9 of the Covenant on Civil and Political Rights set out a more detailed statement of the prohibition against arbitrary arrest and detention and, among other things, guaranteed a fair trial within a reasonable time or release.[13]

Nevertheless, Article 4 of the Covenant on Civil and Political Rights contains a vague exception to this established standard of international human rights law, as follows:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.[14]

It is this exception, i.e., a "public emergency which threatens the life of the nation," or some derivative thereof, which has been used, whether officially proclaimed or not, to justify derogation from the prohibition against preventive detention. The exception is so remarkably ambiguous that it gives rise to the possibility of a seemingly limitless number of interpretations of what it could mean. It has been said that this "state of emergency exception does not provide adequate jurisprudential resources for defining the 'margin of discretion' that states should enjoy in determining the existence of an emergency or the legal measures necessitated by this emergency."[15] This lack of definition demonstrates one of the inherent problems that exists with respect to the application of the prohibition against preventive detention.

Some of the interpretations of emergency circumstances that permit either the usage or abuse of this exception, as well as historically imbedded legislative approaches, will be analyzed below with respect to a select few democratic nations.

Legislative and Administrative Methods Used to Institutionalize Preventive Detention

India

India has a long and complicated history of the practice of preventive detention, beginning with the colonial legal system created by Great Britain. For example, "In the nineteenth century, a dense network of regulations provided for detention and arrest without trial in certain cases, and detainees were denied the right to petition courts for writs of habeas corpus."[16] Thereafter, in the first half of the twentieth century the British enacted a series of war time emergency legislation that provided for preventive detention and "authorized the government to detain any individual without trial in the interest of public safety and security," and after World War II, peacetime legislation in British India "authorized the government to detain any person thought to be a threat to public order, national security, or the maintenance of supplies and services essential to the community."[17] These examples provide an insight into the early, creative legislative means of broadening the authority of law enforcement to detain people, which served to make the practice of preventive detention an accepted part of the Indian legal system in the colonial era.

When India became independent, its new constitution, which was ratified in 1949, "explicitly vested the state and federal legislatures with the power to enact laws providing for preventive detention."[18] The Parliament and state

legislatures were permitted to enact laws providing for "preventive detention for reasons connected with Defence, Foreign Affairs, or the Security of India."[19] These extremely broad exceptions were regulated under Article 22 of the Constitution of India, which provided that preventive detention laws so enacted would be subject to detailed "procedural safeguards required for any preventive detention law to be constitutionally valid."[20] Several laws on preventive detention were passed and expired thereafter until the National Security Act ("NSA"), which is still in effect, was enacted in 1980.[21] The NSA limits preventive detention for a period to up to one year, but its history reveals that "India regularly uses preventive detention to respond to ordinary criminal matters," rather than "as an extraordinary measure in exceptional circumstances."[22] If it weren't for its colonial history, it would be surprising that such an entrenched system of legislated exceptions to the prohibition against preventive detention was developed in a democratic, constitutional-oriented country such as India.

Great Britain and Israel

Great Britain and Israel have dealt with differing types of terrorism for decades, and each has developed its own brand of exceptions and policies that are designed to justify the use of preventive detention. In terms of context, Great Britain suffered through the IRA's terrorist attacks in the latter half of the 20th century and has faced a large home-grown Islamic terrorist threat, whereas, since its founding in 1948, Israel has been both surrounded by hostile nations and in a perpetual state of emergency.[23] As a result, both of these nations have experienced significant challenges in dealing with international terrorism and "view terrorism as threats to their national security and both countries grapple with the balance between security and liberty in their counterterrorism policies."[24] Each country has enacted legislation to deal with their respective circumstances, including exceptions and provisions that are peculiar to their own perceived dilemmas.

> "The principle that preventive detention may only be permitted under circumstances that constitute a threat to the life of the nation has not fared well..."

In Israel, preventive detention is referred to as administrative detention, which is defined as detention without charges or trial and is authorized by administrative decree.[25] For many years after achieving independence in 1948, Israel relied on the British Mandate's Defense (Emergency) Regulations[26] that permitted the detention of any person it deemed necessary in order to maintain public order, secure public safety or state security.[27] Much later, Israel enacted a statute named the Emergency Powers (Detentions) Law of 1979,[28] which includes both the power of and restrictions on the detention of individuals in Israel, including (i) a maximum detention period of six months, subject to extensions of six months,[29] (ii) a hearing within 48 hours of being arrested to confirm or set aside the detention order,[30] (iii) review of a detention order within three months after its confirmation,[31] and (iv) the right to appeal to the Supreme Court.[32] Taken together, however, these constraints provide the government with enough flexibility to hold a detainee in detention without trial for years.[33]

During both World Wars, Great Britain utilized a system of regulations that permitted the Home Secretary to order the detention of any person who was suspected of being either a spy or hostile to the government.[34] In between the World Wars, the 1939 Prevention of Violence (Temporary Provisions) Act ("PVA")[35] gave the Home Secretary power to detain and hold individuals without warrant for seven days before being charged, which, although it was intended to be a temporary legislative enactment, continued in force until it was repealed in 1973.[36]

With the recurrence of IRA bombings, however, the PVA was reinstated in the name of the Prevention of Terrorism (Temporary Provisions) Act of 1974 ("PTA").[37] The PTA permitted the arrest and detention of persons who were suspected of being involved in an act of terrorism for seven days without being charged, which was intended to be a permanent counterterrorism law.[38] The PTA was short lived, being replaced after 9/11 by the 2001 Anti-Terrorism, Crime, and Security Act ("ATCSA")[39] that allowed police to investigate and prevent terrorist activity and other serious crime and provided that a detainee could be held for fourteen days without being charged (increased to twenty-eight days in 2006).[40] This new bill also included a provision for the indefinite detention of foreign nationals, but this provision was repealed in 2004 when the House of Lords decided it was not compatible with the right to freedom from discrimination rules of the European Commission on Human Rights.[41] Significantly, a person who was detained or deported could appeal the government's certification, with assistance of counsel, under the ATCSA.[42] It became clear that the Parliament was meeting its responsibilities by leading the legislative process and had not relinquished its authority to the executive branch.

United States of America

For the United States, there was a direct connection between the spike in the level of international terrorist attacks on 9/11 and the dramatic increase in the usage of preventive detention techniques to hold foreign national terrorists indefinitely. President George W. Bush announced the War on Terror on September 20, 2001, in a speech to Congress, saying, "Our war on terror begins with al-Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated."[43] Thereafter, President Bush issued an executive order declaring that the Geneva Convention did not apply to the conflict with the Taliban and al Qaeda.[44] Later that year, the Office of Legal Counsel sent President Bush a letter stating that the President had "constitutional authority to order interrogations of enemy combatants to gain intelligence information concerning the military plans of the enemy."[45] Thus, the War on Terror appeared to be invoked to validate the enemy combatant policy whereby those enemy combatants were not entitled to the normal protections of prisoners of war under the Geneva Convention, and were not eligible for the protections provided to criminals under U.S. law. Given the nature and scope of this new policy of the executive branch, the U.S. could "unilaterally designate any person in the world as an enemy combatant and hold that person incommunicado, indefinitely, and with no criminal charges for the purposes of coercive interrogation and incapacitation."[46]

Not long thereafter, many such enemy combatants were detained at Guantanamo Bay without the right to either a lawyer or judicial review "until after the Supreme Court ruled in Hamdi and Rasul that enemy combatants must be allowed to challenge the designation of a neutral forum."[47] In response, the Bush Administration established Combatant Status Review Tribunals that were comprised of panels of military officers from the Department of Defense that evaluated "the detainees' status based on the current threat assessment and intelligence value of each detainee."[48] It was a feeble response to the Supreme Court's decision, and the effect was to continue (i) the denial of access to counsel, (ii) the denial of review of classified evidence, and (iii) the use of a rebuttable presumption in the government's favor,[49] all of which amounted to virtually no change in the original system.

The treatment of aliens detained within the U.S. was covered by the USA Patriot Act,[50] which allowed the Attorney General to hold detainees for seven days before being charged or released.[51] If, however, a detainee could not be deported and the "release of the alien was found to threaten the national security of the United States or the safety of the community or any person," the detainee could be held for renewable terms of six months each.[52]

Although the U.S. Congress passed legislation to deal with foreign nationals being held at Guantanamo Bay (Detainee Treatment Act[53] and Military Commissions Act[54]), it had not dealt with the issue of preventive detention of U.S. persons as enemy combatants.[55] It appears, therefore, that Congress has neglected its responsibilities by failing to take action to protect the procedural and substantive rights of U.S. citizen detainees.

Conclusion

The foregoing review of the background of the prohibition against preventive detention and the usage of preventive detention in four democratic nations reveals a number of disturbing conclusions. First, India, Israel and Great Britain provide more rights and due process of law to detainees than the U.S. Second, the Parliament of Great Britain has consistently taken the lead in promulgating legislation and debating the issues regarding preventive detention, whereas the Congress of the U.S. has for the most part abdicated its responsibility. Third, whereas the U.S. executive branch has asserted, and perhaps even over-stepped, its authority in the War on Terror, the executive branch in Great Britain has not.

Regardless of the differences and similarities in approaches among these four democratic nations, the fact is that due to the massive levels of fear, chaos and disruption caused by international terrorism, the rule of law in general and the prohibition against preventive detention specifically have been diminished by the legislative and executive actions that have been taken in response. In the long term, perhaps the prospect of achieving a more balanced approach will become more probable than it is at present.

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The Indigenous Question: Not a What but a Who

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Introduction

The adoption of the United Nations ("UN") Declaration on the Rights of Indigenous Peoples ("UNDRIP") on September 13, 2007 was a landmark moment for the protection of indigenous peoples.[1] Nevertheless, despite the host of pre-ambulatory clauses and the enumeration of multiple rights for indigenous peoples, there is a curious gap in the declaration: a definition of "indigenous people" is nowhere to be found. In fact, no UN-system body has adopted an official definition for the term "indigenous."[2] Instead, the UN supports a "modern understanding" of the term based on a series of factors,[3] many of which have little to do with the common definition of "indigenous" that one might find in a dictionary.[4] This incongruity undermines the structural integrity of the indigenous rights regime, as it ultimately relies upon an othering and objectifying view of "the Indigenous."

The UN's Understanding

Different bodies within the UN rely on different lists of factors to identify indigenous peoples, though the lists differ more in gradation than substance. Here, we will focus on two sets of factors, one from the UN Permanent Forum on Indigenous Issues ("UNPFII") and another from the Food and Agricultural Organization of the UN ("FAO").

UNPFII provides a list of seven factors: (1) self-identification as indigenous peoples; (2) historical continuity with pre-colonial and/or pre-settler societies; (3) strong link to territories and surrounding natural resources; (4) distinct social, economic, or political systems; (5) distinct language, culture, and beliefs; (6) non-dominance in society; and (7) a resolution to maintain and reproduce ancestral environments and systems as distinctive peoples and communities.[5] These are very similar to the "working definition" used in a study performed by Special Rapporteur José R. Martínez Cobo several decades earlier.[6]

FAO reconstitutes the list as four factors: (1) priority in time, with respect to occupation and use of a specific territory; (2) the voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions; (3) self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and (4) an experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.[7]

Neither set of factors comprises an official, memorialized test. They are merely a collection of common considerations. For example, a report on the situation of the Sámi in Northern Scandinavia clearly reviewed five of the UNPFII factors (and peripherally the other two).[8] Subsequently, a report on the situation of the Maya,[9]

Xinka, and Garifuna in Guatemala focused primarily on self-identification and state recognition.[10] Therefore, the UN's "modern understanding" does not rely on the factors in their entirety for every situation.

The Necessity of Identification

Such laxness in classification illustrates the first fundamental issue with this approach. The UN contends that "the most fruitful approach is to identify, rather than define indigenous peoples."[11] While a noble sentiment, based in the right to self-identification,[12] this is nonfunctional. In fact, it somewhat begs the question. For groups to be identified, there must be some means of identification. While there are means of identification other than a definition, a definition is merely a collection of factors delimiting the scope of a particular term,[13] such as the factors that inform the UN's "understanding." Therefore, by articulating a list of identifying factors, the UN has created a *de facto* definition of "indigenous peoples," even if it is not officially adopted as such.

Perhaps an official definition would not provide the flexibility required to incorporate certain groups that are generally considered indigenous but for which only some factors are clearly met. This would also explain the selection of the term "factors" to describe the various considerations. Most standard definitions rely on elements instead of factors.[14] Even so, an official definition could instead rely on a collection of factors and state that they are to be considered as a whole.

Inversely, one concern may be that certain groups, which the international community does not intend to include, would then find themselves covered under the term "indigenous people." If that is the case, it should not be construed as a problem with the definition of "indigenous" but instead with the prevailing conception of indigeneity. Unclear requirements provide fertile ground to include or exclude groups based on little more than political whim or zeitgeist. This does a disservice to the framework of indigenous rights as a whole.

> "To treat "the Indigenous" as a primitive or static existence - much as the prevailing framework does - is to segregate "the Indigenous" from modern life, no matter how well-intentioned."

Case-based Counterexamples

In fact, some degree of this arbitrariness can already be seen in the application of the articulated factors. Many groups that are within the core conception of "indigenous peoples" do not meet all of the factors of the UN's understanding. These would readily include multiple groups in both the Americas and Africa—as well as some in the Asia-Pacific region—but, for purposes of illustration, we will examine only two.

For a "strong link to territories and surrounding natural resources," we can look to the Americas for a counterexample. The "strong link" in question is presumed to reference the land on which the people in question currently reside. It does not, after all, make much sense to determine whether a group is indigenous in a place based on its strong link to some geographically distinct locale. Unfortunately, the history of the United States is rife with examples of indigenous peoples who have been relocated from their homelands.

One of the most infamous examples of this is the Trail of Tears, which saw the relocation of the Choctaw, Seminole, Creek, Chickasaw, and Cherokee from their homelands in the Southeast United States to Oklahoma.[15] Despite nearly two centuries in Oklahoma, Oklahoma is not their homeland. It is not the territory that primarily inspired and shaped their socioeconomics, language, or mythology.[16] These peoples do not have a strong link with the territory in which they now live, at least not to the degree of the Sámi with Sápmi or the Australian Aborigines with that great island. Despite this, no one would argue that these groups are not indigenous peoples.

For "non-dominance in society," we turn to an African example. The Tigre and the Tigrinya are two closely related ethnic groups in Northeast Africa. The Tigre have long inhabited a region that includes portions of Sudan,[17] whereas the Tigrinya inhabit an adjoining area that includes the Tigray province of Ethiopia.[18] In both of these places, the Tigre-Tigrinya are indigenous minorities. However, they also comprise approximately 85% of the country of Eritrea, a country that broke away from Ethiopia in large part to provide a nation state for the Tigre-Tigrinya.[19] Eritrea also comprises part of the Tigre-Tigrinya homeland. They are thus indigenous to Eritrea regardless of their position of dominance in the region. Or, argued another way, the Tigre-Tigrinya are indigenous to those portions of Sudan and Ethiopia they inhabit regardless of their dominance in Eritrea.

It is a worthwhile caveat that both of these examples—and many of the others that could be given—depend to some extent on how broadly the identifying factors are interpreted. For example, if the strong link to territory is taken at a larger, country-wide level, then the various relocated

Amerindian groups of the United States do have a strong link to the territory and surrounding natural resources of somewhere in the United States.

Moreover, as an observation of the inverse case, there are many peoples that meet the enumerated factors, either in their strict or expanded interpretations, but whom the international community resists labeling as indigenous. One such example would be the Irish, particularly as regards the FAO criteria.[20]

The modern population of Ireland shows substantial continuity with populations tracing back to at least the Bronze Age and Neolithic eras.[21] Though these groups were not all Celtic, migrations from Iberia to Ireland likely infused the island with its Celtic heritage over much of the same time period.[22] Although there is a gradient that shows subsequent Norse and English settlement, a Celtic population structure can be found throughout the Irish population.[23]

The Irish population is also culturally distinct, having its own language,[24] folklore and mythology that have penetrated both Irish culture and religion,[25] and numerous unique artistic traditions,[26] among other distinctive elements. There is little doubt that this population is identified, both by itself and others, as a distinct collectivity. The distinct ethnonym serves as some proof of this, and phenomena such as "The Irish Question" corroborate that the Irish both self-identify and are identified by others as a distinct collectivity.[27]

This "Irish Question" also encapsulates the experience of the Irish with marginalization. Hibernophobia has plagued the land and its people since at least the Norman invasion of Ireland.[28] With the advent of Anglicanism, the Irish suffered significant social and political oppression for their refusal to renounce Catholicism in favor of the English church; this repression was only heightened by the imperialist activities which occurred more and more frequently from the Tudor dynasty onward.[29] The subsequent centuries saw the public perception of the Irish transform from a bucolic, though at other times parochial, peasantry to violent, apelike monsters,[30] and such Hibernophobia saw the Irish subjected to discrimination in both employment and legal proceedings.[31] There then should be no question of a history of marginalization for the Irish people.

Nevertheless, a discussion of the Irish would seem out of place in most conventional discussions of indigenous rights. There are several potential reasons for this; nevertheless, most if not all stem from a particular conception of "the Indigenous" that currently informs the international framework.

Indigenous as Objectified Other

The current conception involves a substantial othering of "the Indigenous." Multiple of the criteria under both UNPFII and FAO focus on "distinctiveness," with "distinct" explicitly appearing in approximately half of each set of factors.[32] Importantly, these criteria often do not specify the basis of comparison, *i.e.*, what a people must be "distinct" from. In practice, the reference point is through the lens of the State, as FAO makes explicit in one of its factors.[33] Therefore, a people would apparently need to be distinct from the people of a given State, presumably that State's majority population, to be treated as indigenous.

This creates a false dichotomy between in-State and non-State groups.[34] If a given people is a major force in a State and its society at large, it would be in-State; however, other groups would belong to that non-State group and could, if the other factors were met, potentially be considered indigenous. But through this false dichotomy, societies conflate an indigenous people's non-Stateness with additional things that belong to a generalized "Other."[35]

Typically, this conflation involves a primitivization of "the Indigenous."[36] A poignant illustration is found in one of the factors of UNPFII's understanding, which contemplates a reproduction of "*ancestral* environments and systems."[37] It is not sufficient under the UNPFII factors for a group to be prior in time; they must instead continue to act substantially as their ancestors did. This conception then also essentializes those systems, treating "traditional" systems as fundamental to "the Indigenous."[38]

Beyond intellectual incongruities, this all has the pernicious effect of denying "the Indigenous"—and those selected as belonging to it—a place in modern society. The framework for indigenous "rights"[39] demands that groups ossify in order to maintain or be awarded "indigenous" status and the "rights" that accompany it. This occurs because the framework's criteria force groups to perpetuate certain aspects of culture and society in order to defend a claim to those rights.[40] They must become static.

The current prevailing framework for indigenous rights, therefore, implicitly denies that "the Indigenous" involves living people and dynamic culture. Nothing living is static. Every group, every people, is constantly adapting to new circumstances, phenomena, or ideas. To treat "the Indigenous" as a primitive or static existence—much as the prevailing framework does—is to segregate "the Indigenous" from modern life, no matter how well-intentioned.

Conclusion

Many indigenous peoples have been subject to hardship and maltreatment that the international community now seeks to redress. However, the prevailing international framework does not identify "indigenous" in the standard, etymological definition of the term, which would focus solely on autochthony and priority in time. Instead, the modern "understanding" as promoted by the UN, both as articulated and applied, relies on a conception of "the

Indigenous" that treats real, living people as an unsophisticated and unequal Other.

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Endnotes

1 UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, available at* https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf.

2 United Nations Permanent Forum on Indigenous Issues (hereinafter "UNPFII"), *Who Are Indigenous Peoples? at 1, available at* https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf.

3 *Id. See also Food and Agriculture Organization of the United Nations (hereinafter "FAO"), FAO Policy on Indigenous and Tribal Peoples 4 (2015), available at* http://www.fao.org/3/a-i4476e.pdf.

4 For such a definition of 'indigenous,' *see, e.g., indigenous, Oxford English Dictionary Vol. VII at 867 (2d ed., 1989).*

5 UNPFII, *supra* note 2, at 1.

6 Study of the Problem of Discrimination Against Indigenous Populations Part III, at 50, E/CN.4/Sub.2/1983/21/Add.8 (1983), available at https://www.un.org/esa/socdev/unpfii/documents/MCS_xxi_xxii_e.pdf.

7 FAO, *supra* note 3, at 4.

8 Report of the Special Rapporteur on the Rights of Indigenous Peoples: The Situation of the Same People in the Sápmi Region of Norway, Sweden, and Finland, at 4–5, A/HRC/18/35/Add.2 (2011), available at https://www.ohchr.org/Documents/Issues/IPeoples/SR/A-HRC-18-35-Add2_en.pdf. While this report comes from the office of the Special Rapporteur on the Rights of Indigenous Peoples and not directly from UNPFII, part of UNPFII's mandate is to coordinate activities related to indigenous issues within the UN system. Economic and Social Council Res. 2000/22 (Jul. 28, 2000).

9 There are, in fact, multiple distinct groups of Maya. However, their situations are often similar enough that they are treated as a single group for analyses' sake.

10 Report of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Guatemala, at 4, A/HRC/39/17/Add.3 (2018), available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/246/43/PDF/G1824643.pdf?OpenElement. *But see id. at 7 (discussing issues regarding "communal land" recognition).*

11 UNPFII, *supra* note 2, at 1.

12 *Id.*

13 This comes from the etymology of the term, being *de + finīre, i.e. to "determine the boundary" or to "settle the limits" of something. See define and definition, Oxford English Dictionary Vol. IV at 383–85 (2d ed., 1989); see also definition, Online Etymology Dictionary, available at* https://www.etymonline.com/word/definition#etymonline_v_25869 (last accessed May 21, 2019).

14 *See id.*

15 *See Five Civilized Tribes, Native Peoples A to Z: A Reference Guide to Native Peoples of the Western Hemisphere 866–67 (2009). This occurred pursuant to the Indian Removal Act of 1830 (Statutes at Large 21st* Congress 1st Session p. 412), available at https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=004/llsl004.db&recNum=459.

16 While these aspects of the nations have continued to evolve during their time in Oklahoma, their cultures taxonomically derive from their Southeast woodland home territories. *See generally Handbook of North American Indians XIV (Raymond Fogelson & William Sturtevant eds., 2004).*

17 *Təgre, Encyclopædia Æthiopica IV at 895 (2010).* 'Təgre' is merely a variant spelling.

18 *Təgrəññə-speakers*, Encyclopædia Æthiopica IV at 908 (2010). 'Təgrəññə' is merely a variant spelling.

19 Encyclopædia Æthiopica, *supra note 16, at 895, 908. See also Eritrea, The World Factbook, available at* https://www.cia.gov/library/publications/the-world-factbook/geos/er.html (last accessed May 22, 2019).

20 The FAO criteria are (1) priority in time; (2) cultural distinctiveness; (3) identification as a distinct collectivity; and (4) an experience of marginalization, whether or not such conditions persist. FAO, *supra* note 3, at 4.

21 Daniel G. Bradley *et al., Neolithic and Bronze Age Migration to Ireland and Establishment of the Insular Atlantic Genome, 113(2) Proceedings of the National Academy of Sciences 368 (2016).*

22 *See, Dick Ahlstrom, Genetic Studies Show Our Closest Relatives are Found in Galicia and the Basque Region*, The Irish Times (Feb. 16, 2009), available at https://www.irishtimes.com/news/genetic-studies-show-our-closest-relatives-are-found-in-galicia-and-the-basque-region-1.700877; *DNA Shows Scots and Irish Should Look to Spain for Their Ancestry, The Scotsman (Sep. 10, 2004), available at* https://www.scotsman.com/news-2-15012/dna-shows-scots-and-irish-should-look-to-spain-for-their-ancestry-1-552560. Such a connection to Iberia should come as no surprise, given the genetic links noted in other species between northern Spain and Ireland. *See, e.g., Inga Reich et al., Genetic Study Reveals Close Link Between Irish and Northern Spanish Specimens of the Protected Lusitanian Slug Geomalacus maculosus, 116 Biological Journal of the Linnean Society 156 (2015); Gemma E. Beatty & Jim Provan, Post-glacial Dispersal, Rather Than In Situ Glacial Survival, Best Explains the Disjunct Distribution of the Lusitanian Plant Species Daboecia Cantabrica (Ericaceae), 40 Journal of Biogeography 335 (2013). Moreover, though commonly dismissed as mainly pseudohistorical, Ireland's medieval national history, Lebor Gabála Érenn, discussed an invasion to the Ireland by Spaniards. A worthwhile recension is R.A. Stewart Macalister's Lebor Gabála Érenn: The Book of the Taking of Ireland, Edited and Translated, with Notes, etc. (1956).*

23 Ross P. Byrne *et al., Insular Celtic Population Structure and Genomic Footprints of Migration, PLOS Genetics 14(1) e1007152 (2018), available at* https://journals.plos.org/plosgenetics/article?id=10.1371/journal.pgen.1007152#sec001.

24 Although still second to English, the Irish language has undergone somewhat of a renaissance, with substantial portions of the population now with some proficiency in the language and a larger percentage of youths with command of the language than elders. An Phríomh-Oifig Staidrimh (Central Statistics Office), Profile *9 What We Know 25 (2011), available at* https://web.archive.org/web/20131114173248/http://www.cso.ie/en/media/csoie/census/documents/census2011profile9/Profile,9,What,we,know,full,doc,for,web.pdf.

25 *See, e.g., Seán O'Súilleabháin, Handbook of Irish Folklore (1942); James Mooney, The Holiday Customs of Ireland, 26 Proceedings of the American Philosophical Society 377 (1889).*

26 Irish music is recognized as a distinctive tradition. *See W.H. Grattan Flood, A History of Irish Music (1905); see also Frances Mulraney, The History and Origins of Traditional Irish Music, IrishCentral (Nov. 11, 2016), available at* https://www.irishcentral.com/roots/history/the-history-and-origins-of-traditional-irish-music; Claire VanValkenburg, *New Irish music festival comes to Arena, Madison Magazine (May 21, 2019, 7:00), available at* https://www.channel3000.com/madison-magazine/arts-and-culture/irish-fest-in-the-barn-introduces-new-irish-music-festival-to-madison/1078474586. One tradition, Uilleann Piping, has even been proclaimed part of the intangible cultural heritage of humanity. *Decision of the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, UN Doc. ITH/17/12.Com/11.b Add.*, at 31 (Nov. 17, 2017).

27 "The Irish Question" refers particularly to the increasingly vociferous Irish nationalism and calls for Irish independence that arose in the early 19th century, though it was a variation on a theme that had played out since the (Second) Norman Invasion. *See Goldwin Smith, The Irish Question, 172 The North American Review 838 (1901).*

28 The papal bull referenced to justify the invasion, Pope Adrian's Bull "Laudabiliter," painted the Irish nation as "barbarous," "disordered," and having "filthy practices." Eleanor Hull, A History of Ireland and Her People Vol. 1 at 487–91 (1926).

29 *See Nicholas Canny, Making Ireland British: 1580-1650 (2001); Padhraig Lenihan, Consolidating Conquest: Ireland 1603-1727 (2007); Desmond Bowen, The Protestant Crusade in Ireland, 1800-70: A Study of Protestant-Catholic Relations Between the Act of Union and Disestablishment (1978).*

30 *See generally L. Perry Curtis Jr., Apes and Angels: The Irishman in Victorian Caricature (2d ed., 1997); William H.A. Williams, 'Twas Only an Irishman's Dream: The Image of Ireland and the Irish in American Popular Song Lyrics, 1800-1920 (1996).*

31 Rebeca A. Friend, *No Irish Need Deny: Evidence for the Historicity of NINA Restrictions in Advertisements and Signs, 49 Journal of Social History 829 (2015); UK Military Justice was 'Anti-Irish': Secret Report, Independent (Aug. 7, 2005,*

00:11), available at https://www.independent.ie/irish-news/uk-military-justice-was-antiirish-secret-report-26211428.html.

32 UNPFII, *supra* note 2, at 1; FAO, *supra* note 3, at 4.

33 FAO, *supra* note 3, at 4.

34 *See Katie Bresner, Othering, Power Relations, and Indigenous Tourism: Experiences in Australia's Northern Territory, 11 PlatForum 10, 11 (2010); see also Edward W. Said, Orientalism 43–44 (1979). Though Said does not use the same words, his 'Orientalism' is a particular manifestation of othering, and his description still works well in this case if 'the Indigenous' replaces 'the Orient' as the strange.*

35 Jean-François Staszak, *Other/otherness, in International Encyclopedia of Human Geography (Rob Kitchin & Nigel Thrift, eds., 2009). See Samantha Loppie et al., Aboriginal Experiences with Racism and Its Impacts 2 (2014), available at* https://www.ccnsa-nccah.ca/docs/determinants/FS-AboriginalExperiencesRacismImpacts-Loppie-Reading-deLeeuw-EN.pdf.

36 *See Glenda MacNaughton & Karina Davis, Beyond 'Othering': Rethinking Approaches to Teaching Young Anglo-Australian Children About Indigenous Australians, 2 Contemporary Issues in Early Childhood 83, 85–87 (2001); see also Bresner, supra note 34, at 19; Staszak, supra* note 35.

37 UNPFII, *supra* note 2, at 1.

38 *See Edvard Hviding, Indigenous Essentialism? 'Simplifying' Customary Land Ownership in New Georgia, Solomon Islands, 149 Bijdragen tot de Taal-, Land- en Volkenkunde 802, 802–03 (1993); see also Bresner, supra* note 34, at 18–19 *(describing a case of indigenous tourism as consisting of various samplings of 'traditional' culture).*

39 Quotations are used here to indicate circumspection given the critique, as a purported right that only accrues to those meeting certain demands looks more like a privilege than a right.

40 In many states, this goes beyond such sociocultural ossification and infringes upon the indigenous people's autonomy in a much broader sense. *See, e.g., Loppie et al., supra* note 35, at 5.

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Immigration: Minor Criminality Is a Big Headache for Business in Canada

BY SERGIO R. KARAS, B.A., J.D.

Introduction

Traveling to Canada on business has become trickier over the past few years. Under the *Immigration and Refugee Protection Act* ("*IRPA*"),[1] which came into force in 2002, a "foreign national" applicant with a criminal record, even a minor one, can be denied entry to Canada.[2] Under the *IRPA*, and in particular section 36(2), it is difficult for an applicant with a conviction to enter Canada. This presents a challenge to employers and employees alike.

Criminality Under the IRPA:

Immigration legislation divides criminal offenses committed abroad into two major classes:

- section 36(1)(b) deals with convictions outside of Canada where the equivalent offence in Canada could be punishable with a sentence of imprisonment of at least ten (10) years. That is considered to be "serious criminality."
- section 36(2) applies to individuals who are convicted outside of Canada of an indictable offence, or two summary offences, regardless of the penalty. That is considered to be "criminality."

A foreign national can be deemed "inadmissible" and can be refused entry into Canada if he or she has been convicted outside of Canada:

* of an offense punishable by way of indictment; or
* of a "hybrid offense", one which could be prosecuted either summarily or by indictment.[3]

An indictable offense is one which is generally more serious and carries a longer sentence; and is more or less similar to a felony in the United States. Summary offenses are generally less serious, carry shorter sentences or smaller fines and are somewhat similar to misdemeanors in the United States. Hybrid offenses are those that can be prosecuted either by indictment or by summary conviction depending on the nature and circumstances of the offense. Driving under the influence of alcohol ("D.U.I.") is one example of such offense. Pursuant to section 36(3)(a) of the *IRPA* a hybrid offense is considered to be an indictable offense for immigration purposes, even if it has been prosecuted summarily.[4]

Canadian Equivalency of the Offense

Immigration officers determine the inadmissibility of an applicant convicted of an offense in a foreign country by equating the offense with its Canadian equivalent.[5] What must be considered as the governing principle is what the status

of the offense would be if committed in Canada. A lenient or harsh treatment of the offense in a foreign country is irrelevant for the purposes of equivalency, while the nature of the offense and penalty range under Canadian law governs the determination of its equivalence.

How to Overcome Inadmissibility

1. Temporary Resident Permits ("TRPs"):

An applicant who may be barred from entering Canada for a past conviction has a number of options to overcome inadmissibility. One option is to apply for a TRP either at the border or at a Canadian visa post in his host country. Generally speaking, the former is dependent on the CBSA officer's discretion and the latter takes a considerable amount of time to process. The legislative authority for granting TRPs is found in section 24(1) of the *IRPA*:

> 24. (1) A foreign national who, in the opinion of an officer, is inadmissible or does not meet the requirements of this Act becomes a temporary resident if an officer is of the opinion that it is justified in the circumstances and issues a temporary resident permit, which may be cancelled at any time.

It must be noted that, in order to qualify for consideration for a TRP, the entry to Canada by the applicant has to be justified in the circumstances. This has generally been construed by the courts as "exceptional circumstances."[6]

2. Criminal Rehabilitation:

Where more than five years have passed since the completion of the applicant's sentence, payment of fine and conclusion of any probation, the applicant can apply for "criminal rehabilitation." Rehabilitation removes inadmissibility and is recommended if the applicant seeks to enter Canada whether for business or pleasure. The decision to grant rehabilitation is dependent on a variety of factors. The documentation necessary for an application is extensive and processing is lengthy.

Criminal rehabilitation applies to those persons who have committed offenses considered to be either serious criminality or have more than one conviction, even if they are for summary offenses or misdemeanors. Applications must be filed at the appropriate Canadian visa post abroad accompanied by court records, police certificates, letters of support, and exhaustive submissions documenting the purpose of the entry. Criminal rehabilitation is not possible if the sentence has not been completed.[7]

3. Deemed Rehabilitated:

Another way to overcome inadmissibility is if more than ten years have passed since the completion of an applicant's sentence where the offense can be considered indictable or hybrid in Canada, or five years when the offense is punishable by summary conviction. In such circumstances, rehabilitation does not happen automatically but the applicant may be "deemed rehabilitated" by immigration officials at a port of entry.[8]

Port of Entry Checks and Applicant's Duty to Disclose

Canada Border Services Agency ("CBSA") officers have authority to permit or deny entry into Canada.[9] Canadian border officers have access to computerized information of criminal records of U.S. citizens intending to enter Canada.[10] It is therefore advisable to disclose any prior offenses or charges when applying for a Canadian visa or entry to Canada at a border, regardless of whether an applicant was actually convicted or not.

Conclusion

Thousands of foreign nationals have been turned away from the border since the *IRPA* came into force. This has become a serious problem for individuals who have minor convictions dating back several years. Businesses that have customers or operations in Canada and who want their employees to travel to Canada will find the practical effects of this provision frustrating, if their employees have ever been convicted of any offense. It is therefore advisable to obtain the necessary documentation and appropriate legal advice to overcome "inadmissibility" before seeking to enter Canada.

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Endnotes

1 S.C. 2001 c. 27, as amended.
2 "[T]he IRPA marks a change from the focus in the predecessor statute, which emphasized the successful integration of applicants more than security." Supreme Court of Canada in *Medovarski v. Canada*, (Minister of Citizenship and Immigration), 2005 SCC 51 (S.C.R. June 7, 2005).
3 IRPA s. 36(2), *supra*.
4 *Cha v. Canada* (Minister of Citizenship and Immigration), 2006 FCA 126, [2006] F.C.J. No. 491 (QL).
5 *Wang v. Canada*, 2007 FC 1188, held that a visa officer is under an obligation to conduct an equivalency analysis to show that the act "if committed in Canada, would constitute an indictable offence under an Act of Parliament", as set out in paragraph 36(2)(c) of the *IRPA* before deeming a person "criminally inadmissible".
6 *Nasso v. Canada*, 2008 FC 1003.
7 *Rafat v. Canada*, 2010 FC 702.
8 IRPA s. 36(3)(c).
9 Immigration law is based on the fundamental principle that non-citizens do not have an unqualified right to enter or remain in Canada. *Chiarelli v. Canada* (Minister of Employment and Immigration), [1992] 1 S.C.R. 711,733.
10 'Americans say Canadian border is tightening for those with minor criminal past', By Les Perreaux, The Canadian Press Online, Feb. 17, 2008.

Labor Law Amendment: A New Reality for Collective Bargaining in Mexico

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Introduction

On April 29, 2019, Mexico's Senate approved the much-anticipated amendment to the Federal Labor Law (the "Amendment"), substantially modifying such statute.[1] The Amendment comports with the United States-Mexico-Canada Agreement ("USMCA"), which has not been ratified by the three countries but calls for Mexico to amend its labor laws before the USMCA enters into force. The two pillars of the Amendment are the right of employees to organize and negotiate collectively, and a new labor justice system.[2] Notably, the Amendment does not address the topic of outsourcing, but such may be discussed in Congress this September.

Right to Organize and Collective Bargaining

In relation to union matters, the Amendment provides several mechanisms to protect the right of employees to organize and negotiate collectively. Employers will now be required to provide employees with a printed copy of the collective bargaining agreement within 15 days after its filing or renewal, as well as to post in a visible place in the workplace all formal notices for voting to approve the execution of a collective bargaining agreement or renewal, as well as any union applications for a Certificate of Representation.[3]

Under the new Amendment, Unions must now obtain a Certificate of Representation to file a strike notice, demand the execution of a new collective bargaining agreement or dispute representation of the employees from another union. Such Certificate will be issued by the new Federal Mediation and Labor Registry Center if the union can prove that it represents at least thirty percent of the workforce. If another union claims to represent a company's employees, the Certificate will be issued to the union that receives the most votes from company employees.[4]

Employees will now have the right to exercise their vote personally, directly, freely and secretly in voting to elect union representatives and to approve union contracts and contract renewals. The Amendment states that the protection of such voting principles is fundamental to the validity of union contracts.[5]

Going forward, existing collective bargaining agreements must be renewed at least once over the next four years following the implementation of the Amendment's new rules, and the majority of employees must approve the terms of such agreements.[6] Failure to approve a renewal will result in cancellation of the union contract.

Labor Justice System

Under the Amendment, all employment disputes will be resolved by Labor Courts, in the judicial branch of government. The current system of State and Federal Labor Boards will be phased out. State Labor Courts will begin to operate within three years, and Federal Courts must initiate operations within four years. Further, Mediation Centers will be created in which the parties must attend at least one mediation hearing. As such, cases will be heard in a labor court only if the parties do not previously settle in mediation.[7]

A Federal Mediation and Labor Registry Center will also be created under the Amendment, in which mediation will be conducted in federal jurisdiction cases, and all matters involving union bylaws, collective bargaining agreements and internal work rules (*Reglamento Interior de Trabajo*) will be filed. The Federal Center must begin operating the Labor Registry within two years following enactment of the Amendment.[8]

Final Comments

It is highly recommended that all companies doing business in Mexico thoroughly review the Amendment and continue to monitor the national and local labor relations environment. They should also begin to prepare strategies to update union contracts and other matters that may need to be adjusted to comply with the new obligations set forth in the Amendment.

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Endnotes

1 The Amendment became effective May 2, 2019, as per legislative decree published in the Mexican Official Gazette on May 1, 2019 (the "Decree").
2 The Decree.
3 Article 132 of the amended Mexican Federal Labor Law (the "Amended Law").
4 Article 389 Bis of the Amended Law.
5 Article 386 Bis of the Amended Law.
6 Transitory Article Eleven of the Decree.
7 Article 684-B of the Amended Law.
8 Transitory Article Three of the Decree.

Anatomy of a Technology Transaction

BY AARON WOO
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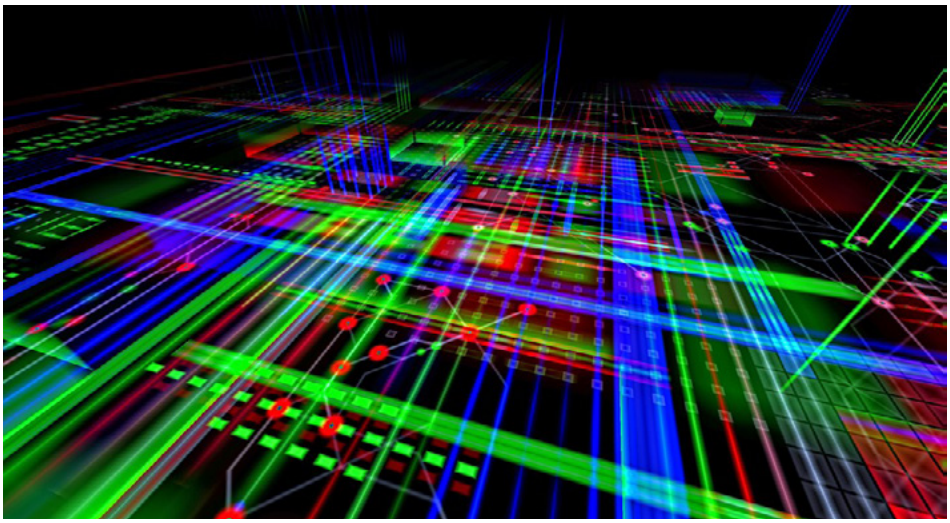
Introduction

It's 2019 and nowadays almost every business has some technological or data component that is critical to its profitability. So, what makes a tech deal different from a standard bricks and mortar deal? This article assumes you are familiar with basic M&A principles and addresses a handful of concepts that are unique to Technology Transactions.



Consideration

What's being paid to get the deal done? Most of the time, cash, stock or a combination of both are used as consideration in tech deals, although I have seen other types of quirky forms of payment, such as cryptocurrency, source code, or even automobiles. If cash is used as consideration in the deal, the deal is somewhat simplified (yet you'll still find elaborate payment structures with earn-outs), but frequently in tech deals, Buyer stock (combined with cash) will be used as a form of payment to incentivize both the Buyer and Seller to ensure in the post-closing success of the Acquired Company to the Buyer. Because of this, the Seller or Acquired Company should also exercise the same level of due diligence on the Buyer to ensure that the value of the Buyer stock is preserved.

In addition to the due diligence items, there are a variety of contractual mechanisms such as a Fixed-Exchange Ratio, Fixed Value, Collars, Caps and Floors, to ensure the price of the Buyer stock is preserved during the period between signing and Closing. Otherwise, any decline in Buyer stock could allow the Seller to walk away prior to Closing.

Shareholder Rights/Voting

Often in tech deals, there will be sophisticated investors involved in an emerging growth company (i.e., Angel Investor, Venture Capitalist). Therefore, always review the governance documents of the Acquired Company to determine whether:

- There are any Liquidation Preferences and Participation Features amongst the shareholders, members, or founders;
- The shareholders vote collectively as a single class or whether each class requires a separate vote; or
- There are any Rights of Co-Sale or Rights of Refusal which would motivate the Buyer to acquire all of the outstanding shares of the Acquired Company rather than just a controlling interest.

It's always advisable to work with the founders, CFO and CPAs to determine the accounting and distribution of the Closing proceeds for each share and class of stock.

Contracts

The contracts of the Acquired Company are always a strategic asset in a tech deal. In fact, some Buyers disregard the underlying technology, and are solely motivated for doing the deal in order to gain access to the Acquired Company's customers or vendors so that they can sell more products and services or lower their operational costs with economies of scale. Set forth below is a list of contracts frequently found in tech companies.

- Outbound Licenses. These licenses are the key to gaining access to existing customers and are the revenue stream to the Acquired Company. They allow customers to use the Acquired Company's technology and products by paying a license fee. As such, always examine the duration, scope, termination rights, and assignment restrictions to these licenses to ensure that these customers stay on-board and associated revenue streams remain intact post-Closing.

- SaaS Agreements. A variation of the Outbound License Agreement is the SaaS ("Software as a Service") Agreement in which the customer pays a subscription fee to use a product or software product that is virtually hosted in the cloud rather than being installed directly on the customer's local network. This exemplifies the evolution of software technology and associated business model.

- Inbound Licenses/Open-Source Licenses. It is common practice to combine third-party products and code with the company's IP to build a final product. In software, many of these third-party components are "open-source code" (i.e., snippets of code that are available to the public), which provide certain functionality that are combined to make the final product operational.

- Services Agreements. Once a customer is "locked-in" to using a technology or software product, technology companies often diversify their license revenue by selling additional support and services to maintain their products as the customer's needs and operating environments change.

- Training Agreements. Training is another common service sold to customers. After all, a company's products are worthless unless the customer knows how to properly and safely use them.

- Channel Partners and Reseller Agreements. These are basically middle-men that allow a software company to piggy-back onto the partner's or reseller's existing relationships and sell products and services to new customers. You'll need to differentiate whether these relationships are "white label," in which the channel partner basically sells the company's products as if it were their own, or "value-added," in which the Value Added Reseller ("VAR") adds additional bells and whistles to the company's product and bundles it into a final product before selling it to its customer base. IP Ownership, branding and customer access are usually the important issues to analyze when performing diligence on these agreements.

- OEM Agreements. Original Equipment Manufacturer ("OEM") Agreements are commonly used in hardware manufacturing, and constitute another variation of the VAR relationship, where the parts and components from several companies are assembled by the OEM into the final product before the VAR distributes them to the market. Branding control, warranty obligations, and IP ownership are common issues to think about in OEM Agreements.

- Joint Venture Agreements. Occasionally, software companies will combine efforts with other companies to develop a new product, reduce operating costs, or penetrate a new market. Each party may contribute a variety of strategic items to the venture such as IP, key personnel, hard assets, cash or a combination of the above. These agreements are critical to tech M&A as it is important to understand whether anything, such as IP ownership, has been inadvertently conveyed away into the Joint Venture.

Intellectual Property

Always understand the motives of the Buyer and Seller for entering into a deal. If the Buyer is interested in acquiring a technology and integrating it into its product suite, then IP becomes an important variable to consider. Set forth below are some common issues to look at when doing a tech-focused deal that may have international operations.

- IP Holding Company. Frequently, software companies spinoff a software holding company that houses its core technology and grants licenses/sublicenses to third parties in order to insulate the core technology from claims and liabilities of the business. As such, the definitive agreements must address the structure of the deal and whether the software holding company or its licenses are included as part of the deal.

- International Development. In this day and age, the development and maintenance of technology is outsourced and decentralized to multiple parties around the world. As such, make sure all key parties (employees, contractors, founders, executives, etc.) involved in building the technology have signed the appropriate Confidentiality and IP Assignments, while ascertaining that no technology of a third party has been inadvertently or illegally incorporated into the final product, such as that of a competitor or a prior employer. Additionally, it is always prudent to double check that none of the parties involved in development are subject to any restrictions (such as

a Non-Compete, Non-Development or IP assignment) imposed by a third party that could potentially prevent the entire project or final product from being commercialized. Finally, if third-party components are incorporated, examine the effect of tariffs and import/export restrictions on the costs of building the final product, and properly allocate this risk under the definitive agreements.

- IP Infringement. An entire article could be dedicated to the topic of IP Infringement. In short, IP rights are often the most valuable assets in tech deals because they can fulfill the Buyer's objectives of acquiring rights to a better "widget," the freedom to operate, and the ability to exclude others. Depending on the goals of the Buyer and the history of the Acquired Company's IP portfolio, due diligence questionnaires should be tailored carefully to suit the situation of the parties while balancing the scope of the representations and warranties to address any risks or assumptions uncovered from due diligence. If there are any blemishes on any IP of the Acquired Company, the valuation of the transaction will ultimately be impacted. As such, make sure the Buyer will be able to freely use the IP without requiring any consents of a third party, and confirm that there are no foundational IP rights in a similar technology that effectively block or narrow the ability to use the acquired IP. If there are defects discovered in the IP, factor in the cost of correcting such defects so that the purchase price can be adjusted accordingly.

- IP Assignments of Employees, Contractors and Founders. Too frequently, I see tech companies forget to obtain something as simple as an IP Assignment document. Everyone is eager to embark on a new project but overlooks important legal details at the outset. A few years into the project, however, relationships might disintegrate or people may no longer be communicating, but each of them may have contributed something significant to the technology of the Acquired Company. When a large sum of money is about to exchange hands, chasing down signatures for an IP Assignment prior to Closing is oftentimes exorbitantly more expensive than getting everyone to sign one before the project commences. It is not uncommon to see co-founders, who are no

longer getting along, hold a company hostage by refusing to sign critical deal documents by asking for more money to obtain their signatures. Also, you may have co-founders or contributors to the IP who may be "moon-lighting" from their full-time jobs whose employment agreements may grant their employers automatic IP ownership to anything that they have developed.

- Transfer Ownership of Domain Name/App/Code. In a digital economy, apps, domain names and websites, when used in conjunction with a trademark, are even more important than your traditional IP. Always obtain a list of domain names, including common spelling iterations that can be poached by a third party, from the Seller and check all domain registries to ascertain that none have lapsed and that they are rightfully owned by the Seller. As a Closing deliverable, you can stipulate that ownership of a domain name or App be transferred and reflected in the appropriate domain name or app registry.

- Obtain a List of IP (Patents, Trademarks, Copyrights, and Trade Secrets). Identify what is being acquired so work with IP counsel to ensure that all filings are current and have not lapsed or are being challenged in all of the countries and markets within which the Seller operates and/or sells its products/services.

- Software Patents. Software patents are rare and narrow. As such, source code are often protected as a Trade Secret, which has a broader scope of protection but is also easily lost if the Seller has not taken the appropriate measures to protect its secrecy (especially when granting access to the Buyer and its representatives to perform due diligence). As such, make sure that: (i) the Seller has put in place reasonable security measures to protect the confidentiality of its source code and IP; and (ii) everyone, including the prospective Buyer, who has come in contact with the critical IP and source code has signed the appropriate NDA's, IP Assignments and even Non-Compete/Non-Development Agreements. Additionally, verify whether any source code has been placed into a Source Code Escrow, which could force the Acquired Company to relinquish its code to a customer under certain circumstances, such as bankruptcy.

- Joint Ventures. If the Company is involved with Joint Ventures, we must determine if there is any core or foundational technology that is co-owned by a third party or licensed to allow another party to freely use IP or code that is strategic to the Company. We have occasionally seen companies inadvertently grant away certain ownership rights in core technology underlying their products. On the flipside, it is also imperative to determine whether there is any underlying component required to power the core technology but which is owned by a third party. If development and engineering has taken place abroad, work with local IP counsel to ensure that there are no local laws that would allow the creator to retain any IP ownership in the technology that was built.

- Source Code Review. With software development decentralized around the world, developers frequently build software by plugging in pre-existing snippets of third-party, open source code, rather than building the code from scratch. It is imperative to perform a code review (i.e., Black Duck) by examining the licenses of such third-party code to ensure that the software/technology has not been contaminated by source code that is deemed "viral" or "copyleft" and, thereby, jeopardizing the IP ownership of the software by granting unfettered rights for public use.

Cybersecurity

In a virtual world where data is the new currency, the protection of data has evolved into a huge priority and also transformed into a major risk. Commonly, you'll find a significant portion of a Buyer's due diligence focused on the Company's IT security protocols while having the appropriate provisions ("model clauses") in purchase agreements to address the transfer of data and the protection of the Acquired Company's IT networks. Ensuring the security of the IT networks not only defends the data of your customers and personnel, but also, that it protects against the theft/loss of trade secrets, financials, and intellectual property. Prior to the outset of any deal, the Buyer must closely scrutinize the acquired Company's IT networks to ensure that there are no vulnerabilities that could compromise the entire IT system, thus forcing the Buyer to absorb any post-closing fines, penalties, or loss of data imposed by a regulatory body. To mitigate any post-closing risks arising from cyber-threats, there are now specialized representations and warranties focused on the allocation of risk from security of the Acquired Company's software and IT networks, along with minimum requirements of maintaining cyber-insurance to hedge against a breach.

Privacy and Data

In addition to the company's technology, data is currently paramount to the value of the business. The inability to use the existing data may render a company worthless. Depending on the technology

involved and the type of data collected, additional regulations may govern a Buyer's ability to use or own the data collected by the Seller. For example, a FinTech startup may be collecting financial and account information of its customers, so the ability to use and transfer the data will be regulated by the Graham Leach Bliley Act,[1] while a digital health company may be collecting personal health information and, therefore, implicating compliance with HIPAA[2]/HITECH[3] as ownership is transitioned.

So, depending on the structure of the deal and rights granted in the Acquired Company's privacy policy, you will need to determine how the ownership of the data can be transferred from the Seller to the Buyer, and also any other additional security measures and compliance burdens (such as providing notices to its customers, obtaining consents, hiring a Data Protection Officer, and having the appropriate contractual provisions to safeguard the privacy of such data) imposed on the Buyer as such data is integrated into its systems and policies. In multinational deals, this issue is more apparent if an Acquired Company in the EU is acquired by a Buyer in the U.S., which must therefore comply with the requirements under GDPR[4] and the EU-US Privacy Shield.[5] At the end of the day, who bears such additional compliance risk and regulatory cost must be addressed prior to closing and, ultimately, whether the purchase price must be adjusted in order for the Buyer to comply with any additional requirements.

Additionally, your due diligence should also assess the security measures, data retention practices, and functionality of the software or app for users to opt-out, access, and delete their information to minimize any likelihood of post-closing liability arising from penalties and fines assessed by regulatory bodies such as the FTC or GDPR.

Conclusion

As Moore's law has predicted, the technology environment is constantly evolving at an exponential rate, which also requires business models, regulatory bodies, and lawyers to keep pace with the changes. This article is by no means exhaustive but superficially highlights some of the common issues encountered over the years that have remained somewhat constant. However, it is prudent to note that a new set of issues and risk tolerance seems to be introduced every few years and must be addressed in the various stages of a technology deal.

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Endnotes

1 https://www.ftc.gov/tips-advice/business-center/guidance/how-comply-privacy-consumer-financial-information-rule-gramm.

2 https://www.hhs.gov/hipaa/for-professionals/security/laws-regulations/index.html.

3 https://www.hhs.gov/hipaa/for-professionals/special-topics/health-information-technology/index.html.

4 https://eugdpr.org/.

5 https://www.privacyshield.gov/welcome.

CALENDAR - UPCOMING EVENTS

2019

SEPTEMBER 23
11:30 am-1:30 pm (includes lunch)
"Artificial Intelligence, Blockchain, & Cryptocurrency: Transforming How Business is Done Around the World"
(1.5 hours MCLE credit – approval pending)
Holland & Knight, Plaza Level Conference Room, 111 Congress Ave, Austin, TX 78701
$75 ILS Members I $100 Non-Members
$15 Non-Member Students I Free for ILS Member Students
More details and registration link coming soon ...

OCTOBER
San Antonio CLE

DECEMBER 10
Houston CLE
Vinson & Elkins

2020

FEBRUARY
Dallas CLE

MARCH
Annual Institute

APRIL
El Paso CLE

MAY
International Trip to Toronto, Canada w/CLE

JUNE 25-26
Texas Bar Annual Meeting – Dallas

More details to follow soon. For the latest calendar updates, please visit our website at ilstexas.org.

INTERNATIONAL LAW SECTION
THE STATE BAR OF TEXAS

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