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The Texas Bar International Law Section Recognizes the Tenth Anniversary of the adoption of the United Nations Guiding Principles on Business and Human Rights.

INTERNATIONAL LAW SECTION
THE STATE BAR OF TEXAS

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Message from Juan Alcalá, ILS Chair of the State Bar of Texas

The next twelve months will be a period of transition as we close one of the most challenging years in our lifetime and we begin to recover from the various hardships that have impacted us. It will be an honor to follow in the footsteps of so many past-Chairs who have built significant momentum and a solid foundation for this International Law Section. I look forward to working with an incredibly diverse and talented Council team and with the ILS membership as a whole to put the Texas legal community on the world stage.

Texas is an international powerhouse – it has the world's 9th largest economy (if it were its own country) ahead of Mexico, Russia, Spain and Australia and surpassing Brazil in 2020; it is the #1 state in the U.S. for foreign direct investment; it ended 2020 as the No.1 exporting state in the United States for the 19th consecutive year; and it is replete with stories of international companies relocating or expanding their operations in our backyards. Not surprisingly, our ILS members work across the world and offer services to global companies operating in Texas, our law schools are offering an increasing number of international courses and programs, and law firms and legal departments continue to expand their international expertise. This trajectory will, no doubt, continue in the years to come.

This year the ILS will strive to achieve the following goals: (1) to promote Texas as a legal market and further attract international legal work to this state; (2) to help Texas become more accessible to those seeking to pursue a legal education and a Bar membership in this State; (3) to expand collaboration with international and foreign legal organizations; (4) to continue to improve the professional development of our members through an increased number of educational programs focused on international cutting edge issues; and (5) to engage our members in international pro bono projects.

Some of these objectives will not be easy to achieve, but that is no reason not to try and if we fail to try again. Together and with the use of technology, we will continue to meet the challenges and opportunities that this next year brings. ■

Message from Tom Wilson, Editor-in-Chief

In this edition of the ILS International Newsletter, we celebrate the tenth anniversary of the adoption of the United Nations Guiding Principles on Business and Human Rights. I had practiced in this area since 1994. I did not really know what to call the practice, I just knew I had clients, particularly in the energy and minerals industries, that continued to need help on human rights matters around the world. Unfortunately for those industries, if one overlays the heat maps for where human rights violations are most prevalent over a map where oil, gas and other minerals are found, they matchup all too well. Until the publication of the Guiding Principles, I must say I was on my own and really developing approaches to these issues as best I could without much outside guidance.

The Guiding Principles were a brand new start for my practice in this area. Not long thereafter, I advocated to the State Bar of Texas and the ILS to create an International Human Rights Committee (IHRC), which the Bar and the ILS did. It was the first of its kind in the United States. Other state bars have since followed our lead. Members of the Committee have spoken across the state of Texas and authored articles not only in this International Newsletter but also in the Texas Bar Journal and other legal and non-legal publications. Two years ago, the IHRC celebrated International Human Rights Day (December 10th) with a live and broadcast seminar on the topic. Last year, despite the pandemic, the IHRC with the International Bar Association (IBA) sponsored an across the world broadcast of three panels on December 10th. The audience included lawyers from over 50 different countries. Plans for another such event are currently underway. I was gratified to see that part of the remote Texas Bar's Annual Meeting CLE and in particular its ethics offerings consisted of the re-broadcast of the 2020 December 10th panels.

Shortly after the IHRC was created, I was invited by the IBA to speak at its annual meeting in Vienna on the topic of what local bar associations can do to educate lawyers on international human rights issues. First, many were shocked I was not from New York or California. I explained to them the importance of this topic to Texas as a state whose economy is truly international in scope and in particular the importance of this topic to the energy and minerals businesses located in Texas. A few of us practitioners in this area noted that before the Guiding Principles, we would be lucky to get more than six to come listen to a discussion of the topic. Now we were attracting hundreds. While I was in Vienna, I received a call from a company in the Middle East asking that I come to discuss with them the Guiding Principles and how they might impact a construction contract for a project in South America. It was a big step for this company to reach out on the topic.

Much has changed since the Guiding Principles were adopted. I am gratified to see just in my firm a new generation of lawyers coming along to practice on elements of this topic, such as environmental justice. Now there is a new generation coming through our law schools who are interested in the topic as is shown by the articles drafted by the winner and runner-up of the IHRC writing contest and published here in this edition of the International Newsletter. There is still much work to do on this topic which is why the ILS and IHRC will continue to provide information and training to Texas lawyers on the topic in seminars and in publications. I hope this edition of the ILS International Newsletter proves to be the next important step in fulfilling that mission. ■

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Lawyers in the state of Texas whose clients are involved in international business may be confronted more frequently with the human, legal, and reputational risk associated with violations of internationally recognized human rights. The State Bar of Texas created the International Human Rights Committee (IHRC) in August 2015, the first of its kind among state bars, with the goals to study legal issues related to international human rights, inform Texas lawyers of these issues, and provide guidance to these Texas lawyers.

The IHRC Podcast will periodically feature experts on various topics related to international human rights important to Texas lawyers and their clients.

For more information on our committee's work, visit us online at State Bar of Texas International Human Rights Committee or send an email to Joshua Newcomer at jnewcomer@mckoolsmith.com.

Forced Marriage Reform in the International Criminal Law

Winner in the International Human Rights Committee Essay Contest

RYLIE HAYES
3L, Southern Methodist University Dedman School of Law

In 2011, the Prosecutor of the International Criminal Court (ICC), Fatou Bensouda, expressed her dedication to detect, investigate, and prosecute sexual and gender-based crimes (SGBC).[1] The conviction on February 4, 2021 of Dominic Ongwen (Ongwen), a high-ranking officer of the Lord's Resistance Army (LRA) in Uganda,[2] exemplifies a major accomplishment by the Prosecutor and the ICC. Ongwen's conviction addresses overlooked SBGCs and advances "international criminal jurisprudence on the matter."[3] The ICC found Ongwen guilty of 61 war crimes and crimes against humanity; 19 of the charges related to SGBCs and 11 related to crimes directly committed by Ongwen.[4] Ongwen's conviction involved the highest number of SBGV charges in an ICC case to date and marked the first successful conviction of forced marriage as an "other inhumane act" before the ICC.[5]

Forced marriage was not only a common practice among LRA soldiers, but it has also been practiced in many war-torn countries such as Sierra Leone, Liberia, and Rwanda.[6] Yet, despite the prevalence of forced marriage in armed conflict, forced marriage is a new topic for consideration by the ICC.[7] In fact, "Ongwen is the first person to be charged with the crime of forced marriage" as an "other inhumane act" by the ICC.[8] As a result, Ongwen's subsequent conviction is recognized as a significant step in the right direction, however, the novelty of the conviction exemplifies the need for continued development in the international criminal law.

In light of the Ongwen decision, this paper is going to analyze forced marriage as an "other inhumane act" and a crime against humanity and the lasting effects victims of forced marriage experience post-conflict. First, it will provide an overview of international criminal law on forced marriage. Second, it will provide an analysis of the strategies applied by the Prosecutor in the Ongwen decision. Third, this paper will examine the classification of forced marriage as an "other inhumane act" and the failure of the ICC and individual countries to provide adequate

assistance towards the reintegration of forced marriage victims into their communities. The paper recommends removing forced marriage from the category of "other inhumane acts" and enumerating "forced marriage" as a listed crime in Articles 7 and 8 of the Rome Statute.[9] Additionally, it recommends that the Trust Fund for Victims Unit of the ICC award collective reparations to forced marriage victims and that the ICC issue a statement encouraging additional funding for and further development of intervention efforts aimed at the personal recovery of forced marriage victims. Overall, these solutions will likely stimulate future prosecution of forced marriage offenders and support the interests of forced marriage victims.

Forced Mariage and the Current State of the Law

Forced marriage was officially identified as a crime against humanity by the Appeals Chamber of the Special Court for Sierra Leone (SCSL) under a residual clause prohibiting "other inhumane acts."[10] The Appeals Chamber held that forced marriage and sexual slavery were distinctive because although they share elements "such as non-consensual sex and deprivation of liberty," forced marriage uniquely involves "a perpetrator compelling a person by force or threat of force . . . into a forced conjugal association resulting in great suffering, or serious physical or mental injury on the part of the victim," and "implies a relationship of exclusivity."[11] The concept of forced marriage originated from interviews detailing the experiences of female victims as "wives" to rebels during the civil war in Sierra Leone.[12] As a result, forced marriage was classified as a separate crime that was of similar gravity to the several enumerated crimes against humanity listed in Articles 7 and 8.[13]

The Rome Statute of the ICC similarly "does not enumerate forced marriage as a crime against humanity" or a war crime,[14] but includes residual provisions in Articles 7 and 8 prohibiting "any other form of sexual violence of comparable gravity" as well as "other inhumane acts of similar character intentionally causing great suffering, or serious injury to body or to mental or physical health."[15] The ICC classified forced marriage as an "other inhumane act" when prosecuting Ongwen as a war criminal.[16] However, because Ongwen is the first person to be convicted of forced marriage by the ICC, "case law remains insufficient in addressing forced marriage as a crime against humanity."[17] The disappointing reality is that "there have been no successful convictions for SGBV crimes at the ICC," prior to Ongwen's conviction.[18]

> "These solutions will likely stimulate future prosecution of forced marriage offenders."

Conviction of Dominic Ongwen

The Chamber in Ongwen was the first ICC Chamber to charge and convict a perpetrator of forced marriage as an "other inhumane act."[19] Ongwen was successfully convicted of 61 charges of crimes against humanity and war crimes, 19 of which related to SGBV, and 11 of which related to crimes directly committed by Ongwen as a perpetrator.[20] The guilty verdict against Dominic Ongwen was a major achievement in fighting against SGBV, including forced marriage. Ongwen's conviction was a breaking point in the ICC because "acts of sexual violence against women and girls" were classified not only as "sexual violence (rape and sexual slavery) but [also] as torture and outrages upon personal dignity."[21] Ongwen was found guilty of these acts because of seven brave women who provided detailed testimonies regarding their abduction and roles as Ongwen's "bush wives."[22]

The ICC trial against Ongwen "firmly established the crime of forced marriage in international criminal law."[23] Because the ICC is the only permanent international criminal court, the "narratives created, and the language used carry" great weight in influencing the rest of society.[24] As a result, the Officer of the Prosecutor (OTP) carefully detailed the events and subsequent charges as a means of promoting justice for victims and setting the correct precedents. For example, the Prosecution carefully explained that the "specific labeling of these crimes as forced marriage [was] important because it recognizes the specific harm done to the girls when they were assigned as 'wives.'"[25] The OTP acknowledged that forced sexual services were an inherent part of being in a forced marriage, but it also encompassed "other, nonsexual tasks such as household chores, cooking, and child rearing i.e. raising new LRA fighters."[26] Additionally, the Prosecution successfully stressed that "while victim's lack of consent may have seemed obvious at first, when they were subsequently bludgeoned into silent submission, this did not mean the acts became consensual."[27] The specific language employed by the OTP served as a powerful acknowledgement towards the victims' suffering and ensured misconceptions did not occur.[28]

Forced Marriage is Underdeveloped in the International Criminal Law

It is imperative that the guilty verdict of forced marriage by Ongwen is studied in light of the broader ICL in order to encourage further legal development. Accountability for forced marriage offenders and reparations for forced marriage victims remains a work in progress.[29] The current gaps in the ICL on forced marriage are based on the legal classification of forced marriage and the lack of adequate support for forced marriage victims post-conflict. Discourse has "centered on whether forced relationships are best qualified as sexual slavery, forced marriage as an 'other inhumane act,' . . . or whether the Rome Statute ought to be amended to include a distinct crime of forced marriage."[30] Additional challenges concern the lack of support for the recovery and rehabilitation of victims post-conflict.[31]

Legal Classification of Forced Marriage

The legal classification of forced marriage in the ICL is a matter of sharp debate across the international community.[32] Forced marriage is legally complex because "the multi-layered acts of brutality frequently overlap with sexual slavery, enslavement, rape, and arranged marriage."[33]

Many commentators argue that the term "forced marriage," which includes both sexual and non-sexual elements, is distinguishable from other SGBCs.[34] They argue that the term "forced marriage" was created based on the personal experiences of victims[35] and that prejudice towards victims stems from the long, intimate relationship between the victim and perpetrator, not from use of the term "forced marriage."[36] The problem is that "forced marriages are not codified in the Rome Statute as an independent crime."[37] Therefore, the Chamber of *Ongwen* classified forced marriage as an "other inhumane act" in order to charge it as a separate crime,[38] finding that the gravity of forced marriage permitted its inclusion.[39]

The "other inhumane acts" provision in the Rome Statute is frequently criticized for being ambiguous and having an unclear scope with limited guidelines.[40] Admittedly, the provision is necessary in order to permit the prosecution of crimes not listed in the Rome Statute.[41] However, the crimes traditionally categorized as "other inhumane acts," although severe, "do not seem to match the brutality [or complexity] of forced marriage."[42] For example, forcing nudity, men to rape women, and civilians to witness family deaths all qualify as "other inhumane acts" by the ICC.[43] Forced marriage is distinguishable because of its complex, long-term, and intimate nature, serving as a gateway to victimization of additional crimes such as rape, enslavement, and torture, among many others. For instance, when forced marriage victims are abducted, they are often "forced to watch the killing or mutilation of close family members."[44] As a result, classifying forced marriage as an "other inhumane act" is likely to diminish its severity, which could arguably make it more difficult to prosecute effectively.[45] It would also likely "create confusion leading scholars, courts, and legal practitioners to . . . disregard forced marriage" because of its complexity.[46] Consequently, the disputes regarding the legal classification of forced marriage, and its dearth in the ICL exemplify the need for a concrete solution that will create legal certainty, fill the gap in the ICL, and foster future prosecution.

Experiences of Forced Marriage Victims Post Conflict

Forced marriage is a heinous crime committed against young women and girls during wartime that is becoming increasingly recognized in the international criminal law (ICL). One victim of forced marriage by Ongwen testified that "she could not refuse to have sex with him because she felt as if her whole life was in his hand" and recounted feeling as if her "whole body was being torn apart" during the forced sex.[47] Ongwen demanded that the victim refrain from crying and subsequently forced her to wash "the bedding covered in her own blood" after the act.[48] Victims of forced marriage by Ongwen were also forced to "perform different domestic duties, including cooking," cleaning, gardening, and "nursing Ongwen when he was injured."[49] Any refusal or failure to complete these tasks to Ongwen's liking resulted in severe beatings as punishment.[50] Sadly, the experiences of Ongwen's forced "wives" pose as mere examples of the cruel treatment that most victims of forced marriage endure.[51]

Survivors of forced marriage are subjected to profound and lasting impacts, with sometimes irreversible physical, psychological, and behavioral repercussions.[52] Unfortunately, significant gaps exist "between international discussions about the problem and concrete changes at national and local levels, especially when it comes to meeting the needs of individuals affected by" forced marriage.[53] The lack of reliable research, combined with inadequate financial, psychological, and medical support for victim recovery and reintegration has become a major issue in post-conflict States.[54]

Even though it has been a decade since the war ended in northern Uganda, "there is still a lot we don't know about the long-term effects" experienced by survivors of forced marriage, "including

how spousal and familial relationships have been affected."[55] Although research on victim reintegration is inconsistent, the present research has demonstrated that *at least* a minority of forced marriage victims face social repercussions, such as the "inability to own property, access education, or earn a living," and community stigma deriving from their close association with the rebels.[56]

Forced marriage is particularly heinous because it subjects women and girls to harsh sexual, physical, and mental abuse that creates long-lasting consequences and profoundly impacts the victims' lives post-conflict. For example, many survivors have experienced "reproductive health problems such as traumatic inflammatory disease, infertility, and HIV/AIDS," as well as other physical injuries sustained during their forced marriages.[57] High levels of mental and behavioral health issues have also been reported—including depression, anxiety disorders, suicidality, recurring nightmares, alcohol and substance abuse, and post-traumatic stress disorder (PTSD), in addition to general feelings of "shame, fear, and guilt."[58]

Unfortunately, victim rehabilitation is a major challenge among post-conflict communities, such as those in northern Uganda. The Ugandan government, for example, has failed to establish any form of support mechanism for forced marriage victims.[59] As a result, forced marriage remains dramatically underreported and research remains limited because of the lack of support and cultural taboos, threats, trauma, and information deficits associated with reporting.[60] The limited support available to victims has thus been left to local non-governmental organizations (NGOs) that are overloaded, underfinanced, and lack sufficient equipment to fight the widespread issues associated with forced marriage.[61] Despite these efforts, resources for victims post-conflict, including victims of forced marriage, remain limited, signifying the need for additional international assistance.[62]

Proposed Solutions

Although statistics vary, the international center for Research on Women estimated that over 51 million girls under the age of 18 were victims of forced marriage in 2003.[63] The widespread prevalence signifies the importance of regularly reviewing and developing the ICL in order to guarantee successful convictions of forced marriage offenders and maximize support for forced marriage victims.

Explicitly Enumerate Forced Marriage in the Rome Statute

Forced marriage should be explicitly enumerated as a crime against humanity under Article 7(1)(g) of the Rome Statute alongside the other SGBCs.[64] An accurate and effective legal classification of forced marriage is critical to ensure legal certainty and promote legal recognition by the international community.[65] The current gap in ICL regarding forced marriage has resulted in weak criminal enforcement by the ICC.[66] Removing forced marriage from the residual category of "other inhumane acts" and clearly identifying it as a SGBC will not only "cast greater spotlight on a crime that has received scant recognition by the international community,"[67] but will also "ensure that the prosecution of a defendant is based on specific and clear legal provisions" establishing "legal certainty, predictability, and foreseeability."[68] Admittedly, the amendment process is complex and requires a two-thirds majority vote by the State Parties if consensus cannot be reached.[69] However, several acts originally listed as "other inhumane acts" in the case law of the ICC tribunals, including sexual violence and enforced prostitution, were later codified in the Rome Statute.[70] This implies that the Rome Statute could be amended to enumerate crimes presently classified as "other inhumane acts," such as forced marriage.[71] The first forced marriage conviction against Ongwen proves that although the ICL is moving in the right direction, continued legal development is necessary to ensure successful future convictions. The alternatives to amending the Rome Statute fall short of these objectives, as illustrated above. It is imperative that forced marriage is not subsumed within separate legal categories, but instead is distinctly recognized in the ICL.[72] By doing so, "the criminalization of forced marriage by the international community will gain ground" and stimulate future convictions.[73]

Increase Support for Forced Marriage Victims Post-Conflict

Victims of forced marriage commonly suffer from "severe [forms] of trauma," but rarely receive proper support concerning their recovery.[74] In an effort to increase support for all victims, the ICC created a Trust Fund for Victims (TFV) "to implement Court-ordered reparations and to provide physical and psychological rehabilitation or material support to victims."[75] Although the TFV has established multiple projects in Uganda to support victims,[76] the availability of support for victims of forced marriage remains scarce.[77] The ICC can increase accessibility to support services for forced marriage victims through its role as a credible and visible international institution and its close relations with victims. For example, the ICC can award collective reparations to victims and issue statements requesting support for forced marriage victims from the international community, detailing where assistance is needed and the optimal organizations to support.

The TFV should award collective reparations to victims of forced marriage

in Uganda in order to finance community-based support and ensure the greatest number of victims are benefited.[78] Collective awards have the ability to impact every victim living in benefited communities whereas individual awards are limited because they are constrained to victims who participate in trial.[79] The TFV also has limited resources and is thus constrained from meeting "the expectations of all victims."[80] However, the TFV is able to "order collective reparations where the number of victims and the scope, forms, and modalities of reparations make a collective award more appropriate."[81] The thousands of forced marriage victims in Uganda and the absence of adequate support demonstrate that awarding collective reparations is optimal to finance rehabilitation services for numerous victims.[82]

The ICC is likely the most competent organization to assess the needs of forced marriage victims because of its international platform, commitment to provide justice for victims of SGBV, and direct engagement with victims and affected communities. The close and in-depth interactions between victims and the ICC staff—including field agents, the victims' lawyers, and the experts in the Victims and Witnesses Unit of the ICC—allow the ICC to develop a significant understanding of "the material needs of [the] victims."[83] Although the ICC has limited resources that may impact its ability to fully investigate relief for victims, a statement made by the ICC would be most persuasive because of its visibility as a global platform.[84] Further, the ICC could coordinate with NGOs in Uganda, employ its cooperation agreement with the United Nations,[85] and utilize its own expertise in order to sufficiently assess the needs of forced marriage victims. As a result, the ICC should release statements detailing the need for additional funding and support for forced marriage victims and identifying a network of organizations that donors should contribute to.

Existing research indicates that intervention efforts for forced marriage victims should prioritize "livelihood and income generation projects" to help victims "support themselves and their children; food security; education for [the victims'] children; [and the victims'] need for support in their personal recovery."[86] Efforts should be made to increase overall access to physical and mental health services, economic opportunities, and legal aid.[87] The best way to achieve these goals is to utilize the international position of the ICC in order to award collective reparations and issue statements encouraging support from the international community.

Conclusion

In conclusion, although the Ongwen conviction was a major accomplishment towards achieving justice for forced marriage victims, further developments in ICL are necessary to encourage future forced marriage convictions and ensure proper recovery for forced marriage victims. The ICC should specifically focus on amending Articles 7 and 8 of the Rome Statute to include forced marriage as an explicitly enumerated crime and increase support efforts concerning victims' recovery and reintegration. These actions will cast a spotlight on forced marriage to ensure perpetrators are held accountable for their actions and victims are afforded proper support during post-conflict recovery. ■

Endnotes

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64 Nguyen, *supra* note 17.

65 *Id.*

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68 Kerr, *supra* note 32.

69 Rome Statute of International Criminal Court, Art 121.

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74 *Id.*

75 *What We Do*, TFV, https://trustfundforvictims.org/index.php/en/what-we-do.

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77 Linus Nnabuike Malu, *The International Criminal Court and Conflict Transformation in Uganda*, ACCORD Sec. 8 (February 2015), https://www.accord.org.za/ajcr-issues/the-international-criminal-court-and-conflict-transformation-in-uganda/.

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83 Mark Kersten, Victims at the ICC: What is the Way Forward?, Justice in Conflict (Dec. 10, 2014), https://justiceinconflict.org/2014/12/10/victims-at-the-icc-what-is-the-way-forward/.

84 *See generally id.*

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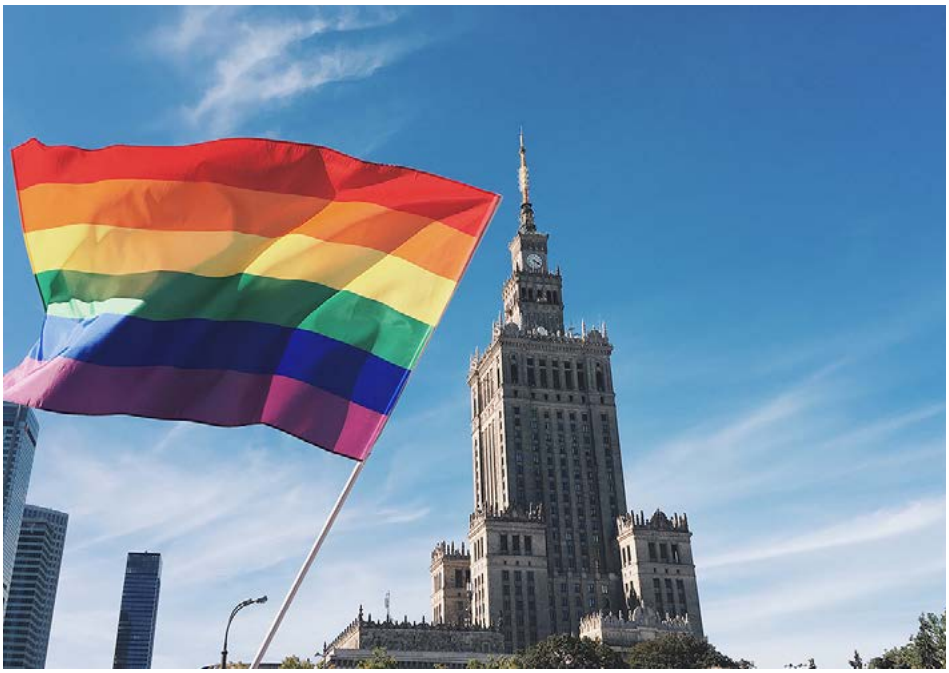
International Human Rights & Rhetoric: Case Study on Poland and Hungary

First Runner-Up in the International Human Rights Committee Essay Contest

EMORY POWERS
3L, University of Houston Law Center

General Information and Historical Background



The international sphere of human rights has made progressive strides in recent years. Particularly, as related to the rights of LGBTQ+ individuals, many countries have adopted legislation to address discrimination and a lack of legal protections for this community.[1] These laws include not only marriage equality, but also rights to equal health care benefits for same-sex couples, the rights of transgender individuals to access transitionary care, protections in housing, employment, public services, and more.[2] Despite these advancements, the discussion of LGBTQ+ rights has also been a highly politicized and controversial topic across the world. In some countries, the progression of rights is devolving into discriminatory policies that threaten the safety of the LGBTQ+ community.[3]

Political developments in Poland and Hungary in just the past few years have led to an increase in these discriminatory policies against the LGBTQ+ community.[4] In Poland, "nearly a third of the country" was declared an "LGBT-free" zone in which the "ideologies" of the LGBTQ+ community were denounced.[5] These zones began with a family charter created by the current political majority party in Poland, the conservative[6] Law and Justice Party (PiS[7]).[8] The charter alleged to give parents more influence in their child's upbringing, but it also heavily implied that LGBTQ+ parents were not considered fit to be a family or adopt children, and banned teaching of "LGBT ideology in schools."[9] The issue quickly became one of international concern, invoking reactions from the European Union (EU), then-presidential candidate Joe Biden, and a number of world leaders.[10] Poland has since become a focal point of LGBTQ+ activism, placing the country in between strong influences from both international players and domestic parties.[11]

In response to these zones, the EU withheld funding from its town twinning program to any Polish city that adhered to the denouncement of LGBTQ+ individuals.[12] Ultimately, the gesture did little to enforce compliance and Poland simply provided substantially

similar funding to replace what those municipalities had lost.[13] In September 2020, international diplomats publicly spoke out against Poland's acquiescence of these zones in an open letter and called the matter one of "human rights" concern.[14] Despite international involvement, Poland has not rebuked the declarations. The Polish Embassy in the United States released a statement reinforcing a commitment to rights of all citizens and minimizing the declarations as the views of "local officials on issues of moral salience."[15] Notably, the letter made a point to clarify that the municipalities did not create the "LGBT-free zone" language, but it did not go so far as to condemn the family charter as discriminatory.[16]

In Hungary, recent discriminatory legislation has focused more pointedly on transgender, intersex, and gender-diverse individuals.[17] A new law redefined the term ""nem", which in Hungarian can mean both 'sex' and 'gender,'" to be narrowly determined by a person's biological sex at birth.[18] It also restricted the ability to change birth records and other identifying documents once they have been recorded.[19] These regulations resulted in a ban on gender corrections for transgender and gender-diverse individuals seeking to correct their legally identifying documents in Hungary.[20] The law has already been described by some civil rights groups as a violation of "Hungary's obligations under the European Convention on Human Rights", yet little has been done on the international stage to encourage its repeal or Hungary's compliance.[21]

Similar to Poland, Hungary is hardly a stranger to international tensions related to political freedoms and human rights obligations.[22] Following criticisms of an unfair election in 2019, Prime Minister Orbán openly stated, "the era of liberal democracy is over."[23] Both Poland and Hungary experienced a strong shift to a conservative-wing political majority in 2015 and 2010 respectively.[24] Historians contend that the status of these countries as former members of the Soviet Bloc has a strong influence on their current political climate. Some suggest that Poland and Hungary are simply proxies for Russian influence in Europe.[25] A part of this political climate has included tensions with the LGBTQ+ community and these increasingly discriminatory policies.

The following analysis will examine the current social conflict in Poland and Hungary in terms of case studies of domestic political pressures that conflict with international human rights obligations. A greater understanding of the underlying influences resulting in the current discriminatory policies will allow subsequent discussion of potential human rights enforcement tactics to which these countries may be more or less likely to respond. This article will also cover the enforcement tactics that the international community has utilized to this point, and why they have been inadequate to resolve similar conflicts. In addition, the author will propose changes to international enforcement strategies that are appropriate, proportional, and promising in the context of LGBTQ+ rights. Finally, the author will consider the larger international implications of these policies and what can be gleaned from how the international community chooses to react to defiance of enforcement attempts.

Case Studies

Poland

Poland's past political trends are essential to understand the current political climate and pressures. In 2015, Poland came under a single party government led by the conservative-right leaning PiS.[26] The PiS majority in both parliament and the presidential office marked the first time Poland was governed by a single party since the political dissolution of communism in 1989.[27] This election marked a shift in the political climate within the country that some have seen as a stark decline in the open democratic process.[28] There are various theories regarding the reasons behind this shift, each one warranting its own in-depth research on historical causation.[29] Regardless of the underlying reasons, some scholars have labeled it as a shift to a political structure marked in part by exclusionary identity politics.[30] Specifically, it is suggested that Polish PiS leadership has taken action to consolidate power, influence media outlets, and create a divisive national identity by "othering" certain groups.[31] The existence of such a political structure was strikingly clear in the recent presidential election.

In the July 2020 elections, incumbent President Duda, supported by the PiS, ran against Rafal Trzaskowski of the more center-oriented Civic Platform party.[32] The election was riddled with tense rhetoric, biased media coverage, and accusations of invalid processes.[33] During the campaign period, presidential candidates played to the "deeply polarized" political parties,[34] some used othering tactics against LGBTQ+ individuals,[35] and gave strong preference to particular media outlets.[36] Duda took a divisive stance during his campaign by making LGBTQ+ rights a major debate-point.[37] In what became a widely covered event of the election, he stated during a rally that LGBT ideologies are "more destructive" to society than communism.[38]

LGBTQ+ rights became a talking point to rally support for Duda and the PiS during the elections.[39] Duda joined PiS during his campaign to promote the family charter and promised to "defend children from LGBT ideology."[40] Although the family charter did not explicitly use the language "LGBT-Free Zone," it had subversive implications for this community in particular.[41] The exact phrase "LGBT-Free Zone" however, was

not propelled into the media spotlight by the PiS or even Duda, but from a gay activist in Poland, Bart Staszewski.[42] Staszewski created faux street signs that stated "LGBT- Free Zone" in various languages and posed with them outside the municipalities that had signed the PiS family charter declaration.[43] Staszewski classified the signs as a form of "performance art" and they were incredibly successful in making a statement.[44]

In the end, Duda won his reelection campaign by an extremely close margin with only 51.2% of votes, a slim majority.[45] It was the "slimmest presidential election victory" in Poland since the end of communism.[46] However, the conflict over LGBTQ+ rights in Poland extended well past the election cycle. When the "LGBT-free zones" became a focus of international media, Duda's decision to stand by PiS and promote the charters implicated him as a cornerstone of the efforts.[47] As a result, Poland as a state and the Polish government as a whole received "mounting international criticism."[48] The slim election so close behind may have been just another piece in the complex number of reasons that the Polish government adhered to the PiS perspective. Although Duda cannot seek reelection after this term, he does not seem to have intentions of straying from PiS priorities or shying away from drastic policy measures. Without reelection in the future or potential election consequences for unpopular politics, there may be less concern about proposing controversial policies like discriminatory LGBTQ+ laws.

Hungary

In Hungary, a similar political backdrop has led to discriminatory practices, recently targeting transgender, intersex, and gender-diverse individuals in particular. The conservative *Fidesz-KNDP* party has governed Hungary since 2010.[49] Viktor Orbán has led the party as Prime Minister during that time and become a major figure, arguably the largest modern figure, in Hungarian politics.[50] The political strategy that the *Fidesz-KNDP* used to maintain majority power has garnered criticism and concern from other democratic states as a significantly un-democratic method.[51] Notably, the party,

> "Similar to conflicts in Poland, the international stage has done little more than symbolically denounce these policies and call for reform."

"changed the Constitution without involving the opposition in the process; curtailed the rights of the Constitutional Court; filled the ranks of institutions representing checks and balances, like the office of the Chief Prosecutor, with loyal party members; changed the electoral system to benefit the most popular party; and took over the vast majority of media outlets, which now serve as channels of propaganda for the ruling coalition."[52]

The *Fidesz* party leans starkly to the right of the political spectrum, with many reports that identify its policies as "increasingly populist."[53]

Against this political backdrop, new policies that discriminate against gender non-conforming individuals are hardly a surprise. Since coming to power in 2010, Orbán has been pushing legislation that is "chipping away at LGBTQ rights in Hungary."[54] For example, in 2012 a new Hungarian constitution redefined marriage as specifically a union between man and woman,[55] and more recently, redefined family as a union with a mother and father.[56] The country has also declined repeatedly to add any constitutional protections for LGBTQ+ individuals against discrimination.[57] Finally, a new law passed in 2020 removed the ability for transgender, intersex, and gender non-conforming individuals to change their sex listed on identifying documents.[58] These policies all have a role in creating a social world that LGBTQ+ individuals cannot participate in by legal definition. This world includes benefits and freedoms such as marriage, adoption, and correct identification documents from which LGBTQ+ individuals are exempted.

Similar to conflicts in Poland, the international stage has done little more than symbolically denounce these policies and call for reform.[59] The European Union originally voted to remove Hungary from the European Council as a result of increasingly discriminatory policies, but never completed the procedural process to do so and the idea has stalled.[60] More interesting and somewhat dichotomously, the EU continues to provide funding to Hungary despite the fact that the country has implemented similar policies to those of Poland.[61] Although it has been recognized that these policies are discriminatory and have adverse impacts on minority groups, the political hold of the *Fidesz* party is difficult to overcome.

This case study prominently presents the conflicts in international human

rights law that arise when cultural and political differences begin to blur the definition of what truly is a human right. To be sure, Polish and Hungarian leadership clearly views LGBTQ+ rights as a policy concern rather than a human rights issue.[62] The EU, UN, and other international state organizations however have recognized these rights under the umbrella of human rights law.[63] This stark dichotomy in framing LGBTQ+ rights is essential to understanding how the international community can enforce those rights. If a country disagrees on the basic, underlying idea that a particular right even qualifies under human rights law then typical enforcement methods will be ineffective. This rings particularly true when the country not only disagrees on the qualification of a right, but when there are strong domestic pressures that outweigh any fear of violation.

International Response and Fortifying International Human Rights

International human rights law has been criticized as a somewhat ambiguous area for legal enforcement because of cultural, social, and political differences and a lack of proper recognition of these differences.[64] Without a baseline agreement on the bounds of human rights law, and what is included under this umbrella of law, it is difficult to analyze the enforcement methods that will be most effective. When the rights are clearly defined, then states can better anticipate what acts will amount to a violation, and international organizations can implement methods of enforcement with more surety.[65]

The European Union's Response

The European Union had a potentially large role to play in Poland following these policy changes targeting the LGBTQ+ community. Under Article 21 of the Charter of Fundamental Rights of the European Union, discrimination based on sexual orientation is prohibited among the EU member states.[66] The EU has been unmistakably clear in its understanding that members have obligations to protect the rights of LGBTQ+ individuals.[67] While Poland and Hungary are signed on, and in theory obligated, to follow these values of the EU acceptance of the LGBTQ+ community has been hard fought by public sentiments and leadership in both countries.[68] The current policies in Hungary and Poland have been debated as a violation of human rights obligations, but denouncing an entire group based on their sexual orientation or gender identity surely results in socially discriminatory practices.[69] Despite the potential legal implications of Charter violations and the EU's clear prerogative to enforce the charter, all enforcement attempts have been essentially ineffective.

The European Union's response to Poland's legislative and political developments has been largely symbolic and legally non-binding. Although the EU withheld a portion of financial funding to the Polish municipalities who had signed the family charter, this did very little to influence the municipalities to change course.[70] Poland simply found the money to reimburse those municipalities for any lost EU funds, giving them even more than the EU funding would have.[71] In fact, the municipalities who lost funding received more than double the amount from Poland itself; an indication that the withheld amounts from the EU were minimal at best.[72] In theory, economic coercion or pressure is a valuable enforcement method that "would directly compel compliance with human rights standards."[73] However, the EU's action here were little more than a thin attempt to gain compliance without garnering any substantially effective results.[74] The funding withheld was simply not significant enough to induce change of policy within Poland and ultimately served as more of a gesture than true, binding legal enforcement.

In 2006, similar anti-gay rhetoric in Poland resulted in resolutions from the European Parliament that denounced homophobic comments but did little beyond that.[75] A similar symbolic showing was made earlier this year when over 50 European diplomats signed onto a letter denouncing the anti-LGBT zones in Poland.[76] The lack of any legal backing behind these responses has created a grey area of policy surrounding minority rights. Although these discriminatory actions are not favored in the international community, and subsequently denounced, the symbolic responses are not significant enough to counteract the social and political pressures leading to anti-LGBTQ+ sentiments at home. As a result, a trend has seemed to emerge in which states denounce the LGBTQ+ community through various social declarations, and the EU struggles to find a proportionate response strong enough to compel change.

On one hand, withholding more substantial forms of funding may result in compliance considering the significant amount and varying sources of EU funding that is sent to Poland.[77] On the other hand, these methods of diluted enforcement may be the only proportionate response to the "symbolic" actions taken by Poland that are rooted entirely in rhetoric. More tangible consequences, aside from the minimal financial coercion and public denouncement already used, may not be appropriate in this case. Unless Poland's policies shift to a more aggressive or legally binding form of discrimination it would be difficult to validate harsher penalties. Essentially, the EU is placed in a bind between the need for proportionality of response, and the weakness of its response

that gives Poland the opportunity to ignore the consequences in practice.[78] Strengthening international human rights while balancing this dichotomy of proportionality and effective enforcement is a difficult line to walk.

In November of 2020, the EU took steps to address this enforcement concern by proposing a novel "LGBTIQ Equality Strategy" intended to address concerning statistics of LGBTQ+ discrimination in Europe.[79] News sources identified the strategy as a direct "challenge" to the increasingly discriminatory policies of right-wing leaders in Poland and Hungary specifically.[80] The strategy included a proposal that would add "homophobic hate crime and hate speech" to the list of "Eurocrimes," crimes considered major offenses among European states.[81] This proposal would require a unanimous vote of support by all EU members.[82] At this time, it is unclear whether this particular proposal adding homophobic speech to the list of Eurocrimes will be approved. Regardless, the proposal alone is a significant step in the direction of necessary development of stronger protections for LGBTQ+ individuals against verbal and social discrimination.

Strengthening Enforcement Mechanisms of International Human Rights Law

Currently, international human rights law is severely limited in the practice of inducing compliance.[83] Scholars have frequently discussed this weakness of international human rights law in general as a legal concept that relies almost entirely on voluntary compliance among the sovereign states.[84] The existing soft law mechanisms of international enforcement lack clarity on who holds the legally binding duty of enforcement, what factors warrant enforcement, and "the legitimacy of "external" international decision-making," on issues of human rights.[85] More specifically, when analyzing issues of social discrimination and antagonistic rhetoric as opposed to egregious tangible violations, like physical violence or genocide, it is increasingly unclear what methods of enforcement are appropriate. There are, however, two areas of structural reform in the area of international human rights law that would be potentially more useful in combatting ideological violations. The first is a push for clear recognition by international organizations of the damage and dangers of discriminatory rhetoric, discriminatory political narratives, and social denouncements. The second is a restructuring of human rights treaties and policies to incorporate hard law in order to encourage greater state compliance and bring clarity to the structure and enforcement of human rights law.

First, the recognition of discriminatory rhetoric, political campaigns, and social denouncements as violations of international human rights law is needed to close the gap that currently exists. Even in extreme cases of violations, the international community can be slow to act as a result of unclear enforcement policies and legal responsibilities.[86] Human rights violations committed solely through rhetorical narratives of discrimination and pervasive public exclusion of minority groups present an even murkier question regarding the proper response. The impact of this kind of discrimination is well documented as leading to an increase in physical hate crimes, social discrimination, and a substantial lack of legal protection for targeted groups.[87] To be sure, the European Parliament published a research study on the connections between hate speech and subsequent hate crimes that result from such speech.[88] The report stressed not only that hate speech creates greater levels of discrimination, but more pointedly that this risk was higher when the speech came from political officials or state agents.[89]

The EU has already begun work in the context of LGBTQ+ rights by identifying the harm that is posed by hate speech.[90] By proposing an elevation in the classification of homophobic speech as a "Eurocrime"[91] there is a recognition of the harms that speech alone may cause. While it would be ideal if that proposal is unanimously approved, the recognition alone is a significant step for the EU in paving a path for future policies addressing the harm of discriminatory rhetoric generally.

Identifying the harm that rhetoric alone can cause is particularly timely in light of the growing use of antagonistic, discriminatory political rhetoric against otherwise protected groups.[92] While rhetoric alone may not seem enough to warrant legal enforcement, identifying these narratives as contrary to international human rights would serve to preemptively put a halt to furthering acts of violence that stem from this rhetoric. It is important to note that there is still a lack of enforcement when these discriminatory practices extend beyond mere rhetoric and result in tangible legislation that adversely impacts the LGBTQ+ community, as it did in Hungary.[93] These instances depict the need for more than simple recognition of the harm as a violation of human rights and instead require additional actionable enforcement methods.

Second, to address discriminatory practices and policies, hard law should be incorporated into existing international human rights law to create binding enforcement methods. The historical and prevalent use of soft law in international human rights enforcement has resulted in a weakened system that relies almost purely on voluntary compliance with no legal teeth.[94] Currently, the system is one that is almost entirely dependent upon a sovereign nation's determination that human rights standards are within

their own best political and economic interests.[95] There are varying scholarly debates on the exact factors weighing into the cost-benefit analyses that lead countries to voluntarily comply with human rights standards.[96] In a broad sense, it is fair to say that many countries see few "serious consequences" when they violate these protections.[97] It has been said that stronger enforcement methods are "most needed where it is least effective, and most effective where it is least needed."[98] Implementing hard law, even only partially, would create legal force behind the protection of human rights and encourage more consistent compliance.[99] The incorporation of hard law gives legal substance to human rights protections that would otherwise, and currently do, bend to the demands of domestic politics and other state considerations.

In continuing a discussion of the EU's response to Poland's family declarations and Hungary's limiting gender policies, hard law would have clarified the available potential repercussions. For example, if the threatened consequences were placed in legally binding agreements between the nations, Poland would be on notice that their actions would be met with financial penalties, or Hungary would know the policy may lead to revocation of their EU membership. In short, both countries and others considering similar policies would have more definite consequences to consider when weighing the cost-benefit analysis of potential discriminatory policies or practices.

It is vital, however, that these policies are legally binding to ensure that nations believe the consequences will truly follow a violation, thereby deterring some violations before they begin.[100] These polices must also legally bind the international community to take consequential actions against the violating state.[101] These potential benefits of hard-law mixed in with the predominant soft-law of human rights agreements are clear when viewed in connection with the failed sanctions against Hungary. Although the EU began sanctions to remove Hungary from the European Council, those ideas were stalled and evaporated within the procedural process.[102] If stronger binding policy had outlined such action as a consequence of human rights violations, then the EU would more than likely be legally obligated to proceed with sanctions.

> "Currently, international human rights law is severely limited in the practice of inducing compliance"

Removal from membership is, however, an extreme reaction that should not be lightly considered.[103] There are a plethora of other incentives that the EU may impose that would demand compliance or serve as a pre-emptive deterrent without amounting to the drastic penalty of removal. Financial pressures may be the most actionable and available path of recourse for the EU because of the substantial financial resources that the EU provides for members.[104] In 2020 alone, the EU's total actual spending amounted to over $150 billion[105] on items such as security and citizenship, sustainable growth, and inclusive growth.[106] Legally requiring international organizations to take such action in withholding financial resources, specifically financial resources that are substantial enough to actually warrant a reaction from the impacted members, would remove any ambiguity regarding the true consequences of human rights violations.

Broader Considerations

This situation reflects on the larger issue of international enforcement of human rights in a general capacity, particularly as issues such as the rights of LGBTQ+ individuals, women, immigrants, and other minorities become the focus of increasingly contentious politics.[107] Protecting the social rights of minorities from political targeting is as important as protection of their legal rights. Studies have shown that discriminatory political and social rhetoric against a particular group leads to an increase in hate crimes, declining mental health for group members, and social inequality.[108]

If international organizations tasked with monitoring and protecting rights in this capacity are unable to manage these concerns through substantive recourse now, they will only continue to struggle as these discriminatory policies develop into more aggressive, tangible forms of discrimination. If the EU or any other international organization hopes to uphold the equality of similar minority groups as a foundational portion of human rights law, a redevelopment of human rights enforcement is well overdue.

Rifts between political parties, divisive rhetoric, and the use of minority groups as political pawns are easily recognizable political movements around the world. The conflict and tension in Poland and Hungary may seem isolated or symbolic but poses a potential opportunity for international organizations to tackle the political

manipulation of minority groups for party gain. Verbally denouncing a group may not seem like a human rights violation but allowing these groups to be subjected to hate speech to uplift a political party has substantial implications for human rights. Discriminatory rhetoric in politics is pervasive as ever;[109] international organizations need to begin analyzing and responding to these concerns for the true threat to equality that they are.

The conclusion of these tensions in Poland and Hungary may reveal whether international organizations will permit certain discriminatory policies to persist despite human rights concerns. Future discriminatory acts that present "symbolic" human rights violations may reveal a trend in international response to these kinds of conflicts. The pervasiveness of the issue may surely speak to the need for improvement, or at the very least reconsideration, of current international human rights enforcement mechanisms.

Conclusion

In this article, the author has analyzed the political and social forces at play in two LGBTQ+ human rights situations in Poland and Hungary. A narrow election victory for right-leaders in Poland has led to increasingly discriminatory policies within the country and culminated in the symbolic denunciation of LGBTQ+ "ideologies" in a significant portion of the country.[110] In Hungary, the governing Fidesz-KNDP party passed new legislation that prevents gender-diverse individuals from correcting their documents has led to fear amongst the LGBTQ+ community.[111]

Despite the fact that these policies have been recognized as legal concerns that qualify or, at the very least, warrant consideration under human rights law, little action has been taken by international organizations in response.[112] The EU's attempts to dissuade these countries from promulgating such policies has been greatly overshadowed by internal political rhetoric and tensions. In response to similar actions, the author suggested that unequivocally identifying discriminatory rhetoric as a potential human rights violation and incorporating hard law in the enforcement of human rights violations generally is vital to establishing human rights as a priority on the international stage.

Rhetoric undoubtedly promulgates further discriminatory action and results in mounting inequalities for groups that are targeted.[113] Identifying such rhetoric as an indicator of human rights concerns provides some clarity to establish that these issues, for purposes of international law, will fall under the umbrella of human rights. Further, incorporating hard law as a method of deterring and punishing future discriminatory human rights action will be essential to correcting the current lack of systematic enforcement. It was suggested that these hard law enforcement mechanisms need not be harsher than simply withholding funding, a penalty that the EU already implements. However, they should be binding penalties that ensure legal consequences for particular violations.

The response to the proposed LGBTIQ Equality Strategy will provide an indication of EU member states' willingness to expand human rights law to rhetoric and similar hate speech. As the EU continues to attempt to strengthen both LGBTQ+ protections and human rights protections in general, a reassessment of current policy enforcement is a critical requirement for the success of international human rights law.

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Emory Powers is a third-year student at the University of Houston Law Center. Prior to law school, he graduated from the University of Texas with a dual-major in Political Communications and Radio-Television-Film. He went on to work for the Texas Senate before deciding to pursue law. Emory is passionate about issues related to human rights, public policy, and the LGBTQ+ community.■

Endnotes

1 *See generally* Acani Uppalapati et al., *Eighteenth Annual Review of Gender and the Law: Annual Review Article: International Regulation of Sexual Orientation, Gender Identity, and Sexual Anatomy*, 18 Geo. J. Gender & L. 635 (2017) (discussing international developments in laws and legal protections for LGBTQ+ individuals).

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3 *See* Andrew R. Flores, *Social Acceptance of LGBT People in 174 Countries 1981 to 2017*, The Williams Institute (2019) (finding that out of 174 countries studied, 16 experienced a decline in LGBT acceptance, 27 experienced no change, and 131 experienced increases in acceptance).

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6 Throughout this article, "conservative" will be used to refer to political affiliations which are right leaning on the political spectrum.

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18 *Id.*

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20 Emma Reynolds, *'Living in Fear' Hungary's New Ban Throws its Transgender Community into Limbo*, CNN, https://www.cnn.com/interactive/2020/06/world/hungary-transgender-portraits-cnnphotos/ (last accessed Nov. 12, 2020).

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22 *Hungary 2020*, Amnesty International, https://www.amnesty.org/en/countries/europe-and-central-asia/hungary/report-hungary/ (last accessed June 29, 2021) (review of discriminatory political practices and legislation in Hungary during 2020).

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24 *See* Robert Sata & Ireneusz Pawel Karolewski, *Caesarean Politics in Hungary and Poland*, 36 East Eur. Pol. 206 (2020) (noting that the Fidesz party came back to power in 2010, and the PiS party returned to power in 2015).

25 *See* Anthony Bowyer, *Countering Russian Influence in Europe and Eurasia: IFES White Paper*, 11-12 (2019) (discussing Hungary and Poland's focus on Russian-inspired value models and Russia's influence tactics in Poland).

26 *Id.* at 214.

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U.S. Government Takes a Hard Line to Stop Human Rights Abuses with Clear Signals to Industry

OLGA TORRES
Managing Member, Torres Law, PLLC

MARIA ALONSO
Associate, Torres Law, PLLC

In recent years, the U.S. Government ("USG") has taken numerous actions to target forced labor and other human rights violations, with a significant increase in 2020 and early 2021. These include the issuance of trade-related restrictions, such as import and export laws, economic sanctions, and civil monetary penalties, that target companies involved in forced labor and human rights violations and abuses. Consequently, U.S. companies should carefully review global supply chains to ensure they are not involved in forced labor/human rights violations. This article will provide an overview of the main U.S. legal authorities for imposing such restrictions and a summary of the key measures the USG took in 2020 as well as ongoing actions in 2021 that focus on forced labor and human rights abuses.

USG Actions Targeting Human Rights Concerns

The actions taken by the USG range from advisories to economic sanctions and visa restrictions. Below we discuss the main categories of actions and examine certain regulatory restrictions imposed in the recent past, most of which have involved parties from the People's Republic of China ("China").

Xinjiang Supply Chain Business Advisory

On July 1, 2020, the U.S. Departments of State, the Treasury, Commerce, and Homeland Security jointly issued an advisory, "Risks and Considerations for Businesses with Supply Chain Exposure to Entities Engaged in Forced Labor and Other Human Rights Abuses in Xinjiang."[1] This advisory details the risk of exposure for businesses with supply chain entities that engage in forced labor and other human rights abuses in China's Xinjiang Uyghur Autonomous Region ("XUAR"), with specific attention to abuses that target Uyghurs, Kazakhs, and other members of Muslim minority groups. It urges businesses with supply chain connections to XUAR to implement appropriate human rights due-diligence policies and procedures to mitigate reputational, economic, and legal risks.

Import Restrictions

The Tariff Act of 1930 and the Trade Facilitation and Trade Enforcement Act of 2015

In the import regime, there are two main legislations targeting forced labor: section 307 of the Tariff Act of 1930 (19 U.S.C. § 1307) ("the Tariff Act") and the Trade Facilitation and Trade Enforcement Act of 2015 ("TFTEA") (Pub. L. No. 114-125 § 910). Generally, both section 307 of the Tariff Act and TFTEA prohibit the importation of goods mined, produced, or manufactured, wholly or in part, in any foreign country by forced labor, including convict labor, forced child labor, and indentured labor.

Prior to TFTEA, there was a loophole in the law that allowed some imports of forced labor goods if such goods were not sufficiently produced in the United States to meet U.S. consumer demands. TFTEA repealed the "consumptive demand" exception, and imports into the United States of goods made with forced labor are now prohibited.

Enforcement on Imports

The repeal of the "consumptive demand" exception significantly enhanced the U.S. Department of Homeland Security ("DHS") agencies' ability to prevent forced labored goods from being imported into the United States. The DHS agencies, U.S. Customs and Border Protection ("CBP") and U.S. Immigration and Customs Enforcement, enforce prohibitions against importing and benefitting from supply chain-related use of forced labor goods through civil and criminal enforcement actions, respectively. CBP has the authority to deny entry of such goods, potentially resulting in the goods being seized and forfeited, and even issue civil penalties against the importer and other parties. Recently, and as discussed below, there has been an increase in CBP's issuance of Withhold Release Orders ("WROs") to detain goods at the port of entry until a finding regarding the forced labor concerns is reached.

CBP WROs

To enforce section 307 of the Tariff Act, CBP can issue WROs to prohibit the import of products when there is evidence that "reasonably but not conclusively" indicates that the products were made with forced labor.

> "WRO activity significantly increased in 2020, and this has continued in 2021."

WRO activity significantly increased in 2020, and this has continued in 2021, with a focus on Chinese-origin products. On January 13, 2021, CBP issued a region-wide WRO[2] on all cotton and tomato products produced in XUAR; it follows the November 30, 2020 WRO issued on all cotton products made by Xinjiang Production and Construction Corps ("XPCC").

On May 10, 2021, CBP issued ruling HQ H318182 denying a protest for a shipment of cotton garments imported from China detained under the XPCC WRO.[3] The ruling noted that the importer "has not provided substantial evidence to establish that the entities within the XPCC that processed that cotton into the subject goods did so without the use of forced labor." Consequently, the cotton garments were excluded for violating the XPCC WRO and were deemed inadmissible.

A total of 15 WROs were issued in 2020 by CBP, and nine involved products originating from China, mostly products from the Xinjiang region.[4] Three WROs involved disposable gloves and palm oil from producers in Malaysia, and the remaining three WROs involved seafood from Taiwanese-affiliated fishing vessels.

CBP Forced Labor Findings

In 2020, CBP not only significantly increased the number of WROs issued, but it also issued its first finding of forced labor[5] since 1996, for stevia leaf extracts and derivatives produced in China by the Inner Mongolia Hengzheng Group Baoanzhao Agriculture, Industry, and Trade Co., Ltd., based on a WRO it had issued four years earlier in May 2016.

Most recently, on March 29, 2021, CBP issued a finding of forced labor for certain disposable gloves produced in Malaysia by Top Glove Corporation Bhd.[6] The WRO was issued by CBP on July 15, 2020.[7] As a result of the CBP forced labor findings, all covered products are seized at U.S. ports of entry and subject to forfeiture proceedings.

CBP Penalty for Forced Labor

In August 2020, CBP collected $575,000 in penalties following the closure of a civil enforcement action against the importer, Pure Circle U.S.A., Inc.[8] Pursuant to the stevia WRO investigation, CBP discovered that Pure Circle imported at least 20 shipments of stevia powder and derivatives produced from stevia leaves that were processed in China with forced labor in violation of U.S. law.

Export Controls

Entity List and Licensing Policy

Pursuant to the Export Administration

Regulations ("EAR"), the U.S. Department of Commerce Bureau of Industry and Security ("BIS") has the authority to add parties to the Entity List (Supplement No. 4 to Part 744) when such parties are engaging in activities contrary to U.S. national security or foreign policy interests. Designated parties on the Entity List are prohibited from receiving exports, reexports, or transfers (in-country) of items subject to the EAR without a license.

Further, BIS can also amend or set the licensing policy for licensing determinations of items subject to the EAR.

BIS Entity List Designations

To date, BIS has issued Entity List designations in October 2019, and June, July, and December 2020, for more than 50 Chinese governmental and commercial organizations implicated in human rights violations and abuses which include the implementation of China's campaign of repression, mass arbitrary detention, forced labor, involuntary collection of biometric data and genetic analyses, and high-technology surveillance against Uyghurs, Kazakhs, and other members of Muslim minority groups in XUAR.

As a result of these designations, in general, BIS imposed additional license requirements on the Chinese entities and limited the availability of most license exceptions.

BIS Licensing Policy Amendment

BIS also amended its existing licensing policy to address human rights concerns. On October 6, 2020, BIS issued a final rule that amended the existing licensing policy in the EAR (see 15 C.F.R. § 742.7).[9] Notably, Section 742.7(b)(1) was modified to note that BIS generally will consider favorably, on a case-by-case basis, license applications for items controlled for crime control reasons, unless there is civil disorder in the country or region of destination, or if BIS assesses that there is a risk that the items will be used in a violation or abuse of human rights. Moreover, BIS added a new subparagraph (b)(2), specifying that except for items controlled for short supply reasons, every license application review for all export-controlled items listed on the Commerce Control List will now include a review of human rights concerns.

Economic Sanctions

Global Magnitsky Human Rights Accountability Act and Executive Order

The Global Magnitsky Human Rights Accountability Act ("Global Magnitsky Act")[10] and Executive Order ("EO") 13,818,[11] which builds upon and implements the Global Magnitsky Act, authorize the Secretary of the Treasury to impose economic sanctions on certain persons who, among other things, are involved in serious human rights abuses. To implement the Global Magnitsky Act and EO 13,818, the U.S. Department of the Treasury, Office of Foreign Assets Control ("OFAC") published a final rule adding the Global Magnitsky Sanctions Regulations at 31 C.F.R. part 583.

In brief, OFAC can impose economic sanctions by adding companies and individuals who have been involved in human rights violations, including forced labor practices, to the Specially Designated Nationals ("SDNs") and Blocked Persons List. U.S. persons are prohibited from directly or indirectly engaging in transactions or dealings with such SDNs and any entities owned 50 percent or more by one or more SDNs, unless an OFAC authorization is available.

OFAC Sanctions

Pursuant to the Global Magnitsky Act and EO 13,818, OFAC sanctioned multiple parties in 2020 and 2021 for human rights abuses. In July 2020 and March 2021, OFAC added parties to the SDN List for their connection with serious human rights abuses (mass arbitrary detention and severe physical abuse, among others) against ethnic minorities (*e.g.*, Uyghurs) in XUAR.

Department of State

The U.S. Department of State ("State") has also taken actions against parties involved in human rights violations. On October 8, 2019, State announced a visa restriction policy under section 212(a)(3)(C) of the Immigration and Nationality Act for Chinese government and Chinese Communist Party ("CCP") officials implicated in human rights abuses in XUAR.

In 2020, State continued to issue additional visa restrictions and travel bans. On July 9, 2020,[12] it designated three senior CCP officials[13] under section 7031(c) of the FY 2020 Department of State, Foreign Operations, and Related Programs Appropriations Act for their involvement in gross human rights violations. Consequently, the three individuals and their immediate family members are ineligible for entry into the United States.

Additional visa restrictions were also placed on other CCP officials believed to be involved in unjust detention or abuse of minority groups in XUAR. For example, on July 31, 2020, State announced that because of the July 31, 2020 OFAC designations, travel to the United States was restricted for Sun Jinlong (former Party Secretary of the XPCC), and Peng Jiarui (Deputy Party Secretary and Commander of the XPCC).[14]

Other Laws

The Trafficking Victims Protection Act's Crime of Forced Labor (18 U.S.C. § 1589)

Pursuant to the Trafficking Victims Protection Act ("TVPA"), the USG can criminally charge any person benefiting

from forced labor, if the person knew of, or recklessly disregarded, evidence of such forced labor and knowingly participated in the relevant venture. Criminal violations of the TVPA may result in companies facing a fine up to $500,000, and executive and company employees involved may face up to 20 years of imprisonment. Additionally, the TVPA permits a civil right of action.

Uyghur Human Rights Policy Act of 2020

On June 17, 2020, the Uyghur Human Rights Policy Act of 2020[15] was signed into law. It directs United States resources to address human rights violations and abuses of specified ethnic Muslim minority groups in China's XUAR.

Uyghur Forced Labor Prevention Act

Two bills, both titled the Uyghur Forced Labor Prevention Act ("UFLPA"), were reintroduced at the beginning of 2021 in both the U.S. House of Representatives (H.R. 1155)[16] and the U.S. Senate (S. 65).[17] These bills may ban all goods produced in whole, or in part, in XUAR, unless importers can prove that the goods were not made with forced labor. Under the UFLPA bills, CBP would be authorized to issue a region-wide WRO, enabling it to detain all products from XUAR, and sanctions for violations could be issued.

Why Should Industry Care?

It is expected that the Biden administration will maintain the focus on human rights, and that there will continue to be an increase in trade-related restrictions, including WROs, BIS Entity List designations, export licensing policies, economic sanctions, and visa restrictions, among others.

Companies need to carefully review their trade compliance programs to ensure that all risks of forced labor/human rights abuses and violations in their supply chains are addressed. For example, companies should conduct risk assessments and contract review, and improve policies and procedures, due diligence and auditing processes, and training. Other suggested measures include having anonymous reporting mechanisms and internal controls to detect noncompliance issues.

In addition to the legal risks related to forced labor and human rights, there are also economic and reputational risks. Companies that fail to conduct due diligence reviews of their global supply chains are likely to face significant revenue losses when products are seized or forfeited or when they must change suppliers at the very last minute. And, of course, companies may face reputational harm when their products are associated with human rights violations.

Conclusion

We advise that all companies closely monitor their global supply chains for potential human rights compliance issues. While many of the above actions have related to China, human rights abuses can occur throughout the globe. With the high frequency of measures taken by the USG to address forced labor and human rights abuses and violations, companies should take affirmative steps to strengthen their supply chains and ensure inadvertent violations are avoided. The time to act is now.

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Olga Torres is the Managing Member of Torres Law, PLLC. Ms. Torres concentrates her practice in the areas of international trade and national security law, anti-corruption compliance, and Customs matters. Ms. Torres is a frequent speaker and moderator. She has lectured on export controls and international trade for organizations, universities, and government agencies in different countries, including the United Kingdom, the Netherlands, Mexico, Thailand, France, and Canada. She authored several chapters in selected trade publications including the WorldECR's Export Compliance Manager's Handbook and the Society of International Affairs Export Voluntary Disclosure Handbook. She was previously an attorney in the International & Cross Border Transactions group at Holland & Knight LLP in Washington, D.C.

Maria Alonso assists clients with a broad range of international trade and national security matters, including those governed by the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR), economic sanctions, U.S. customs laws and regulations, and the Foreign Corrupt Practices Act (FCPA). Ms. Alonso advises clients on the U.S. national security review process administered by the Committee on Foreign Investment in the United States (CFIUS). She has experience advising clients on the potential national security risks of proposed transactions and assists clients in seeking clearances from CFIUS for transactions subject to review. Ms. Alonso also advises clients on a variety of compliance matters, including export classification, compliance procedures, voluntary disclosures to government agencies regulating trade, and corporate investigations. ■

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First Complaints Filed Under the USMCA's Rapid Response Labor Mechanism

PABLO SÁENZ
Partner, Cacheaux, Cavazos & Newton, LLP

The United States-Mexico-Canada Agreement ("USMCA") provides for a Facility-Specific Rapid-Response Labor Mechanism (Annex 31-A) (the "Labor Mechanism"), which allows the United States to request that measures be taken against Mexican companies that violate their employees' rights to freely unionize and to bargain collectively. The U.S. government has 30 days to determine whether the complaint is admissible, and whether it will formally file such with the Mexican government, through Mexico´s Department of Economy (Secretaría de Economía) ("SE"), giving such agency 45 days to respond as to whether or not the employees' rights have been violated and, in the case of a violation, to propose a plan for remediation.

First Request for Rapid Response

On May 11, 2021, the first request for Rapid Response under the Labor Mechanism set forth in the USMCA was filed by the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), Public Citizen, and the National Independent Union for Employees of Industries and Services (Sindicato Nacional Independiente de Trabajadores de Industrias y de Servicios Movimiento 20/32)("SNITIS").

The request was filed in connection with an allegation that Tridonex, a Mexican automotive company, violated its employees' rights. The AFL-CIO alleged that employees have been harassed and fired because of their intention to join the SNITIS union.

The complaint is based on several allegations that Tridonex violated its employees' labor rights, including: (i) that employees have not been allowed to choose their union leaders or legitimize their collective bargaining agreement; (ii) that more than 600 employees were fired in retaliation; and (iii) that the State of Tamaulipas has denied their right to choose which union the employees can join.

Second Request for Rapid Response

The second request for Rapid Response was filed by the United States Trade Representative ("USTR") in connection

with an alleged violation by General Motors of its employees' rights to freely associate with any union and to enter into a collective bargaining agreement. The U.S. government determined that the complaint was meritorious; therefore, the Mexican government must commence the aforementioned process.

Mexico´s Department of Labor and Social Welfare (Secretaría del Trabajo y Previsión Social) ("STPS") will be the governmental agency in charge of coordinating the legal evidence necessary to determine whether a violation of employees' rights has occurred. It will do so by convening an Integral Analysis and Remediation Board (the "Board"), comprised of the SE, STPS, union associations, industry chambers, and representatives from the workplace involved in the allegations, to grant such parties the opportunity to offer additional evidence to document the matter and issue an advisory opinion.

If the Board determines that employees' rights were violated, it is required to propose a plan of remediation that is well-grounded and sufficiently convincing so the complaining party, in this case the U.S. government, will accept it and therefore suspend the claim during its implementation. If the parties do not agree on a plan of remediation, the complaining party may request that a panel be appointed to determine if a violation exists. The panel must be composed of a panelist from the complaining party, another from the respondent, and a third from a list of non-nationals, who will be responsible for presiding over the panel.

If the panel determines that the employees' rights were violated, Mexico´s government will have five days to negotiate the nature of the sanctions, which may be any of the following: (i) suspension of preferential tariff treatment granted under the USMCA; (ii) imposition of penalties on related goods or services; or (iii) denial of entry of goods or services provided by the facility.

After the imposition of sanctions, the parties will continue to consult on an ongoing basis to ensure the prompt remediation of the violation and removal of the sanctions. As soon as the parties agree that the violation has been remediated, the complaining party shall immediately remove all sanctions implemented.

The first request for Raid Response under USMCA Labor Mechanism was filed on May 11, 2021.

Finally, on May 11, 2021, the STPS published a communication regarding its determination that the process to legitimize the collective bargaining agreement for the General Motors facility located in Silao, Guanajuato, will be replaced. Such decision comes from allegations of violations of employees' rights to vote. The STPS instructed the National Union of Workers of the Metal-Mechanic Industry to replace the prior legitimization process within a period of 30 days, which may not be extended. This response is closely tied to the second request for Rapid Response. It is expected that the aforementioned actions will be part of the plan of remediation the STPS would issue, if necessary.

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Pablo Sáenz is a partner at Cacheaux, Cavazos & Newton, where he has worked since 2011. He is based in Mexico City, and his practice is focused on advising and representing companies from the United States and Mexico, as both a labor law adviser and litigator. Mr. Sáenz frequently serves as a speaker on Mexican labor and employment law topics at events sponsored by various Mexican and international legal, professional, and business organizations. ■

Violations of Journalists' International Human Rights

JAMES W. SKELTON, JR.
Attorney at Law, Houston, Texas

Journalism has become one of the most dangerous professions in the world! The number of countries in which journalists become the victims of violations of their international human rights appears to be increasing from year to year. In fact, the violation of the most fundamental of all human rights, the right to life itself, has become a major issue for journalists, as demonstrated by the alarming upsurge in the number of murders in some regions of the world.

Although a journalist's duty is to report the truth and inform the public, more and more autocratic leaders have grown fond of using the term "fake news" in reference to any news item that seems to reflect on them negatively. Some have even gone so far as to claim that journalists are actually "the enemy of the people." These claims can be used as a justification for censorship and repression of the press media, as well as a way of undermining journalists' work. That is precisely what happened in Hong Kong recently when the police commissioner "warned that publications that produce 'fake news' could face investigation, and he called for new laws to help regulate the media."[1]

The harassment, and even murder, of journalists is the main focus of the overall issue with respect to the ever-increasing attacks on freedom of the press. This article will explore several examples of violations of journalists' human rights as the main element in the assault on freedom of the press.

The Plight of Journalists

The Director of the IBA's Human Rights Institute, Baroness Helena Kennedy, recently stated, "We're seeing, in places like Mexico, all over the Middle East, in parts of the Philippines that attacks on journalists now are growing exponentially and it should be a source of alarm to the free world."[2] The IBA has clearly stated that "More journalists are being killed in countries at peace than in war zones."[3] According to a United Nations report, "nearly 500 journalists died worldwide between 2014 and 2018 – an 18 per cent increase on the preceding five years."[4]

In 2019, the Canadian and UK governments established a panel of 15 experts to prepare a set of recommendations for governments to counter violations against media freedom. The report was issued in November 2020, and is entitled "Report on Providing Safe Refuge for Journalists at Risk."[5] The panel

provided nine recommendations to states and intergovernmental organizations, all of which are related to methods of obtaining visas, travel documents, refugee protection and some protective administrative measures.[6] All of such actions should give journalists more tools with which to seek safety, but they don't address the violent actions of autocratic rulers.

The Global Impunity Index

For many years, the Committee to Protect Journalists (CPJ) has published a Global Impunity Index that keeps track of countries in which journalists are killed but the murderers aren't held accountable. In 2020, Somalia topped the Index's list of 12 nations with 26 unsolved murders.[7] Also on the 2020 Index's list were, Syria (22), Iraq (21) and Mexico (26), among others.[8] According to the CPJ, between August 2010 and August 2020, "277 journalists were murdered for their work worldwide and in 83% of those cases no perpetrators have been successfully prosecuted," and "killers went free in nine out of ten cases between 2004 and 2013."[9]

For the sake of clarification, the "CPJ defines murder as a deliberate killing of a specific journalist in retaliation for the victim's work. This index does not include cases of journalists killed in combat or while on dangerous assignments, such as coverage of protests that turn violent."[10] In addition, this particular Index covers the entire 10-year period of unsolved cases from 2010 to 2020, and adjusts the numbers each year in the event there are convictions in any of the cases. In any event, the fact that there continues to be so many unsolved murders of journalists is cause for deep concern about some governments' utter contempt for the rule of law.

Examples of Human Rights Violations

China/Hong Kong

The Chinese government has been ramping up the pressure against dissent in general and journalists in particular in Hong Kong for the past two years. The passage of a Hong Kong oriented national security law in June 2020, the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (National Security Law),[11] has become the government's technique of choice to stop dissent and silence the media.

The most well-known target during the past year has been Hong Kong's Apple Daily newspaper, which was viewed as being far too active in support of the pro-democracy movement and much too critical of the government. In August 2020, the offices of Apple Daily were raided and 10 arrests of journalists were made, including that of Jimmy Lai, the outspoken critic of the Chinese Communist Party, who founded the newspaper in 1995.[12] Lai was charged under the National Security Law with "colluding with foreign forces, including by calling for sanctions against Hong Kong."[13] He's currently being imprisoned for 20 months on two prior protest related charges from 2019, and faces more charges of "fraud and three counts under the National Security Law, which could carry a lifetime prison sentence."[14]

The most recent attack on Apple Daily occurred on June 17, 2021 when "hundreds of police officers raided the paper's newsroom, hauling off computers, freezing its assets and arresting top editors and executives."[15] All of those arrested "were charged with conspiracy to commit collusion with foreign powers under the security law, and were denied bail."[16] Due to the arrest of its top editors and the freezing of the newspaper's assets, it was only able to survive for a week after the raid, and was forced to print its final edition of the paper and close its doors on Thursday, June 24, 2021.[17] They printed one million copies of the final edition, but even that didn't satisfy the demand for the iconic publication.[18] This approach of promulgating a vague, draconian law to control dissent and journalists is reminiscent of what dictatorial regimes will do to stay in power, but it also demonstrates the Chinese government's willingness to go to any lengths to protect itself, even if it involves the flagrant violation of journalists' human rights.

Yemen

Human rights violations have been perpetrated against journalists in Yemen at an astonishing rate. The UN Office of the High Commissioner for Human Rights (OHCHR) summarized such violations covering a period of five months, between April and August of 2020, as follows: "an assassination and an abduction, three cases of arbitrary arrest and detention, the sentencing of four journalists to death … and the jailing of six others, three physical assaults and threats of physical violence."[19] The High Commissioner described the fate of journalists this way: "They are killed, beaten and disappeared; they are harassed and threatened; and they are jailed and sentenced to death for merely trying to shine a light on the brutality of this crisis."[20] The High Commissioner stressed that "journalists are also protected under international humanitarian law as civilians and the attacks against them 'may amount to war crimes.'"[21]

The crisis is, of course, the civil war between the pro-government forces and the Houthi rebels, which is thought to be the world's largest humanitarian disaster. The OHCHR has documented a total of 357 human rights violations and abuses against journalists in the five and a half

year period from the beginning of the civil war in March 2015 until August 2020. These crimes include "28 killings two enforced disappearances, one abduction, 45 physical assaults, and 184 arbitrary arrests and detentions.[22]

In April 2020, following five years of preventive detention, four journalists were taken before the so-called Specialized Criminal Court in the Houthi controlled city of Sana'a. The four were sentenced to death on the following charges: "publishing and writing news, statements, malicious rumors and propaganda with the intent to weaken the defense of the homeland, weaken the morale of the Yemeni people, sabotage public security, spread terror among people and harm the country's interest."[23] Such obviously fabricated charges are evidence of the total disregard for human rights that prevails in Yemen today. Journalists don't have a chance to write anything of substance unless it's either neutral or supportive of one side of the conflict or another.

Ethiopia

There is a great deal of irony related to the civil war that has been raging in Tigray province in Ethiopia for the past seven months. It's ironic due to two facts: (i) a mere three years ago Abiy Ahmed became Prime Minister of Ethiopia, and (ii) just two years ago he was awarded the Nobel Peace Prize for releasing journalists from jail, unblocking hundreds of websites, and hosting the World Press Freedom Day celebrations for the first time.[24] Given that background, it was disappointing to say the least when Mr. Abiy began a military operation in Tigray on November 4, 2020 in an attempt to get rid of the regional ruling party that challenged his authority.[25] Almost immediately, he shut down the internet in Tigray, blocked journalists from entering the region, and detained Ethiopians in Tigray who were working for foreign international news organizations.[26]

The use of a sham terrorist list to crackdown on journalists has become standard operating procedure.

The CPJ has documented the arrests of at least 10 journalists and media employees since November, and in January security forces were accused of shooting and killing Ethiopian reporter Dawit Kebede in Mekelle, Tigray for ostensibly violating the curfew.[27] Two months later, the Ethiopian Broadcasting Authority revoked the accreditation of Simon Marks, an Irish reporter for the New York Times, and "accused him of 'fake news' and what it called 'unbalanced' reporting about the conflict in Tigray."[28] As of this writing, Mr. Abiy, the 2019 Nobel Peace Prize winner, is continuing both his war in Tigray and his attempt to silence the press with whatever means are necessary.

Belarus

The most bizarre instance of a human rights violation against a journalist occurred recently in Belarus, when President Alexander Lukashenko, known as "Europe's last dictator," ordered one of his MiG-29 fighter jets to intercept Ryanair flight FR4978, en route from Athens, Greece to Vilnius, Lithuania, forcing it to land in Minsk, Belarus.[29] Once on the ground in Minsk, police arrested and detained opposition journalist Roman Protasevich, who had been living in exile in Poland since 2019.[30] As the Ryanair plane was crossing Belarusian air space, the flight controllers there made a false claim that there was a bomb threat against the plane and ordered it to land.[31]

The next day, the European Union imposed sanctions (i) against Belarus' airlines banning them from using the EU nations' airspace and airports, and (ii) against officials involved in the diversion of the Ryanair flight to Minsk.[32] The EU leaders characterized the forced landing as a "hijacking," demanded the immediate release of Protasevich, and stated that his arrest was "another blatant attempt to silence all opposition voices in the country."[33]

Although Protasevich was unknown outside Belarus prior to this incident, he had been an active critic of Lukashenko while serving as editor in chief of an anti-government messaging app known as Nexta, which was a vital component in the coverage and organization of protests against the government.[34] His coverage of the Belarusian uprising in 2020 made him one of the country's best known journalists, which is why his name was added to the government's list of persons who were designated as being "involved in terrorist activity."[35] The usage of this type of sham terrorist list to enforce a crackdown on journalists has become standard operating procedure

for autocratic leaders, like Lukashenko, who are determined to remain in power indefinitely.

Saudi Arabia

On October 2, 2018, Jamal Khashoggi visited the Saudi Arabian consulate in Istanbul, Turkey for the purpose of acquiring a Saudi document that confirmed he was divorced and could marry his Turkish fiancée. He was never seen again and his body was never recovered. His mysterious disappearance has been blamed on none other than Saudi Crown Prince Mohammed bin Salman.

Khashoggi had been close to the Saudi royal family, and had served as an adviser to the government for many years until 2017 when he fell out of favor and went into self-imposed exile in the U.S. He wrote a monthly column for the Washington Post and frequently criticized the policies of the Crown Prince.[36]

We may never know whether those disparaging columns angered the Crown Prince enough to give the order to kill Khashoggi, but Istanbul's chief prosecutor claimed shortly thereafter that he "was suffocated almost as soon as he entered the consulate and that his body was dismembered and destroyed."[37] Many others have speculated about what really happened. The Saudi's deputy public prosecutor made a statement on November 15, 2018, claiming that Khashoggi was "forcibly restrained after a struggle and injected with a large amount of a drug, resulting in an overdose that led to his death. His body was then dismembered and handed over to a local 'collaborator' outside the consulate for disposal."[38] Those statements give rise to more questions than answers, although they do reveal the lengths to which an autocratic leader will go to eliminate a troublesome journalist.

Conclusion

More than ever before, journalists are subject to extreme scrutiny and can become the targets of violent violations of their human rights if they offend a brutal leader. It's amazing to learn how brave these men and women are who strive to find and report the truth. The American Press Association (APA) developed a basic statement of purpose in 2001, as follows: "The central purpose of journalism is to provide citizens with accurate and reliable information they need to function in a free society."[39] Thereafter, they amplified this purpose by creating a list of nine core principles designed to accomplish the task articulated in the statement of purpose, which the APA says could "be described as the theory of journalism."[40]

The examples of violations of journalists' international human rights described above from the Middle East, Eastern Europe and East Africa provide some insight into the types of aggressive attacks to which journalists are subject in the 21st century. It's difficult to come to grips with the fact that so many national leaders have no interest in abiding by the standards established under international human rights laws. This disturbing reality should be sufficient evidence of the need for journalists, lawyers and legislators to redouble their efforts to provide more protection for journalists who willingly take their lives in their own hands when they cover and report a story that includes negative information about their own government. In addition, much more must be done to find ways to hold accountable those who violate journalists' human rights.

Jim Skelton has practiced law for over 45 years, specializing in upstream international energy transactions in emerging markets. He's the author of 25 articles for legal periodicals and books and a memoir, the coauthor of a textbook, and the lead editor and a coauthor of two anthologies. Jim has been a member of the International Law Section since 2014, and a member of the International Human Rights Committee since 2015. He served as the first editor in chief of the ILS' International Newsletter and as an assistant editor thereafter. He has made 18 presentations at international conferences in Houston, Dallas, London and Moscow, and served as an Adjunct Professor at the University of Houston Law Center, teaching the course in Energy Law: Doing Business in Emerging Markets. ■

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COVID-19 Vaccines: Patents and Human Rights

DAVID CARSTENS
Partner, Carstens & Cahoon, LLP

The world is enduring the onslaught of COVID-19, and to date an estimated four million have died as a result. But parts of the world are moving into a post-pandemic state due to effective vaccines. The Pfizer, Moderna and Johnson & Johnson vaccines are each highly effective at preventing hospitalization and death from COVID-19. But, the development of these vaccines required the outpouring of billions of dollars in research and testing—spent at an outlandish pace to bring the vaccines to market as quickly as possible.

Typically, companies that produce useful, novel and inventive substances such as these vaccines are awarded patents. Those patents allow the drug company to recoup those billions by excluding others from making, using or selling infringing knockoffs for a limited period of time. When a competitor is stopped by the developer's patent rights, then the vaccine developer should be able to price its products higher.

Now, due to the human suffering being experienced in the third world from Covid-19, the Biden administration is endorsing a waiver of those patent rights to allow generic manufacturers to step in and produce vaccines that would otherwise infringe those patent rights. The logic goes that by converting the vaccine to an unprotected, commodity product, the vaccines will be more affordable to the third world. A few important issues should be considered first. Will a waiver of patent rights help those in need outside the US? Are foreign countries allowed to do the same under international treaty? Does the waiver of US patent rights in this instance provide a disincentive to drug companies to produce a vaccine for the *next* pandemic? And, is there a better model than waiver that still helps minimize the number who die from COVID-19?

Patent Rights and Competitive Pricing

A United States patent gives its owner the right to exclude others from making, using or selling the claimed invention in the United States. In other words, a US patent excludes a generic manufacturer from making the infringing vaccine in the US or selling the vaccine in the US and prohibits patients from using the infringing vaccine in the US. The US patent has very limited extraterritorial effect. The US patent does not prevent

a generic manufacturer from making an infringing vaccine in India and selling it in India. Therefore, a US decision to waive the enforceability of a *US patent* for a COVID-19 vaccine will have no impact on a generic manufacturer in India or elsewhere from making its vaccines in a country other than the US and selling it outside the US.

Now, companies such as Pfizer and Moderna also obtain patents for their developments outside the US. It is common to file for patent protection in countries around the world. But unless India opts to block or otherwise invalidate those equivalent Indian patents, the US action will have little effect on increasing the number of potential producers.

Many have the misconception that a patent produces unbearable monopoly pricing for essential goods such as vaccines. This mistake requires the assumption that only one solution can exist for a problem. The Covid-19 vaccines help prove this assumption is false as at least five effective distinct vaccines have been produced. In a normal marketplace, when several alternatives each produce essentially the same benefit, then normal price competition should exist, with each company reducing its price to increase sales and maximize profit. Therefore, the assumption that waiving patent rights will produce lower pricing is at least arguable in this instance. A greater number of equivalent options will produce lower pricing and hopefully greater penetration to those in need. It is difficult to decipher accurate Covid vaccine pricing but Astra Zeneca vaccines are priced at $5.25/dose in South Africa which is more than twice the $2.15/dose charged for the same dose in the EU. The Pfizer vaccine is priced at $19.50/dose in the US but only $14.70 in the EU. So, market specific pricing seems to be common.

Impact of International Treaties

Most countries are members of the World Trade Organization (WTO). To join the WTO, a country must also adopt the terms of TRIPS - Trade Related Aspects of Intellectual Property - an international agreement that establishes minimum standards for intellectual property protection in each member country. So, for instance, Article 27 of TRIPS requires that all member countries have legislation that allows for patents for vaccines. But Article 27 also allows countries to exclude protection in instances to "protect public order" or to "protect human life . . . or health." The waiver of vaccine patent rights might fit into those categories. Therefore, members of the WTO should have the right to waive protection of patents related to vaccines.

A "waiver" under TRIPS was first proposed by India and South Africa – two countries with robust generic pharmaceutical manufacturing capacity – in October 2020 as one method of improving availability of COVID-19 vaccines. The WTO's Council for Trade Related Aspects of Intellectual Property, which is charged with administering the treaty, came out with its proposal the same month, seeking a waiver of patent and trade secret protections. This broad waiver would waive the enforcement of patents owned by vaccine companies, but also strip any rights to trade secrets related to their production. The waiver of trade secret rights has been under-reported. The EU has come out strongly against the waiver.

Long Term Impact of Waiving Patent Rights

If generic manufacturers are allowed to produce identical vaccines, how will they price them? If the pricing is identical to that charged by patent holders, then the only result is re-distribution of the profits to the generic producers with no meaningful increase in demand or supply.

With apparent US approval of a waiver, Pfizer and Moderna will lose the right to exclude generic manufacturers from producing additional doses of vaccines that are covered by any patents. This should allow more doses to be produced assuming generic manufacturers lower prices and have the skill to produce them. But where will those doses go. A rational economic answer is that they will go to the *highest bidder*. So, instead of going to the poorest in the third world, the net result could only be a lowering of the price for the developing world. This may sound like a heartless conclusion, but the history of AIDS drugs provides some evidence to support "pharmaceutical arbitrage."

Alternatives to Waiver

When SARS was a concern in 2003, very few politicians thought forward about the potential for COVID-19. Likewise, those proposing a waiver may not be thinking forward to a potential COVID-24 or similar virus which could be even more deadly. Will drug companies be as quick to respond to that threat after having their patent rights waived this time? Probably, but government subsidies might be required to incentivize a company to develop that next vaccine. Of course, a subsidy simply shifts the cost from the vaccine user who pays a premium for the patented vaccine to the taxpayer who pays for the subsidy.

There are alternatives to simply waiving patent rights in the name of human rights. Another path to consider is a compulsory licensing scheme. For example, if a US company has a patent in India, the US company must actually make the product in India within a set amount of time. If it does not "work" the

invention in India, then India can grant a compulsory license to third parties. Section 83(b) of the Indian Patent Act allows a license to be granted to a local company at a license fee that is determined by an Indian tribunal. While this takes the freedom to contract out of the hands of the patent owner, it is at least compensated for the use of its innovative vaccines. India, or another country, could simply shorten the time to "work" to shorter period of time for vaccines.

Another alternative is to provide a tax incentive to US based vaccine manufacturers to dispose of expiring doses to third world countries. For example, the value of the donated doses could be treated as a tax credit used to offset any corporate taxes due. Currently, millions of doses of J&J vaccines are at risk of expiring in June. Rather than allow them to expire, J&J should be incentivized to ship those to countries with low vaccine availability.

It is difficult to watch suffering. But it is essential to have a clear vision of what motivates companies to produce vaccines to alleviate that suffering. Waiving patent rights strikes at the very profit motive that drives innovation. Innovation is the ultimate answer to improving the lives of billions of humans and the extension of life span and the reduction in preventable suffering. Long term human rights are not served by short term waiver of the rights of patent owners.

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David Carstens is a registered patent attorney and founding partner of Carstens & Cahoon, LLP. He is knowledgeable in all aspects of intellectual property including patents, trademarks, copyrights, and trade secrets. His experience includes patent and trademark prosecution and litigation; technology-related transactions, including negotiating license agreements and evaluating intellectual property in preparation for mergers; and counseling on infringement issues, employee non-compete agreements, and confidentiality agreements. For over twenty-five years, Mr. Carstens has served as an adjunct professor at Southern Methodist University School of Law. Mr. Carstens holds a B.S. in Electrical Engineering from the University of Texas at Dallas and a B.S. in Mechanical Engineering from Texas A&M University. He holds a law degree and MBA from Southern Methodist University. ■

Spotlight: The FBI's International Human Rights Program

ELSA J. PAREDES
Staff Operations Specialist, FBI International Human Rights Unit

CRYSTAL STEVENS
FBI International Human Rights Unit

The FBI plays a vital role in the US Government's response to protection and promotion of international human rights. In 2010, the FBI created the International Human Rights Program (IHRP) in support of human rights violations investigations. Under the IHRP, the FBI investigates perpetrators of serious human rights under Genocide, 18 USC § 1091; Torture, 18 USC § 2340A; War Crimes, 18 USC § 2441; Recruitment or Use of Child Soldiers, 18 USC § 2442; Female Genital Mutilation, 18 USC § 116; and/or Providing Material Support to Serious Human Rights Offenses, 18 USC § 2339A.

The goal of the FBI's IHRP is to hold perpetrators of mass atrocities and serious human rights violators accountable to the rule of law in the United States or a foreign country's judicial system and to prevent the United States from serving as a "safe haven" for human rights violators. The FBI has jurisdiction to investigate the aforementioned international human rights violations when the perpetrator is a US person, the victim is a US person, and/or the perpetrator, regardless of nationality, is located within the United States.

The FBI Headquarters component of the IHRP, the International Human Rights Unit (IHRU), provides training and technical assistance to local and foreign partners, works to enhance domestic and international intelligence collection throughout field offices and overseas legal attaché offices, and provides operational support to field offices that investigate priority human rights cases in coordination with its domestic and international partners. IHRU conducts its mission in close collaboration with the Department of Justice Human Rights and Special Prosecutions Section, Immigration and Customs Enforcement/ Homeland Security Investigations at the Human Rights Violators and War Crimes Center, the Department of State Office of Global Criminal Justice, and other US government agencies.

You can help the FBI ensure the United States is not a "safe haven" for perpetrators of human rights violations. If you have any information related to perpetrators of any international human rights crimes, please submit a tip online at https://tips.fbi.gov, by calling 1-800-CALL-FBI (1-800-225-5324), or by contacting your local FBI office. ■

New Pathways for Employers and Temporary Foreign Workers in the Agriculture Sector

SERGIO R. KARAS
Barrister and Solicitor, Karas Immigration Law Professional Corporation

Background

Canada's agriculture sector requires access to the global workforce to meet consumer demands. This leads employers to rely on Temporary Foreign Workers (TFWs) to overcome shortages in general labour.[1] TFWs that work in agriculture are a part of critical infrastructure: They ensure food security and serve an essential function for Canadians' well-being.[2]

To remedy these labour shortages, employers can obtain work permits for TFWs through the *Temporary Foreign Worker Program* (*TFWP*). Work permit applications for TFWs in agricultural sectors are processed on a priority basis, they are also exempt from travel restrictions because of their designation as essential workers.[3] The *TFWP* has two streams: the *Seasonal Agricultural Worker Program* (*SAWP*), and the *Agricultural Stream*. With multiple pathways available, employers should pursue a stream that suits their needs.

The *Agri-Food Pilot Program* is a new federal government initiative that provides an opportunity for agri-food workers to obtain permanent residency. It seeks to attract and retain experienced agri-food workers.[4] If successful, this program can expand and allow Canadian agri-food industries to develop and meet their projected labour needs.

Preliminary Requirements

There are two criteria for employers that are unique to both the *SAWP* and the *Agricultural Stream*: production must be in a sector on the national commodity list, and the job must be in on-farm primary agriculture. The national commodity list includes the following sectors:[5]

National Commodity List:

- Apiary products
- Fruits, vegetables (including canning/processing of these products if grown on the farm)
- Mushrooms
- Flowers
- Nursery-grown trees including Christmas trees, greenhouses/nurseries
- Pedigreed canola seed
- Seed corn
- Grains
- Oil seeds
- Maple syrup
- Sod
- Tobacco
- Bovine
- Dairy
- Duck
- Horse

- Mink
- Poultry
- Sheep
- Swine

Primary agriculture is defined under the *Immigration and Refugee Protection Regulations* (*IRPR*).[6] It refers to work where the duties are performed within a farm, nursery, or greenhouse. It entails machinery operation, working with raw animal products, or working with plants. The products must be for market. The following table identifies the National Occupation Classification codes for jobs in on-farm primary agriculture:[7]

On-Farm Primary Agriculture

National Occupation Classification (NOC) Code	Occupation
0821	Managers in agriculture
0822	Managers in horticulture
8252	Agricultural Services contractors, farm supervisors and specialized livestock workers
8255	Contractors and supervisors, landscaping, grounds maintenance and horticulture services
8431	General farm workers
8432	Nursery and greenhouse workers
8611	Harvesting labourers

When hiring workers under the *TFWP*, a positive Labour Market Impact Assessment (LMIA) is required. The LMIA includes job offer details, it demonstrates that there are no Canadian workers or permanent residents available for the job, and shows that there is a need to hire foreign workers. A positive LMIA enables TFWs to apply for work permits under the *SAWP* and the *Agricultural Stream*.[8]

Employers must provide the same wages and benefits to TFWs that they provide to other employees in the same occupation. Unionized workers are to be paid at the established rate under the collective bargaining agreement. Employers must agree to review and adjust TFWs' wages to ensure that their rates meet or exceed those in the wage tables or the applicable minimum wage rate.[9]

In the past, an LMIA was valid for six months. As a temporary measure due to the rise in COVID-19 infection rates, an LMIA approved for 2021 is valid until December 15, 2021.[10] New measures have been taken to process LMIA applications in a more flexible manner. Employers are no longer required to submit minor administrative changes unless they impact the LMIA's terms and conditions.[11] Primary agriculture occupations are exempt from LMIA processing fees.[12]

There are some costs that are required to be paid for by employers, such as TFWs' round-trip transportation, and transportation between housing and the work location. Employers are obligated to provide adequate, suitable, and affordable housing for TFWs. Housing for TFWs requires an official inspection within eight months before the LMIA application submission. Due to COVID-19, Housing Inspection Reports have greater flexibility when an employer can prove that the appropriate authority cannot conduct an inspection. If an employer lodges TFWs in commercial accommodations rated three stars or higher, a report is not required.[13]

Employers may also have to ensure that their intended hires are covered by a provincial or territorial workplace safety insurance provider. When TFWs work with pesticides or hazardous chemicals, employers must notify workers and provide free protective equipment, training, and supervision. The cost of protective equipment must be paid for by the employer.[14]

There is a mandatory recruitment period where employers must attempt to hire Canadian citizens and permanent residents before offering jobs to TFWs. Employers need to advertise on the national Job Bank or its provincial counterpart. Advertisements must be listed for a minimum of 14 days, and for the three-month period, before submitting an LMIA application. Employers do not have to re-advertise vacant positions during an LMIA application for a replacement worker if the replacement is in the same Job Bank economic region and occupation.[15]

Advertisement requirements were updated because of the economic impact of COVID-19. Job offers posted before March 15, 2020 may need to be re-advertised for an additional two consecutive weeks. Service Canada will contact employers to re-advertise.[16]

The Seasonal Agriculture Worker Program (SAWP)

For eligibility under the *SAWP*, there is a distinct requirement that TFWs must be Mexican citizens or citizens of a participating Caribbean country (Anguilla, Antigua and Barbuda, Barbados,

Dominica, Grenada, Jamaica, Montserrat, St. Kitts-Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago). Canada has bilateral agreements with participating countries that inform how the *SAWP* operates. The roles of participating governments include recruitment and selection, ensuring that required worker documents are available, and the designation of representatives that will assist TFWs in Canada.[17]

Participating governments ensure that the workers selected for their job pools meet all the program requirements. The conditions include farming experience, age of 18 or older, citizenship in a participating country, and the ability to satisfy Canadian immigration law and the laws of their home country.[18] Employers cannot use private recruiters to select workers.[19]

SAWP employers can recover some of the round-trip transportation costs for TFWs through payroll deductions, except in British Columbia. The standard employment contract specifies the amount that employers can deduct. If an *SAWP* employer re-applies for TFWs' replacements, they are exempt from the requirement that their housing inspection report be from within eight months.[20]

Employers are required to have all TFWs register for provincial or territorial health insurance as soon as they are eligible for it. When hiring Mexican TFWs, insurance payments are submitted to Great West Life Assurance Company, and these costs are recoverable through payroll deductions. Employers can get assistance for these deductions from participating government liaison officers.[21]

Employers are not required to re-advertise vacant positions when submitting transfer LMIA applications if they or the transferring employer have a positive LMIA for the current season and the region and occupation are the same.[22] Any informal transfer of employees contravenes the *Immigration and Refugee Protection Act* (*IRPA*) and risks a maximum fine of $50,000 and two years' imprisonment.[23]

An emergency order made under the *Quarantine Act*[24] requires a mandatory 14-day quarantine period for every person entering Canada, with limited exceptions.[25] To calculate deductions for *SAWP* workers during the quarantine period, a week is considered to be six working days, with at least five hours per day and one day of rest.[26] In addition to the minimum 240 hours of pay specified in *SAWP* contracts, employers must provide regular pay and benefits during the quarantine period.[27] The quarantine period does not count towards work duration for LMIA applications.[28]

Employment and Social Development Canada (ESDC) provides standard employment contracts, with formats for either Mexican[29] or Caribbean[30] TFWs. This contract is non-modifiable; its purpose is to specify the rights and obligations of all parties. A copy of the contract in English, French, or Spanish must be supplied to the worker and signed on their first day of work.[31]

The Agricultural Stream

TFWs can be hired for up to 24 months under the *Agricultural Stream*. With this program, employers draft the employment contracts themselves.[32] Governments are not parties to these agreements, as compared to contracts under the *SAWP*. The *Agricultural Stream* is favourable to employers who wish for greater control in the recruitment process and the employment agreement.

Wage deductions are available to employers that supply on-farm or off-site housing at $30 per week from TFWs' wages unless the applicable labour standards require a lower amount. Private health insurance for TFWs must be paid for by their employers. This period begins on the workers' arrival in Canada and lasts until their provincial or territorial health insurance plans are active.[33]

When employers use recruiters or third parties for new hires, the cost cannot be deducted from TFWs' wages.[34] After an employer completes the mandatory recruitment and advertisement efforts, they are ready to apply for an LMIA. The application must be submitted to the Service Canada Centre responsible for the program, or to the centre that processes applications for the employment location.[35]

A public policy was introduced by Immigration, Refugees and Citizenship Canada (IRCC), that allows TFWs in Canada to change jobs before the final decision on their work permit applications. Priority processing is available when an employer provides written notice to Service Canada that their TFWs are in Canada and that they wish to benefit from IRCC's COVID-19 Temporary Public Policy.[36]

Temporary Foreign Worker Program (TFWP) Compliance

ESDC closely monitors employers' compliance with their obligations toward TFWs. These obligations are set out in the *IRPR*, the *IRPA*, and the LMIA. Once an employer applies for a new LMIA, they may be subject to a compliance review. A review will investigate the employer's previous LMIA, and if they provided workers substantially the same wages, working conditions, and occupation as referenced in the documents.[37]

There is a general rule that all records associated with compliance for hiring and employing TFWs must be kept for at least six years. These records may be required as proof of compliance

during an inspection or review. If errors or noncompliance are discovered, an employer must act to remedy them and then inform ESDC.[38] Notice for inspections is not always provided. When selected, employers are informed of the reason, authorization, and type of inspection. The specific compliance conditions that are to be demonstrated will be explained.

Inspections can occur in either a paper-based format or on-site. During an inspection, ESDC will interview the employer and ask relevant questions based on the conditions set out in the LMIA. Employees may be questioned based on these conditions and asked about their treatment. During on-site investigations, EDSC officers may copy documents, take photographs, and make recordings to support their findings. They have the authority to access employers' electronic devices to examine relevant information.

The Agri-Food Pilot

Canada is one of the few net exporters of agri-food products in the world, which provides an opportunity to seize a significant share of the global market and achieve multi billion-dollar export targets by 2025.[39] The *Agri-Food Pilot* provides opportunities for experienced TFWs to obtain permanent residency through a limited number of annual spaces.

Eligible industries include meat product manufacturing, greenhouse, nursery and floriculture production, mushroom production, and animal production. The workers must be experienced and employed in non-seasonal positions.[40] Valid work experience requires one year of full-time work in an eligible occupation in Canada within the past three years.[41]

Applications for this program are processed on a first-come, first-served basis. It must be noted that there are quotas associated with each occupation in the following chart:[42]

Agri-Food Pilot Program

National Occupation Classification (NOC) code	Occupations	Annual Number of Accepted Applicants
6331 9462	Retail butchers Industrial butchers	1470
8252	Farm supervisors and specialized livestock workers	50
8431	General farm workers	200
8611	Harvesting labourers	300
9617	Food processing labourers	730

To gain entry under the program, a worker must meet or exceed the language and educational requirements. Eligible workers require Canadian Language Benchmarks Level 4 in reading, writing, speaking, and listening. The minimum educational requirements are a Canadian high school diploma or an equivalent educational credential assessment report.[43]

In addition, workers may have to demonstrate sufficient settlement funds. They must be able to prove that they can support themselves and any family members, whether the family will join them in Canada or not. This requirement is met by providing official letters from the financial institution where workers' funds are deposited. Settlement funds are calculated in proportion to family size.[44]

Workers already in Canada must maintain temporary resident status until permanent residency is granted.[45] On approval, workers will receive a Confirmation of Permanent Residence in the mail, containing their photo and identification information. A permanent resident visa counterfoil attached to the passport will also be sent, for citizens of countries that require it prior to travel to Canada.[46] TFWs already in Canada will be contacted by IRCC for a subsequent interview with an officer. The interview ensures that the worker has valid documents, and they will be asked questions to verify that they meet the terms for immigration.

There are free pre-arrival services available to TFWs that inform on life and work in the country. For instance, *Active Engagement and Integration Project* has in-person services in China, which are made available globally online. It delivers general information about life in Canada, needs assessments, and referrals to community services.[47] *Canada InfoNet* offers online services to help immigrants prepare for work, providing an opportunity to connect with mentors that have experience in their sector.[48]

COVID-19 Compliance

Updates to the *IRPR* include steep penalties for employers that prevent workers from complying with orders or regulations under the *Quarantine Act* or the *Emergencies Act*.[49] Non-compliance that is discovered through inspections may lead to fines of $1,000 to $100,000 for each violation. Fines are capped at a maximum $1 million annually. Employers may also be banned from the *TFWP* from 1 to 10 years, depending on the violation. For the most serious violations, an LMIA may be revoked and permanent program bans may be issued.[50]

The emergency order made under the *Quarantine Act* on April 14, 2020, implements measures to combat the spread of COVID-19, which include the mandatory 14-day quarantine period.[51] The Federal Government will pay employers $1,500 for each worker, to help ease the financial burdens that result from the quarantine period. This support program will remain in place until the *Quarantine Act* is no longer in force.[52]

Measures have been taken to protect primary producers through the *Emergency On-Farm Support Fund*. It was launched to address COVID-19 outbreaks on farms and to boost protections for TFWs. This initiative supports employers' immediate needs in relation to mandatory changes for ensuring the health and safety of workers and to limit the spread of COVID-19.[53] The fund provides up to $100,000 for emergency response activities. The intake period closed February 26, 2021, and disbursements were to be paid out by March 31, 2021.[54] To be eligible, employers must confirm in writing that they comply with the *Quarantine Act*.[55]

The impact of COVID-19 has altered the hiring process for TFWs. New opportunities have been made available through the *SAWP* and the *Agricultural Stream*. These opportunities come with increased protections for workers, but also strict obligations for employers who must have a thorough understanding of the updated *IRPR* to navigate the changes affecting their businesses. ■

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To contribute, please email submission inquiries to:

Tom Wilson
Editor-in-Chief
twilson@velaw.com

Juan Alcalá
Chair
juan.alcalá@hklaw.com.

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