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IBA Interns' Newsletter

NOVEMBER 2024



IBA Interns' Newsletter

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The rule of law in the balance: addressing the arbitrary detention of human rights defenders as a violation of international human rights law and identifying mechanisms for accountability

It is an alarming reality that lawyers, journalists and human rights activists – those who bravely seek to defend human rights globally – are commonly subject to arrest and detention lacking any clear legal basis on account of their legitimate professional duties, their political opinions, or in relation to the clients whom they lawfully represent as legal counsel.

In the absence of a formal definition in international law, arbitrary detention is contextualised by the United Nations Working Group on Arbitrary Detention (WGAD) with reference to a number of positive indicia.¹ The UN WGAD observes a deprivation of liberty as arbitrary in circumstances where there is no legal justification (Category I),² or where it results from exercising rights protected by the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) (Category II).³ It also includes detention that violates fair trial standards enumerated in the UDHR (Category III),⁴ prolonged administrative custody without review for asylum seekers and immigrants (Category IV),⁵ and discriminatory detention based on identity or opinion (Category V).⁶

Identifying the scale of human rights defenders arbitrarily detained worldwide

In recent years, the international community has witnessed a particular weaponisation of broad national security and anti-terrorism

legislation by authorities across multiple jurisdictions, manifesting in spurious arrests, unfair trials, and the arbitrary detention of human rights defenders in the course of their legitimate professional duties, evidently in an attempt to silence criticism of, and accountability for, injustices.⁷

In Hong Kong, founder of pro-democracy news outlet Apple Daily, Jimmy Lai has been detained by authorities since 2020 and faces a lifetime prison sentence on unfounded charges under the severely restrictive Safeguarding National Security Ordinance⁸ – a national security law which itself has attracted controversy for its broad and vague articles that permit closed door trials and confers on police the power to detain suspects for an extended period of time without charge.⁹ In Turkey, more than 1,700 lawyers have been prosecuted, with 700 lawyers remanded to pretrial detention since 2019.¹⁰ As of 19 June 2024, it is understood that at least 15 of the 46 journalists arrested in the West Bank, Gaza and in the city of Jerusalem are being held under administrative detention, a policy which permits detention without charge and under which individuals are typically held for six months on the basis of preventing them from committing future offences.¹¹ These concerning reports reflect only a fraction of the global reality.¹²



Contextualising the arbitrary detention of human rights defenders as a violation of international human rights law

Article 9 of the ICCPR prohibits arbitrary detention and requires that no one shall be deprived of their liberty except on such grounds and in accordance with such procedure as are established by law.¹³ This is further enshrined under Article 5 and Article 6 of the European Convention on Human Rights (ECHR).¹⁴ The UN WWGAD has equally held that the arbitrary deprivation of liberty amounts to a violation of a jus cogens norm.¹⁵ The misuse of police powers to subject individuals to indefinite incommunicado detention has been recognised as conducive to torture and ill-treatment and the prohibition of which is a recognised jus cogens norm.¹⁶

The particular detention of human rights defenders in the course of their legitimate work infringes upon international human rights law and norms. In terms of non-binding instruments, Principle 18 of the UN Basic Principles on the Role of Lawyers outlines that lawyers should not be identified with their clients or their clients' causes as a result of discharging their functions.¹⁷ Furthermore, lawyers must be able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference.¹⁸ The UN Basic Principles on the Role of Lawyers also outlines that lawyers, like any citizens, are entitled to freedom of expression, belief, association and assembly.¹⁹ The right to hold opinions without interference is protected by Article 19 of the ICCPR as a binding instrument.²⁰ This right is similarly enumerated in Article 19 of the UDHR²¹ and Article 10 of the ECHR.²² Human rights defenders also enjoy the right not to be discriminated against on the basis of political opinion.²³ Equally, their right to a fair trial is protected under Article 14 of the ICCPR and other international law instruments.²⁴

Legal mechanisms for holding perpetrators accountable

Affected individuals or their counsel may seek an Opinion from the UN WGAD or seek assistance through the UN Special Procedures.²⁵ The UN Human Rights Committee may receive and consider communications to the effect that a state party is not fulfilling its obligations under

the Covenant.²⁶ The ICCPR further outlines procedures for resolving disputes between states, including the establishment of an ad hoc Conciliation Commission.²⁷

Targeted sanctions, or 'Magnitsky Sanctions', are particularly effective tools for holding leaders, military personnel, and organisations accountable for arbitrarily detaining human rights defenders. In the United Kingdom, the Global Human Rights Sanctions Regulations 2020²⁸ permits the imposition of financial sanctions for the acts, which, if 'carried out by or on behalf of a State within the territory of that State, would amount to a serious violation by that State' of a number of human rights, including the right to life and the right not to be subjected to torture.²⁹ The European Union, the United States, and Canada have parallel sanctions frameworks.³⁰

It is crucial that individuals are held responsible for their role in arbitrarily detaining human rights defenders. Such an egregious violation of international human rights law amounts to not just an assault on these individuals who are fundamental to democratic society, but a profound challenge to the rule of law itself.

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- 22 See n 14 above.
- 23 ICCPR (4 April 1968) 999 UNTS 170, art 26.
- 24 See UDHR (10 December 1948) 27 A (III), arts 10 and 11(1).
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Digital tax policies in Nigeria: current trends and future directions

Introduction

Globalisation mixed with technology has revolutionised profit creation in foreign jurisdictions with the creation of a digital economy, which is a broad range of economic activities based on digital technologies through the internet¹ without the need for contact with any physical structure of the company providing the services.² Prior to the digital economy’s inception, taxation operated on the residency principle, exclusively taxing entities and persons with a physical presence in the country.³ The digital economy has challenged this as the principle allows foreign companies in the digital economy to evade taxes in antithesis to their profit accrual in the country of operation. Nevertheless, the digital economy needs to be taxed. The problem of digital taxation has been globally recognised. It is being tackled by organisations such as the Organisation for Economic Co-operation and Development (OECD) with its Base Erosion and Profit Shifting (BEPS) Action Plan. Nigeria has also adopted some of these measures and policies. This article will inquire into what policies

have been adopted and speculate about the future of digital taxation in Nigeria.

Current tax policies

With the proliferation of the digital economy in Nigeria creating potential revenue sources, Nigeria has adopted two pillars of digital taxation: the Significant Economic Presence (SEP) principle and the Reverse Charge VAT mechanism. Prior to 2019, the taxation of foreign companies in Nigeria under the Companies Income Tax Act (CITA) was limited to where the company:⁴

- had a fixed base of business in Nigeria, and that profit is attributable to the fixed base;
- trades or carries on business in Nigeria through an authorised person;
- derives profits from turnkey projects which means execution of a single contract for surveys, deliveries, installations or construction; or
- engages in a fictitious or artificial transaction in Nigeria involving a related party.

However, this failed to encompass foreign companies deriving income from digital



services or goods offered to Nigerians and, thus, their tax liability was limited to withholding tax on the contracts entered into with Nigerians.⁵

The enactment of the Finance Act of 2019 (FA 2019), Finance Act 2020 (FA 2020), and Finance Act 2021 (FA 2021), alongside the Ministerial SEP Order of 2020 (the ‘SEP Order’) addressed this problem by implementing the SEP principle innovated by the OECD BEPS plan as an option to create a taxable presence in a country where a non-resident company (NRC) has a significant economic presence based on factors such as revenue, digital address, and target users⁶ that evidence purposeful sustained interaction with the country’s economy via technology and other tools.⁷ Any NRC is imposed with a tax liability of six per cent on its annual turnover⁸ where the NRC engages in providing digital services or goods to Nigerians to the extent that the company has SEP in Nigeria and profit can be attributable to such activity⁹ and such NRC would be deemed to have SEP where it makes a NGN 25m annual turnover, uses a Nigerian domain name or registers its website address in Nigeria, or has a purposeful and sustained interaction by customising its digital platform to target persons in Nigeria¹⁰ but will not be deemed to have SEP if it makes payment to its employees under employment, for teaching in, or by, an educational institution, or by a foreign fixed base of a Nigerian company.¹¹ This policy requires NRCs to file their returns following section 55(2) of CITA,¹² and failure to willingly file grants the Federal Inland Revenue Service (FIRS) with the right to assess the NRC on a best-of-judgment basis.¹³

The FA 2020 establishes that the supply of goods and services anywhere would be subject to VAT in Nigeria provided that the beneficial owner of such supply is a taxable person in Nigeria and the goods or right thereof is situated, registered, or exercisable in Nigeria.¹⁴ However, a reverse charge mechanism is utilised for the NRCs where the NRCs must charge VAT on the invoice for all taxable supplies¹⁵ and remit VAT to the FIRS as an agent,¹⁶ but instead of incurring a penalty upon failure,¹⁷ the receiver would be obligated to remit the tax to the FIRS.¹⁸ The NRCs must not only charge and remit but must also register for VAT with the FIRS and obtain a tax identification number.¹⁹

To ensure the success of these digital taxation policies, the FIRS has implemented the Digital Economic Compliance technology tool to fully capture non-resident digital companies in its tax administration system, and failure to key in creates a penalty for the company.²⁰ Furthermore, NRCs can appoint fiscal representatives in Nigeria that will assist them with their tax compliance.²¹

Future direction

The Nigerian digital tax policies follow the OECD-prescribed strategies for digital taxation,²² however, it is notable that the digital economy exists as a result of high technology tools, the future of digital tax policies will require the FIRS to adopt advanced levels of digitalisation in its administration strategies²³ and develop skill sets in cloud computing, data analytics, machine learning and artificial intelligence (AI).²⁴ Furthermore, the two-pillar framework of the OECD BEPS statement, proclaimed to be the answer to the global profit-shifting problem, has maintained an unfair playing field as it grants NRCs without a global turnover of €20bn the power to avoid taxes in their country of operation.²⁵ The pillar has been rejected in Nigeria as the multinationals operating here do not meet this €20bn threshold and would be a great disadvantage to the economy.²⁶ Although the OECD supports the SEP principle and the digital service tax, it is intended that these policies are temporary and eventually all countries will adopt a collaborative tax policy.²⁷ It is foreseeable that Nigeria may accept the OECD’s action plan when it is reviewed to address the realities of developing countries.

Conclusion

The digital tax policies in Nigeria are structured to address all tax challenges affecting the digital economy in Nigeria. However, the future direction of digital taxation is still riddled with uncertainties as digital tax policies are heavily laced with global considerations and the efforts of the FIRS to ensure that there are strong, effective administration policies for the success of the policy.

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Georgia Roberts

Slapping back: putting the smack down on SLAPP suits

Environmental activists, attorneys, and indigenous peoples have long been fighting the good fight against climate change. Their efforts have had tremendous successes,¹ but it has not always been smooth sailing. Drawing both the eye and the ire of the corporate world has its own set of consequences. Silencing tactics like SLAPP suits are a form of litigious retaliation.² Not only do they affect those who are involved in bringing corporate bad actions to light but they act as deterrents against those who would otherwise bring forward legitimate grievances.³ It is why it is

time for SLAPP suits to finally face their own slap down.

'SLAPP' is an acronym coined in the 1980s that stands for 'Strategic Lawsuit Against Public Participation'.⁴ There is no standard form that SLAPP suits take. SLAPP suits can include claims of defamation, monetary loss, and accusations of criminal behaviour, amongst other allegations,⁵ however, there are a few identifying characteristics of SLAPP.⁶ The CASE notes that these include: (1) a legal claim that comes as a response to an act of public participation on a topic of public interest or concern; and (2) the claim



itself is meritless.⁷ Under the first element, the matter of public participation is usually by an individual concerned with a subject matter such as ‘academic research, whistleblowing, campaigning, or investigative journalism’.⁸ Defendants of SLAPPs are typically individuals pulling back the curtains on obscured information;⁹ raising issues that affect public daily life but might not be frequently discussed outside of a small sphere.¹⁰

Take for example the host of *Last Week Tonight*, John Oliver. Oliver and his HBO network were sued in 2017 by the Chief Executive Officer of Murray Energy after airing a segment about alleged misconduct by the company.¹¹ The case between the parties was dragged out for two years before it was dropped by the court.¹² While the suit was eventually dropped, the situation reveals a particularly sinister aspect of SLAPPs. Unlike this case, SLAPPs normally do not involve parties of equal wealth or power.¹³ Most SLAPP cases are brought by huge corporations or wealthy individuals against individuals with much fewer means and resources.¹⁴ This repeat pattern is no mere coincidence.

In 1993, Steven Dozinger brought a claim against oil giant Chevron.¹⁵ This case alleged that Chevron’s subsidiary, Texaco, had wrecked dozens of acres of indigenous land in Ecuador.¹⁶ In a remarkable outcome, the indigenous group won,¹⁷ however, Chevron was not about to take this lying down.¹⁸ In the 30 years since the beginning of this case, Steven Dozinger has faced constant harassment by the company in a variety of SLAPP suits.¹⁹ Dozinger lost his law licence, and he also incurred 700+ days of house arrest during which his assets were frozen, and six months in federal prison.²⁰ All of this at the hands of judges and attorneys with public ties to Chevron stock.²¹ Worse yet, Chevron withdrew from Ecuador and refused to honour the lawful monetary damages they owed to its citizens.²² The consequences of Chevron’s inaction means that the pollution continues, and the Ecuadorian people continue to suffer health and environmental devastation.²³

The global legal community has seen the trouble brought by SLAPPs and several countries have reacted accordingly.²⁴ In 2023, the United Kingdom introduced its first anti-SLAPP law.²⁵ In 34 states in the United States, there are anti-SLAPP measures already in place.²⁶ The problem is that while SLAPPs

are an international concern, it is countries in the Global South who are the most affected.²⁷ Particularly vulnerable to SLAPPs are environmental groups speaking out against climate change within their communities.²⁸ Defamation and slander are the claims most used to enforce their silence.²⁹

Forum shopping contributes to the issue by allowing for claimants to bring suits outside of the territory where the damages were incurred.³⁰ It took years to confirm a jurisdiction in the Dozinger case and even then, Chevron challenged the court’s legitimacy.³¹ In order to address this global problem, there is a two-step solution that should be considered. The first is a global recognition of SLAPPs as a violation of human rights; the second is that individual states need to adopt protective measures at the highest legislative level.

The freedom of expression is a human right.³² It is recognised as such by the international community in the Universal Declaration of Human Rights (UDHR) and by a multitude of states.³³ SLAPPs are a plague on human rights – they add strain to the arduous fight of the underdog everywhere. SLAPPs threaten our democracy by creating more fear among those who fight to expose the truth daily.³⁴ Without the ability to raise concerns of bad acting, society everywhere cannot improve. It is the duty of the international community to act together in recognising the threat posed by SLAPPs. Recognition through a global treaty would put states on alert to address this problem within their communities.

As mentioned above, the UK has taken its first step towards fighting SLAPPs,³⁵ however, the anti-SLAPP Economic Crime and Corporate Transparency Act could go further.³⁶ The 2023 law only recognises SLAPPs in the context of economic crime.³⁷ The UK Anti-SLAPP coalition recognises additional measures that ought to be implemented.³⁸ As a leading expert on SLAPPs, they have drafted an ideal basic bill³⁹ which includes measures such as: recognition of different subjects/individuals targeted by SLAPPs; dismissal procedures; and associated costs.⁴⁰ These solutions are not universal, but they are a good base line for countries to use as a starting point.

To fight the problem, global acknowledgement is a must. How individual states adopt measures will depend on the legal and judicial systems they already have in place. But this human rights issue needs to be

addressed globally. At its core, the harm that SLAPPs pose is a threat to all people taking a stand against injustice.

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Laura Maurin

Climate refugees: towards the recognition of such a status under international law?

The issue of environmental migration 'promises to rank as one of the foremost human crises of our times',¹ as millions are being, and will increasingly continue to be, forced to relocate due to the adverse impacts of the climate crisis, such as natural disasters, severe droughts, flooding, and sea-level rise. 376 million people have reportedly been displaced due to environmental factors since 2008,² and this number is predicted to rise to 1.2 billion by 2050.³ Despite the alarming escalation of these climate-induced waves of migration, nothing has yet been done at the international level to respond to the issue, placing these 'forgotten victims of climate change' in a legal void.⁴ This is largely due to the fact that environmentally displaced persons (EDPs), defined as those who, 'for reasons of sudden or progressive change in the environment that adversely affects their lives or living conditions, are obliged to leave their habitual homes',⁵ do not fall within the scope of the definition of 'refugees' as per the 1951 Refugee Convention and are thus not entitled to the protection guaranteed by its provisions.

The inadequacy of the current international legal framework

Despite its common use, the term 'refugee' as defined by the Refugee Convention of 1951 is restricted to people who 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing

to such fear, is unwilling to avail himself of the protection of that country'.⁶ This definition presents several obstacles to the recognition of EDPs as refugees, namely the absence of environmental factors in the exhaustive list of valid grounds for fear of persecution and the requirement of an individualised threat of harm directly linked to one of the Convention grounds – which would be virtually impossible to establish given the generalised, indiscriminate nature of environmental damage. Moreover, the persecution feared by the refugee requires an actor of persecution – either a state or non-state agent – and thus does not recognise climate change as a valid source of persecution. Finally, the person must be able to demonstrate his or her country of origin's neglect or refusal to protect him or her from persecution. In the case of environmental harm, the state's inability to mitigate or protect its citizens from the impacts of the climate crisis would not only be extremely difficult to prove, but would also likely fail to meet the threshold for this requirement.

The cornerstone of the international refugee framework is the principle of *non refoulement*, provided by Article 33 of the Refugee Convention, which imposes a duty on states to refrain from expelling refugees 'to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.⁷ The Convention also guarantees other fundamental rights such as the right to work, housing, access to courts and education.⁸ Extending the definition of refugees to EDPs would thus provide them

with a significant level of protection, not only to relocate to another safe country but also to be protected from return to a place where they are faced with a risk of severe harm or death.

Recent developments and prospective courses of action

The United Nations Human Rights Committee recently delivered a landmark decision which, although non-binding, has opened the door to the potential future success of climate change related asylum claims. The case of *Teitotia v New Zealand*⁸ concerned a Kiribati citizen who was forced to relocate due to sea level rise and whose application for refugee status was rejected by the New Zealand High Court. He claimed a violation of his right to life under Article 6 of the International Covenant on Civil and Political Rights (ICCPR) before the Human Rights Committee. Although the Committee found that the claimant could not qualify as a refugee as the general threat of harm that he was faced with fell short of the requirement of an individualised fear of persecution for one of the five Convention grounds, it acknowledged that environmental damage represents a serious threat to the right to life, thereby triggering obligations of *non-refoulement* under Article 6 of ICCPR. In another French case held by the Bordeaux Court of Appeal,¹⁰ a Bangladeshi citizen who suffered from asthma avoided deportation as the court found that the severe air pollution in his country of origin exposed him to a real risk of death in case of return. This unprecedented consideration of environmental factors in a deportation case may create a pathway into the future application of such criteria in the assessment of asylum claims.

The adaptation of existing human rights legal norms to EDPs through the development of customary international law could be a way to address the growing crisis. Indeed, the application of the *non-refoulement* principle under the right to life would provide some form of protection to EDPs, failing the recognition of refugee status under the Refugee Convention. Alternatively, a more effective response would be the adoption of

a new international treaty or an additional protocol to the Refugee Convention, which would amend the definition of refugees to include those forced to flee their country of origin due to environmental factors, as it has already been done by two regional legal instruments.¹¹ This avenue also presents a risk that negotiations of the current international refugee framework would lead to a decreased level of protection,¹² as it is being threatened by the rising populist discourse.¹³ Finally, another possibility is the absence of change in international law, leaving the issue to the discretion of politicians and their goodwill to adapt their national migration policies; as New Zealand did with its creation of a ‘Pacific Access Category Visa’, which allows an annual quota of 1,300 Pacific Islanders to live, work and study in New Zealand. However, the absence of international obligations on states would not adequately bridge the existing gap in the international protection regime, as their reluctance to recognise a new category of refugees is likely to override the need to respond to the escalating crisis.

Notes

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