

State Bar of Texas International Law Section

INTERNATIONAL NEWSLETTER

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Issue Focus: The Ukraine War and Sanctions After a Year



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**Eric Hinton**

ILS Chair

MESSAGE FROM ILS CHAIR

We are pleased to present this edition of the International Law Section Newsletter. It has now been more than a year since Russia's invasion of Ukraine and in this edition we cover a number of related topics. We hope that these insightful articles will be meaningful in advancing our members' understanding of the legal ramifications of Russia's incursion. We are also pleased to share the results of the Thomas H. Wilson Human Rights Essay Contest and have included two student articles. In addition, we are happy to report that we held a very successful International Law Institute in Dallas, addressing a number of important international law topics, which included a keynote interview with former US Senator and NATO Ambassador, Kay

Bailey Hutchison. The International Law Institute would not be possible without the support of Diana Marin as well as our sponsors, the Dallas Bar Association International Law Section, Dickinson Wright, Haynes Boone, Schulz Trade Law, the SMU Rowling Center for Business Law & Leadership, and Torres Trade Law. We look forward to providing you with details on next year's event. Finally, I am pleased to announce that Richard Munoz will be our incoming ILS chair and Josh Newcomer will be the incoming chair of the Human Rights Committee.

We are grateful for each member's involvement with the ILS and hope you will reach out with any questions, suggestions, or concerns.



Josh Newcomer

Editor-In-Chief

EDITOR-IN-CHIEF MESSAGE

Human rights was one of the passions of Tom Wilson, my predecessor and the founder of the International Newsletter. In the Winter/Spring edition of Volume 3 of the International Newsletter, he committed us to publishing at least one article each edition focusing on international human rights. Thus, it is with both appreciation and sadness that we honor his legacy in this issue, which is focused on the paramount new development in international human rights law over the course of the past year—Russia’s full scale invasion of Ukraine.

In addition to our memorial to Tom Wilson, this volume contains articles focused on the sanctions regimes put in place in response to Russia’s invasion. We are also publishing an article by Shelby Lepley, the winner of the Thomas H. Wilson Human Rights Scholarship Award, which analyzes the war as a potential test case for application of the war crime of starvation, which has become even more prescient since Russia suspended its participation in the Black Sea Grain Initiative.

This year, we received a strong pool of applicants for the award, and have decided to publish the runner-up submission as well, which is an article about business and international human rights in China centered on the National Basketball Association.

In the coming year, we plan to roll out new initiatives for our Newsletter. First, we plan to publish short summaries of developments in domestic case law and legislation impacting the international law space. We hope this will encourage our membership to contribute to the dialogue. Second, we will publish summaries of laws of countries outside of the U.S. for the benefit of our readers. We hope that this will encourage many authors from outside the U.S. to contribute to the Newsletter in the future.

If you have thoughts on how we can improve the Newsletter and make it both interesting and useful for the ILS’s members, please let us know.



New Officers and Members

The ILS is pleased to announce the Officers and Councilmembers for 2023- 2024 Term. Please contact Richard Muñoz if you are interested in joining the council.

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Broomfield, CO



Richard Munoz, incoming Chair, thanks Eric Hinton, outgoing Chair, for a successful tenure leading the ILS.

In Memory of Thomas H. Wilson (1960-2022)

JAMES W. SKELTON, JR.



Thomas H. Wilson was a natural leader who impressed all who knew him as an intelligent, kind, caring, good humored and principled man. He had an innate ability to inspire people with his calm demeanor and logical approach to the issues at hand. Everyone who knew him was shocked and saddened when he passed away at the age of 62 with his family at his side on October 25, 2022. He was a great man who was taken from us far too soon. The void left as a result of his loss is felt by his many friends and colleagues around the world.

Tom was, above all else, a devoted family man who loved his wife, Kathryn, and their sons, Marshall and Merrick, as well as his many siblings and their

families. He grew up in the small town of Newell, South Dakota where he loved to go camping and fishing in the Black Hills. He graduated from Drake University in Des Moines, Iowa in 1982, and earned his Juris Doctor degree from the University of Tennessee College of Law in Knoxville, Tennessee in 1985.

He was proud to be a lawyer because he believed lawyers could make a difference in the world and that everyone should be treated with respect and dignity. He was involved in a lot of volunteer work, serving on the boards of three non-profit health centers: Good Neighbor, Vecino and San Jose Clinic. He also volunteered for decades at The Brookwood Community and The Briarwood School, trying to make sure they could continue to provide their much-needed services for functionally disabled adults and students with learning differences, respectively.

Tom was a partner at Vinson & Elkins where he worked in the firm's Employment, Labor & OSHA section, and was certified by the Texas Board of Specialization in Labor and Employment Law. He represented many clients who had international operations that required detailed and precise advice on labor and employment problems. His exposure to such international labor matters allowed Tom to acquire invaluable insights into the complications that arise as a result of his clients' reliance on overseas supply

chains, as well as their involvement in international transactions and operations.

As a result of achieving those insights, Tom realized that potential international human rights violations needed to be addressed in the course of rendering his advice, and that due diligence activities needed to be enhanced with respect to the activities of contractors and subcontractors. At first, in the early 1990s, he took a practical approach to providing that advice, but in 2011 with the publication of the UN Guiding Principles on Business and Human Rights, things changed. The V&E website quotes Tom as follows: "It was a watershed moment because now we had a name for what we were talking about for all those years. And we had some guiding principles to live by, and some things we could actually talk around that actually gave us focus." That focus included the recognition that there was an overriding need to educate his fellow lawyers about international human rights.

I met Tom in 2014 when I rejoined the International Law Section (ILS) of the State Bar of Texas, and was fortunate to witness his many remarkable accomplishments in educating and mentoring lawyers about human rights. In August 2015, against all odds, Tom obtained the approval of the State Bar of Texas to establish an International Human Rights Committee (IHRC) as a committee of the ILS, and he immediately became the first

Chair of the IHRC. I joined the IHRC as soon as it was formed and worked with Tom on a number of projects in connection with the role of the IHRC and international human rights issues.

Under Tom's direction, the IHRC (i) created a website that contains the text of many basic human rights documents, and (ii) conducted research on possible revisions to the Texas Disciplinary Rules of Professional Conduct with respect to international human rights obligations. Tom arranged for the University of Texas School of Law's Human Rights Clinic to review the Texas Disciplinary Rules, compare them with the UN Guiding Principles on Business and Human Rights, and make recommendations for possible revisions to the Disciplinary Rules. The Human Rights Clinic did make such recommendations for specific, beneficial revisions to the Disciplinary Rules, which were widely circulated for discussion purposes.

During his tenure as Chair of the IHRC, Tom traveled all over the U.S. and to many countries such as Australia and Abu Dhabi, making presentations about the IHRC and the hard and soft law implications related to international human rights issues. In his presentations, Tom covered the goals and activities of the IHRC, and the importance of the UN Guiding Principles on Business and Human Rights, which are at the heart of the IHRC's efforts.

Tom established an IHRC-sponsored International Human Rights Writing Award for law school students as a means of educating future lawyers on the topic. When he was elected as Chair of the ILS in June 2018, Tom launched an International Newsletter as an online publication and made it known that the winning papers from the International Human Rights Writing Award competition would be published therein (the award was recently renamed the Thomas H. Wilson Human Rights Scholarship Award). Due to my belief in Tom's

commitment, I jumped at the chance to be the first editor in chief of the International Newsletter when he asked me if I was interested. Several articles on international human rights topics have been included in the newsletter and some issues of the newsletter have been devoted to articles with international human rights themes.

When Tom's one-year term as Chair of the ILS ended in July 2019 he became the editor in chief of the ILS's International Newsletter, and I became an assistant editor. Tom was also an active member of the Human Rights Law Committee (HRLC) of the International Bar Association, and served as editor of the newsletter of the HRLC.

Another example of Tom's dedication to and achievements realized through his practical human rights work was his willingness to make a presentation at the Skelton Lecture Series in March 2018, which I sponsor with the University of Houston Law Center's international legal publication, the Houston Journal of International Law. The title of his presentation was "A World of Possibilities: International Human Rights and the International Lawyer," which was very well received by everyone in attendance.

With some assistance from Robert Sheppard, then an associate with Vinson & Elkins, Tom converted that presentation into a scholarly legal article entitled, "In Memory of Sergei Magnitsky: A Lawyer's Role in Promoting and Protecting International Human Rights," which was published by the Houston Journal of International Law in June 2019 in Volume 41, No. 2. In my opinion, this article represents Tom's overall commitment to educating the legal profession and the public about the critical nature of international human rights issues and making the world a better place as a result. Some of the facts I've mentioned above were included in the article, but, as I expected, Tom made no mention of

himself in the article.

I admired and respected Tom so much that I nominated him for the 2019 IBA Award for Outstanding Contribution by a Legal Practitioner to Human Rights. I did so because I believed Tom had already made a tremendous contribution to the practice of human rights law, and I thought he demonstrated a remarkable level of determination and courage by advocating for and obtaining the approval of initiating human rights activities within the structure of the State Bar of Texas. As a result of Tom's leadership, the ILS/IHRC has taken the lead among U.S. bar associations in providing information and education about international human rights issues that are related to doing business in international markets.

Tom's legacy will live on and be enriched by our continued commitment to the human rights principles he followed and our desire to build on his achievements.



Jim Skelton has practiced law for over 46 years, specializing in international energy transactions in emerging markets. He's the author of 26 articles for legal periodicals and books and a memoir, the coauthor of a textbook, and the lead editor and coauthor of two anthologies. Jim is a member of the International Law Section and a member of the International Human Rights Committee, as well as the IBA's Human Rights Law Committee. He served as the first editor in chief of the ILS's International Newsletter and as an assistant editor thereafter. He has made 18 presentations at international legal conferences in Houston, Dallas, London and Moscow, and served as an Adjunct Professor of Law at the University of Houston Law Center, teaching the course in Energy Law: Doing Business in Emerging Markets.

Unprecedented Response to Russian Invasion of Ukraine Marks New Era for Multilateral Cooperation on Export Controls and Sanctions

OLGA TORRES

Managing Member, Torres Trade Law, PLLC, Dallas, TX

DERRICK KYLE

Senior Associate, Torres Trade Law, PLLC, Dallas, TX

ALEX DIETER

Law Clerk, Torres Trade Law, PLLC, Dallas, TX

Sanctions and export controls levied by the United States and its allies against Russia in response to its invasion of Ukraine have imposed significant costs on the Russian economy, military industrial complex, and political elite.¹ But the impact of the new Russia economic sanctions and export control measures reach far beyond the targeted government, sectors, entities, and individuals. As a result of new U.S. and multilateral economic measures taken against Russia in the past year, U.S. persons now face increased primary sanctions risks when doing business in Russia or with Russians in third countries, and non-U.S. persons face heightened secondary sanctions risks when engaging in activities that may constitute “support” for Russian government and military actions. This article examines select measures imposed against Russia by the U.S. and others, discusses the significance of enhanced multilateral cooperation on sanctions and export control administration and enforcement, and highlights key takeaways for industries seeking to effectively manage the legal, practical, and political risks associated with export control and economic sanctions compliance.

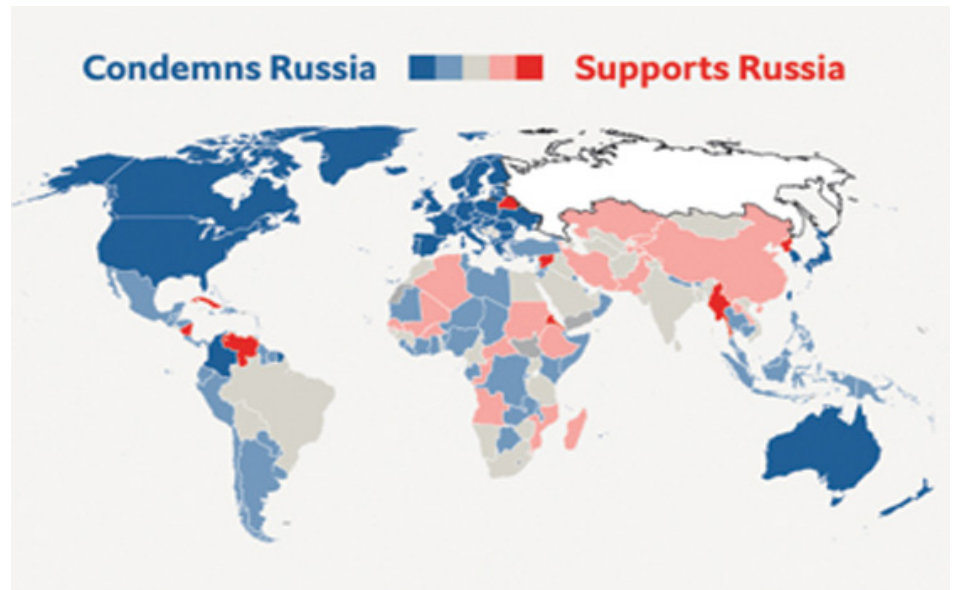


Image Source: Who Are Russia's Supporters, The Economist (Apr. 4, 2022)

Overview Of U.S. Economic Sanctions and Export Controls

Economic Sanctions and Export Controls

Though often colloquially referred to under the umbrella term “sanctions,” economic sanctions and export controls are formally separate, albeit closely related, tools of economic statecraft.

Generally, economic sanctions refer to a broad range of measures governing the activities of U.S. persons wherever located; whereas, export controls govern the export, reexport, and in-country transfer of U.S.-origin controlled items.²

The U.S. utilizes economic sanctions against its targets, including foreign governments and regimes, economic sectors, entities, and individuals, in a variety of contexts, with the aim of

modifying the target's behavior or promoting other national security or foreign policy objectives.³ Economic sanctions may encompass measures such as blocking assets and interests in assets subject to U.S. jurisdiction; restrictions on access to the U.S. financial system, including transactions with U.S. individuals and businesses; limits on the availability of private and government loans, investments, insurance, and underwriting; trade restrictions; and denial of foreign assistance and government procurement contracts.⁴ U.S. export controls are designed to promote U.S. national security and foreign policy objectives as well as to maintain U.S. strategic technological leadership.⁵ Both economic sanctions and export controls are flexible because they can be adjusted in response to a target's behavior or changes in factual circumstances.

Agencies Responsible for U.S. Economic Sanctions and Export Controls

The U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") is responsible for administering and enforcing economic and trade sanctions. Sanctions programs implemented by OFAC are based on multiple legal authorities, including executive orders ("E.O.") issued by the President and statutes passed by Congress, and such authorities are further codified by OFAC in its regulations (31 C.F.R. Parts 501-599).⁶ In addition to OFAC, the U.S. Department of State ("State Department") develops and implements foreign policy-related sanctions to maximize their economic impact on targets and minimize damage to U.S. economic interests.⁷ The State Department also endeavors to build international support for the implementation of economic sanctions, which are most effective when implemented multilaterally.⁸

The U.S. export control system,

which compliments the U.S. sanctions regime, is diffused among multiple licensing and enforcement agencies; however, U.S. export controls can generally be divided into dual-use and military controls.⁹ The U.S. Department of Commerce's Bureau of Industry and Security ("BIS") implements and enforces the Export Administration Regulations ("EAR") (15 C.F.R. Parts 730-774), which regulate the export, reexport, and in-country transfer primarily of "dual-use" items, and the State Department's Directorate of Defense Trade Controls ("DDTC") administers the International Traffic in Arms Regulations ("ITAR") (22 C.F.R. Parts 120-130), which regulate the export and temporary import of defense articles, data, and services.

U.S. and International Response to Ukraine Invasion

U.S. Response to Russia's Invasion

The U.S. utilizes sanctions as a core element of its Russia policy, employing them to counter and deter Russian malign activities in a variety of contexts. The U.S. has sanctioned Russia in response to its aggression in Ukraine (beginning in 2014 when Russia annexed Crimea), malicious cyber activities, political influence campaigns, chemical weapons use, human rights abuses, misuse of energy exports as a coercive tool, weapons proliferation, and trade with and political support for North Korea, Syria, and Venezuela.¹⁰

In response to Russia's invasion of Ukraine, the U.S. has imposed full blocking sanctions on Russian individuals and firms, placing numerous targets on OFAC's List of Specially Designated Nationals and Blocked Persons ("SDN List"). OFAC has imposed sectoral sanctions targeting certain sectors of the Russian economy, such as the consulting and accounting sectors, which have been identified by the Secretary of the

Treasury pursuant to E.O. 13662.¹¹ OFAC has also specifically targeted major Russian banks (including the Russian Central Bank), financial institutions, energy exporters, airlines, media outlets, and others. In addition, BIS has imposed export controls targeting strategic goods and technologies that were not previously subject to control, including microelectronics in the Russian military's supply chain, imposing "significant and long-lasting consequences on Russia's defense industrial base, which relies extensively on foreign-sourced items."¹² In early 2023, BIS added several Iranian drone producers to its Entity List for transferring unmanned aerial vehicles to Russia for use in Ukraine.¹³

Multilateral Cooperation

The U.S.-led, "Western" sanctions and export controls targeting Russia imposed over the past year are unprecedented in terms of their scope, coordination, and speed.¹⁴ Analysis by the Economist Intelligence Unit's global forecasting team "found that 36% of the world's population live in countries that have actively condemned Russia and imposed sanctions on the Russian economy," in relation to its 2022 invasion of Ukraine.¹⁵ When it comes to economic statecraft, however, perhaps the more important figure to note is that those same countries account for roughly 70% of global GDP.¹⁶ A multilateral coalition of pro-Western countries – including the European Union ("EU"), the United Kingdom ("UK"), Canada, Australia, New Zealand, Japan, and South Korea, as well as the formerly-neutral Switzerland, Finland, and Sweden, among others – have joined the U.S. (to some extent) in imposing sanctions and export controls against Russia in response to its aggression in Ukraine.¹⁷ Despite considerable variation in the degree of cooperation achieved between the U.S. and its international partners, many

consider the multilateral response to Russia's invasion in 2022 to be the most sophisticated collective economic measures ever imposed against a major power.¹⁸

To date, countries supportive of Ukraine have assisted its effort to resist the Russian invasion in two main ways: sending weapons to Ukraine and imposing restrictions on Russia. And over time, Ukraine's supporters have grown increasingly willing to send more advanced weapons and impose harsher punishments. The multilateral coalition of nations, initially assembled on an *ad hoc* basis outside of the structures of any preexisting international organization or framework, has established and reified intergovernmental relationships amongst relevant licensing bodies and law enforcement agencies. This kind of multilateralism – with respect to both the *administration* and *enforcement* of economic sanctions and export controls – may, in time, prove a momentous development. As the Russian war campaign wages on, the multilateral economic campaign to counter Russian aggression continues to grow more robust and effective.

Impact of New Russia Economic Sanctions and Export Controls

Economic Impact

When discussing the economic effects of U.S. and multilateral measures to counter Russian aggression in Ukraine, such effects can generally be divided into two categories: intended and unintended. The infliction of economic, political, and strategic harm on Russia and its enablers are among the chief intended consequences of such measures. On October 14, 2022, the State Department, OFAC, and BIS issued a Joint Alert informing the public about the impact of U.S. sanctions and export

controls on Russia's military-industrial complex.¹⁹ The alert noted that sanctions have immobilized assets held by the Central Bank of Russia worth hundreds of billions of dollars and imposed sweeping restrictions on access to the U.S. financial system.²⁰ U.S. and allied export restrictions have left Russia's defense sector incapable of replacing "over 6,000 pieces of military equipment, such as tanks, armored personnel carriers, and infantry fighting vehicles," and "Russian hypersonic missile production has nearly ceased due to the lack of necessary semiconductors used in the manufacturing process."²¹ Moreover, production of Russian surface-to-air missiles, airborne early warning and control aircraft, and even civilian vehicles has either drastically fallen in output or ceased altogether.²² One of Russia's largest tank producers was even forced to furlough employees due to a lack of necessary foreign components halting its production lines.²³

Unintended Consequences

Though sanctions and export control measures are generally designed to minimize unintended consequences and mitigate undesired economic harm, some degree of spillover is inevitable. Fortunately, the U.S. does not have, and in fact has never had, a substantial trading relationship with Russia.²⁴ Nevertheless, U.S. sanctions and export controls on Russia have significantly affected certain U.S. businesses and sectors engaged with Russia.²⁵ Measures designed to isolate Russia may also have contributed to global economic trends, worsening negative trends from COVID-19, disrupting international supply chains, exacerbating volatility in commodity markets, and negatively influencing global economic growth.²⁶

Risk Mitigation

From an enterprise risk perspective, the war in Ukraine has radically altered the risk profile of any businesses operating in and around Russia, or with Russian parties. In light of unprecedented U.S. and multilateral measures against Russia, businesses need to make commensurate investments in their compliance programs to mitigate heightened legal and regulatory risk. To avoid costly enforcement actions on the back-end, businesses must devote sufficient resources on the front-end to building robust, risk-based compliance programs, implementing effective internal controls and due diligence procedures, including denied party screening, and, where appropriate, conducting internal investigations into potential misconduct.

Multilateral cooperation with respect to both the administration and enforcement of economic measures targeting Russia has altered the risk profile of doing business with Russia and has increased the likelihood of penalties for non-compliance. Failing to comply with these restrictions can result in significant fines and reputational damage, making it crucial for businesses to understand and adhere to these regulations. Investing in export control and sanctions compliance helps businesses mitigate these risks and avoid reputational harm associated with enabling Russia's aggression in Ukraine.

The unprecedented international response to Russia's invasion also portends a broader paradigm shift in the relationship between geopolitics and international business. Rising tensions between the "West" and adversarial nations like Russia and China have resulted in a torrent of economic measures designed to deal economic blows.

Conclusion

The United States has long used economic sanctions and export controls as means of effecting its foreign policy around the globe. But the coordination of these efforts with other nations, collectively representing 70% of the world's GDP, in the absence of a set multilateral regime makes the response to Russia's invasion of Ukraine unique. As multilateral cooperation deepens and governments step up their enforcement efforts, investing in export control and sanctions compliance has never been more crucial.



Torres Trade Law is an international trade and national security law firm that assists clients with the import and export of goods, technology, and services. We have extensive experience with the various regimes and agencies governing national security and trade such as U.S. Customs and Border Protection, the Department of Commerce Bureau of Industry and Security, the Department of State Directorate of Defense Trade Controls, the Department of Treasury Office of Foreign Assets Control, the Committee on Foreign Investment in the United States, the Defense Counterintelligence and Security Agency, and others. Our firm provides clients with full support for all trade and national security law issues, including U.S. export control and economic sanctions laws, industrial security, and trade strategy and policy.



Endnotes

- 1 See Treasury-Commerce-State Alert: Impact of Sanctions and Export Controls on Russia's Military-Industrial Complex, U.S. Dep't of the Treasury, OFAC Joint Alert (Oct. 14, 2022), https://home.treasury.gov/system/files/126/20221014_russia_alert.pdf.
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- 15 Russia can count on support from many developing countries, Economist Intelligence Unit (Mar. 30, 2022), <https://www.eiu.com/n/russia-can-count-on-support-from-many-developing-countries/>.
- 16 *Id.*
- 17 See generally Minami Funakoshi et al., Tracking sanctions against Russia, Reuters (July 7, 2022), <https://www.reuters.com/graphics/UKRAINE-CRISIS/SANCTIONS/byvrjenzmve/>; Amb. Mark Green, Countries That Have Sanctioned Russia, Wilson Center (May 10, 2022), <https://www.wilsoncenter.org/blog-post/countries-have-sanctioned-russia>.
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- 19 *Supra* note 1.
- 20 *Id.* at 2.
- 21 *Id.* at 3.
- 22 *Id.*
- 23 *Id.*
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- 25 *Id.*
- 26 *Id.*

One Year of Russia Restrictions: Six Key Trends and Lessons for Trade Compliance

SIDLEY AUSTIN LLP

One year ago, Russia launched a military invasion of Ukraine in a major escalation of the Russo-Ukrainian War. In response to Russia's actions, the international community imposed strict sanctions, export and import controls, and other measures on Russia. These measures have had a significant effect on global companies operating in Russia, leading a number of them to suspend operations there or even exit the Russian market altogether.

Restrictions have increased and evolved over the past year, resulting in unique challenges for companies trying to comply with the overlapping web of international sanctions on doing business in or involving Russia. Below we highlight six trends and takeaways from the past year with respect to compliance with sanctions, export and import controls, and other restrictions on Russia.

The Russia Restrictions Introduce New Concepts and Compliance Challenges

Sanctions on Russia are unprecedented in terms of both the numbers of restrictions imposed and the nature of those restrictions. The volume of sanctioned persons and controlled items targeted is greater than under previous regimes. But in addition to the sheer volume of the sanctions, the new



measures have also introduced new sanctions concepts across the various jurisdictions, such as broad services restrictions, a full transaction ban for certain Russian state-owned enterprises, and a price cap mechanism on Russian oil and petroleum.

One of the most challenging aspects of the expansion of sanctions for compliance and transactional professionals has been the ratcheting up of restrictions on the provision of certain services. While the United States has previously imposed bans on the provision of *all* types of services, these restrictions are unique in prohibiting the provision of only certain types of services to persons in Russia (with limited

exceptions). This approach creates challenges for companies trying to assess and understand exactly what types of activities fall within the scope of the covered services, as those sectors are defined. Further, the types of services covered are broad but not always aligned across the various sanctions regimes. Affected sectors include accounting, auditing, tax consulting; business and management consulting or public relations; advertising; architectural and engineering; investment services; IT consultancy and design; quantum computing; legal advisory services; and trust and corporate formation services. Despite broad alignment among the EU, UK, and United States, these measures

have been implemented in different ways, with different exceptions and licensing grounds and even at different times across the jurisdictions.

The main challenge for companies seeking to comply with this new menu of sanctions is the constant need to keep evaluating internal compliance policies as new categories of measures are introduced. In addition to ensuring that sanctions screening takes into account the latest changes and items are appropriately classified against new types of trade restrictions, the new restrictions may affect unexpected areas of operations, as is the case for services restrictions. The services restrictions affect almost all global companies operating in Russia through an entity, branch, or representation office, regardless of the sector in which they are active. The range of issues raised by the services restrictions is broad, including the ability to provide certain intragroup services (legal advisory services, IT services, auditing, bookkeeping, etc.) within a global company that may rely on services centers in one jurisdiction to cover an entire region, including Russia. The restrictions may also affect the ability to use trust structures in the context of debt restructuring or insolvency proceedings involving any Russian persons, and the ability to provide of legal advice or deal support to companies with Russian operations and assets, including in the context of acquisitions and other transactions.

Export Control Restrictions Are Becoming an Increasingly Important Foreign Policy Tool

“Traditional” sanctions measures have typically targeted the flow of money and credit to sanctioned or restricted persons. The sanctions targeting Russia certainly encompass those traditional measures but also include novel and increasingly complex export control

restrictions on the flow of goods, software, and technology to Russia, including restrictions on exports, sales, reexports, and transfers of items to even nonsanctioned persons in Russia. This reflects a growing trend over the last several years of placing more emphasis on export controls as a foreign policy tool. That is, export controls are now being used more frequently and in a unique way as an enforcement tool to address issues of national security.

Recent export-related restrictions on Russia are also unique in the context of traditional export control measures. In particular, “commercial” items that are not controlled as military or dual-use items (i.e., those classified as EAR99 under U.S. export controls, and those that would not require an export license under EU or UK export controls) usually would not be controlled for export. However, in addition to the “traditional” export restrictions targeting military or dual-use items, the United States, EU, and UK have each imposed restrictions on the exports of thousands of “commercial” items to Russia. For this reason, it is no longer sufficient to simply confirm the “traditional” export classification of the item through, for example, an export control classification number; rather, companies need to also check whether the item is listed or described on any Russia-related export control lists maintained by relevant authorities by comparing its tariff code (HS code) and description against relevant lists.

We expect to see export controls increasingly used as a foreign policy tool, both in the context of restrictions on Russia and in response to other perceived national security threats.

Import Restrictions Highlight the Importance of Country of Origin Determinations and Supply Chain Tracing

The flurry of import restrictions put in place by governments around the world last spring and summer, such as prohibitions on the import of certain Russian-origin goods and suspension of normal trade relations (resulting in an increase in the duty rate applied to Russian goods), brought into focus the importance of accurate classifications, country of origin determinations, and supply chain due diligence.

While most trade compliance programs have controls regarding classification, many companies struggle with implementing appropriate country of origin, and country of origin marking, procedures — especially multinational companies that import into a number of jurisdictions with different rules and requirements. Furthermore, supply chain due diligence measures are only starting to become standard aspects of trade compliance programs as trade restrictions, such as those discussed in this alert, spotlight their significance. Indeed, although trade levels of wholly produced or obtained goods from Russia were already low prior to the announcement of Russia trade restrictions, many more imported articles incorporate Russian content. As such, companies must understand not only where the inputs to produce their goods come from but also whether the manufacturing process substantially transforms those inputs in the country of production according to the rules of the country into which the goods are imported. For example, U.S. Customs and Border Protection has increasingly used the “essence” test to determine the country of origin of products. If a product that contains meaningful Russian-originating content does not undergo a substantial transformation under this test prior to importation into the United States, it could be subject to the increased duties on Russian-origin goods. Controls and procedure regarding country of origin determinations and

supply chain tracing are, therefore, critical to ensuring import compliance, particularly as governments continue to use trade restrictions as a foreign policy tool (e.g., the threatened 200% tariff on Russian-made aluminum imported into the United States, the recently implemented Uyghur Forced Labor Prevention Act, and similar measures).

There Are Attempts to Prevent Circumvention of Sanctions Through Targeting of Third-Country Actors

Countries imposing sanctions targeting Russia are conscious of the need to prevent the circumvention of their measures to reinforce their credibility. To do so, such countries have imposed measures targeting the evasion of sanctions by third-country actors by trying to control the activities of third-country actors that may be less incentivized to apply Western sanctions.

In this respect, the United States is known to apply its sanctions and export control laws extraterritorially, through, for instance, the use of secondary sanctions. While the EU and the UK have been in the past critical of the use of such tools by the United States, the Russia sanctions crisis has brought on a policy shift, at least in the EU's approach.

In particular, the EU has taken steps to discourage non-EU persons (which would normally not be required to comply with EU sanctions in the context of a given transaction, except in specific circumstances) from engaging in actions contrary to EU sanctions. The most emblematic move in this respect is the broadening of the designation criteria to empower the EU to designate any individual or entity facilitating the circumvention of EU sanctions (e.g., a third-country company buying goods in the EU to bring them to a third country and then Russia). To date, the EU has not yet used this new power but might

do so against entities in the United Arab Emirates, Mali, and Iran accused of selling prohibited equipment to Russia, in the context of the 10th EU sanctions package currently being negotiated.

In addition to the expansion of the EU's authority in this respect, several countries are reinforcing the reporting requirements on their operators to prevent breach and circumvention of sanctions, creating positive obligations on companies to supply regulators with certain information related to sanctions compliance. For instance, the EU now requires EU operators (which include any EU individual or entity active in any given sector) to communicate immediately any information about funds and economic resources in the EU of designated persons that have not been treated as blocked in violation of an asset freeze by persons that should normally be required to block them.

Asian Countries Are Catching Up on the Sanctions Game

While the United States, the EU, the UK, and Canada have historically been at the forefront of the imposition of sanctions in the last decade, the war in Ukraine led certain countries that are not traditionally using unilateral sanctions tools to impose their own set of sanctions against Russia, in a rather unprecedented move.

For example, a number of Asian nations, such as Japan and Singapore, imposed sanctions targeting Russia in the course of 2022 and early 2023, respectively.

Japan successively imposed a wide range of asset freezes, as well as trade and financial restrictions, on Russia that partly overlap with U.S., EU, and UK measures. Significantly, Japan also imposed far-reaching export prohibitions on dual-use goods, luxury goods, and goods that may strengthen Russia's industrial base

(similar to the lists of goods subject to increased controls under U.S., EU, and UK export) and import prohibitions on Russian precious metals and Russian crude oil above the price cap, among others. Japan further restricted access to its capital markets to Russia by implementing various prohibitions on trading in Russian sovereign debt in the primary and secondary markets in Japan and issuance of bonds from certain Russian banks. In addition, Japan moved to ban the provision of certain trust services, accounting and auditing services, and business management consulting services to Russia and subjected new Japanese direct investment in Russia to approvals.

Singapore imposed a ban on exports of certain items to Russia, including military equipment and certain dual-use items and prohibited the provision of financing or financial services in relation to exports of those goods from Singapore or any other jurisdiction. On the financial side, Singapore implemented various measures, such as the designation of four major Russian banks and any entity directly or indirectly owned or controlled by, or acting on behalf of or under the direction, of such banks; a prohibition on dealings of new securities and provision of financial services facilitating new fundraising by the Russian government, the Central Bank of Russia, and their related entities; a prohibition on transactions or financial services in relation to certain sectors in Donetsk and Luhansk (transport, telecommunications, energy, oil and gas, mineral resources); and a prohibition on any cryptocurrency or digital payment token transactions where the proceeds or benefits of such transaction may be used to facilitate any of the previously mentioned prohibitions.

Unprecedented International Coordination on the Imposition of Restrictions on Russia Increases Compliance Risks

In response to Russia's invasion of Ukraine, the United States, UK, EU, and other allies and partners formed a coalition to implement sanctions and export controls on Russia. This unprecedented level of coordination (outside the scope of United Nations Security Council resolutions) resulted in parallel — though not identical — regulatory policies and controls across the United States, UK, EU, and others, which has produced a much greater impact on Russia than traditional unilateral sanctions and export controls could have achieved alone.

Western countries are seeking to capitalize on this success and replicate this multilateral cooperation in the enforcement arena, including by sharing best practices and information on investigations and enforcement. Some steps have already been taken in this direction, including the announcement of an [enhanced partnership on sanctions implementation and enforcement](#) between the UK Office of Financial Sanctions Implementation and the U.S. Department of the Treasury Office of Foreign Assets Control and the establishment of the broader [U.S.-EU Trade and Technology Council](#). There does not yet, however, exist an international mechanism for open information sharing and cooperation among other allies. Within the EU itself, there is a proposal to revamp the sanctions enforcement framework to ensure cooperation and information sharing among Member States and the European Commission on ongoing investigations and prosecutions of EU sanctions violations.

Even ad hoc enforcement information sharing increases the risk

of a company's facing investigations in multiple jurisdictions, and companies should weigh these considerations when choosing to disclose potential violations. Not all jurisdictions have clear disclosure processes or incentives, and while some countries settle violations only administratively, other jurisdictions may prosecute the same conduct as a criminal offense. These risks will likely increase should the United States, EU, UK, and their allies create a more formalized and open enforcement information-sharing platform.



The trends discussed here make it challenging to stay abreast of the sanctions on Russia, which change frequently and are applied in different ways across various jurisdictions. Novel types of restrictions may require the imposition of new internal controls appropriately tailored to the risks presented by doing business in or involving Russia. Regulators have a clear focus on targeting third-country actors that may participate in sanctions evasion. For this reason, any company with a global footprint should carefully consider the implications of Russia sanctions before engaging in any transaction in or involving Russia. Further, increased coordination and information sharing across jurisdictions may increase enforcement risks. Sidley has trade compliance capabilities in the United States, EU, UK, Singapore, and Japan and continuously advises on best practices and compliance with Russia sanctions.

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Fighting with Food: Prosecuting the War Crime of Starvation

SHELBY LEPLEY

JD Candidate SMU Dedman School of Law

Since February 2022, reports on Russia's invasion of Ukraine have inundated world news. War results in many unintended and indirect consequences, and Russia's decision to target Ukrainian grain terminals, silos, fields, agricultural equipment, and export infrastructure is felt far beyond the opposing military.¹ These attacks crippled the food supply of Ukrainian and global civilians alike. Many scholars have questioned whether the International Criminal Court (ICC) will prosecute Russia for attacks on agricultural infrastructure. However, the ICC has never prosecuted war crimes related to agricultural-related attacks, even with Rome Statute provisions that account for such atrocities.² Due to the lack of precedence, there is no clear definition for the war crime of starvation's (WCS) *mens rea* element,³ nor is the fact analysis detailed for agricultural-related violations of the principles of distinction and proportionality. This article argues that the ICC should prosecute criminal violations impacting agricultural production under the WCS and adopt the "virtually certain" test for indirect effects caused by attacks on agricultural infrastructure.

International Humanitarian Law (IHL) does not define the indirect effects of war,⁴ yet these effects remain pertinent to the war crimes calculus.



There is growing interconnectivity between nations. Therefore, national and transnational decisions inevitably impact third-party countries. Despite a lack of enumerated recognition in IHL, many military manuals already "require consideration of reverberating effects."⁵ The Convention on Certain Conventional Weapons (CCW) noted that determining proportionality requires considering the "foreseeable effects" on civilian populations.⁶ This test alludes to numerous factors weighed during wartime.

The path for nations to seek redress for war crimes is well established. However, it is unclear whether prosecution for the WCS considers

indirect effects on civilians and third-party countries. For this discussion, the impact on global food security caused by the Russo-Ukraine War provides an opportunity to evaluate various approaches to the indirect effects of war crime claims. The adoption of Article 8(2)(b)(xxv) in the Rome Statute indicates the international community's dedication to preventing war crimes related to food production.⁷ Additionally, the ICC established that the court considers war crimes violations under the virtually certain test.⁸ Logically, prosecuting WCS should consider virtually certain effects of war.

This article will first outline the necessary background information to

explain agriculture's relationship to conflict and the Russo-Ukraine War. Next, the article will discuss how IHL and the ICC's war crime provisions relate to agricultural production, with close attention paid to the WCS *mens rea* element. Then, the analysis section will test the various *mens rea* requirements of WCS against hypotheticals and the Russian disruption of agricultural production in Ukraine to determine whether a military leader can be held individually liable. Finally, the conclusion will offer a recommendation for the international order to hold countries accountable for targeting agricultural production during conflicts.

Background

When conflict targets the agricultural industry of any leading commodity exporter, it will result in substantial, foreseeable, and negative consequences on civilians in the country and abroad. Throughout history, agriculture has been weaponized during wartime because it supports various aspects of national security.⁹ Even today, conflicts in South Sudan, Syria, and Yemen demonstrate agriculture's vulnerability and related civilian suffering.¹⁰ Agriculture serves a fundamental role in political, economic, and social stability because it supplies food, fiber, and a wide range of life-sustaining byproducts. Insecurity in agriculture results in political instability, human insecurity, and negative consequences for the global economy.¹¹

Attacks on agricultural production have indirect effects outside of the home country because of the increasing interconnectivity of nations. Comparative advantage, or "the advantage enjoyed by a ... country in the cost ratio of one commodity to another [compared to] the ratio of costs of these same commodities elsewhere," has driven nations to be interdependent.¹² Before global trade

had become commonplace, a nation's access to agricultural goods was limited to its production relative to its resources, environment, and development. Today, trade allows nations to access agricultural commodities that were once inaccessible. This access leads nations to rely significantly on global trade to provide foodstuffs and byproducts for their civilians. Subsequently, disturbances to international trade result in substantial market shifts that all nations experience.

Russo-Ukraine War

The Russo-Ukraine War has had an unprecedented impact on agricultural markets. The world has never experienced an upheaval of global food security to the magnitude caused by this conflict.¹³ Russia has targeted Ukrainian agricultural production, which has deprived Ukraine of export earnings and stable agricultural supply.¹⁴ Without these necessities, neither a military nor civilian population can function normally.

A vital consideration when evaluating possible war crimes violations in Ukraine is the global positioning of Ukraine in international agricultural production. Ukraine is typically a top agricultural producer and exporter of oilseeds and grains.¹⁵ Before the Russian invasion, they provided one-third of the world's sunflower oil (nearly half of global exports) and two-thirds of its sunflower meal.¹⁶ Additionally, they were the fourth-largest corn exporter and the eighth-largest wheat exporter.¹⁷ These facts demonstrate that attacks on Ukraine, especially those targeted at Ukrainian agriculture, would be virtually certain to hinder civilian populations globally.

At the onset of the conflict, reported attacks on Ukrainian agriculture quickly surfaced. News reports relayed, "Russian troops ...

laid waste to farmland, destroy[ed] agricultural equipment and plant[ed] landmines in the rich soil where crops should grow."¹⁸ Furthermore, Russian forces stole tons of Ukrainian grain and killed livestock.¹⁹ A video, presented to the United States Department of Agriculture's (USDA) Outlook Forum by the Ukrainian Minister of Agrarian Policy and Food, Mykola Solski, "showed stark images of fields burning or ones that had burned, aerial footage of fields pocked with bomb craters, farmers racing to save remaining portions of fields from advancing fires and other images of the impacts of war on his country."²⁰ Targeted attacks such as these hinder current and future food production for Ukrainians and civilians abroad that depend on Ukrainian exports.

By March 13, 2023, food sources were depleted in Mariupol, Ukraine, leaving 170,000 civilians without sustenance.²¹ The World Food Programme (WFP) reported that 45 percent of Ukraine's population was worried about finding sufficient food.²² Janusz Wojciechowski, the European Union's Agriculture Commissioner, stated, "The only interpretation is that [the Russians] want to create hunger and to use this method as a method of aggression."²³ Ukrainian President Volodymyr Zelenskyy also alleged that Russia was "doing everything to ruin [Ukraine's] agriculture potential and to provoke a food crisis not only in Ukraine but in the world."²⁴

Russia further targeted Ukraine's agriculture export market when establishing blockades directly. During Russian invasions, "blockade[s] resulted in a sharp reduction in exports as grain was diverted to alternate routes," causing exports to fall approximately one-third of the typical level.²⁵ This fluctuation in supply caused immense stress on storage facilities outside of the conflict zones because the shipping of 26 million tons of cereal crops from the 2021

harvest had been delayed far into 2022.²⁶ Some Ukrainian exports were sent through nonconventional routes, adding approximately \$100 per ton to the cost of Ukrainian grain.²⁷

Since Ukraine and Russia provide a staggering volume of agricultural exports, it is unsurprising to learn that conflict-induced starvation is occurring far outside Ukrainian borders. The WFP and United Nations (UN) analysis indicates that severely food insecure people will increase from 276 million post-pandemic to 323 million because of the Russo-Ukraine War.²⁸ The World Trade Organization (WTO) also attributes increased food insecurity and agricultural commodity prices to this conflict.²⁹ The Center for Strategic and International Studies (CSIS) reported that this war caused higher food prices, escalating food insecurity, and global political instability.³⁰

Some argue that these global disruptions were intentional by Russia,³¹ and evidence proving this would assist in prosecuting Russian officials of war crimes. The European Bank for Reconstruction and Development's former Chief of Economics, Sergei Guriev, rationalized that grain blockades promoted "instability in the Middle East and provoke[d] a new flood of refugees."³² Past Russian President Dmitry Medvedev even stated, "many countries depend on [Russian] supplies for their food security. It turns out [Russian] food is [Russia's] silent weapon. Quiet, but mighty," indicating purposeful exploitation of world agricultural markets.³³

Regarding the ICC's involvement in this conflict, neither Russia nor Ukraine are State Parties to the Rome Statute.³⁴ However, Ukraine accepted the ICC's jurisdiction for alleged Rome Statute violations in its territory starting on February 20, 2014.³⁵ Following the February 2022 invasion, the ICC Prosecutor sought authorization to

investigate the situation in Ukraine.³⁶ Additionally, the Republic of Lithuania initiated (and thirty-three other state parties joined) a State Party referral in March 2022, which the Prosecutor accepted.³⁷ Therefore, the ICC is investigating war crimes in Ukraine, and the potential for prosecution remains. Further supporting potential prosecution, the ICC issued an arrest warrant for President Vladimir V. Putin and another Russian official for war crimes.³⁸

Legal Context

Under the jurisdiction of the ICC, there are two primary ways an individual can be held criminally liable for civilian starvation during war. First, Article 8(2)(b) (xxv) created the WCS, which focuses on methods of warfare that deprive civilians of objects necessary for survival.³⁹ Alternatively, violations of the principles of distinction and proportionality may also support war crimes prosecution associated with agricultural production.

War Crimes of Starvation

Article 8(2)(b)(xxv) of the Rome Statute outlaws "intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival [OIS], including willfully impeding relief supplies as provided for under the Geneva Conventions."⁴⁰ The four elements of this offense include:

1. The conduct took place in the context of and was associated with an international armed conflict;
2. the perpetrator was aware of factual circumstances that established the existence of an armed conflict;
3. the perpetrator deprived civilians of [OIS], including by willfully impeding relief supplies; and
4. the perpetrator intended to starve civilians as a method of warfare.⁴¹

Of these four elements, the final *mens rea* element poses difficulty in prosecuting the WCS.⁴² Two additional elements make up the *mens rea* element: (1) "the perpetrator must have intentionally deprived civilians of [OIS]; and (2) The perpetrator must have intended to starve civilians as a method of warfare."⁴³ The crime of starvation has yet to be prosecuted by the ICC. The complex fact analysis needed to determine intent requirements will lead to a lengthy evaluation in a future prosecution because of the need for sound precedence.⁴⁴ The current Russo-Ukraine War allows the ICC to clarify the *mens rea* element because agriculture plays a leading role in this conflict.

International Humanitarian Law

IHL also prohibits the intentional use of starvation as a warfare tactic through the principles of distinction and proportionality.⁴⁵ Article 8 of the Rome Statute governs war crimes and enumerates wartime actions considered "grave breaches" of the Geneva Convention.⁴⁶ The Geneva Convention lists humanity, necessity, distinction, and proportionality as limits on the force used to pursue military objectives.⁴⁷ Distinction and proportionality are of primary importance in this analysis.

Countries are strictly required to protect civilians by "distinguish[ing] between the civilian population and combatants and between civilian objects and military objectives and accordingly ... direct their operations only against military objectives."⁴⁸ The proportionality principle states that civilians may not be the object of a military attack, and indiscriminate attacks without distinction are barred.⁴⁹ This determination is highly fact dependent.⁵⁰ Military objectives may only include "those objects which by their nature, location, purpose or use make an effective contribution to

military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."⁵¹ Any attempt to "attack, destroy, remove or render useless [OIS] of the civilian population, such as foodstuffs, [and] agricultural areas . . . for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive,"⁵² is explicitly prohibited. Nevertheless, action against sustenance for armed forces or military supplies is permissible.⁵³

To determine if there has been a violation of the principle of distinction, the ICC must determine if the attack impacted military objectives or civilian objects.⁵⁴ A target is a military objective if it provides (1) an effective contribution to military action and (2) a definite military advantage.⁵⁵ Military officials consider this before authorizing attacks to ensure they do not authorize actions violating the principle of distinction.⁵⁶ Debate remains whether a "revenue-generating target" is a civilian object or a military objective because of its substantial contribution to both sectors. The U.S. military policy regarding revenue-generating targets, for example, "consider[s] each potential target on a case-by-case basis and evaluate[s] it in light of the information . . . in order to assess whether it meets the definition of a military objective."⁵⁷

Analysis

This analysis aims to answer whether a military leader can be held individually responsible for the WCS under various interpretations of intent in Article 8(2)(b)(xxv). It also considers whether the principles of distinction and proportionality also protect against attacks on agriculture and food supplies in the event of prosecution. Next, various hypotheticals and situations

unfolding in the Russo-Ukraine War will test the analysis.

Intent Element of War Crime of Starvation

Given the limited prosecution of war crimes by the ICC and no prosecution regarding starvation, it is unsurprising that there is uncertainty around the court's interpretation of the *mens rea* in Article 8(2)(b)(xxv). If the ICC Prosecutor were to initiate such a case, this would likely be the most controversial element.⁵⁸ There are two prevailing views under the ICC's use of intent in this provision. First, some scholars believe that the WCS is a specific intent crime, which only criminalizes purposeful weaponization of civilian starvation where the goal of military action is to starve civilians.⁵⁹ Under this interpretation, successful prosecutions require proof of the specific intent to "weaponize the civilian suffering associated with starvation."⁶⁰ Second, other scholars look to the virtually certain test (established in *Lubanga*)⁶¹ to determine if "deprivation of [OIS] of the civilian population is the expected result of a military action."⁶² This test derives from Article 30(2) of the Rome Statute, which states a person has the requisite intent when "(a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause the consequence or is aware that it will occur in the ordinary course of events."⁶³ Therefore, criminal violations would exist where "perpetrators knew with a virtual certainty that civilians would starve as a result."⁶⁴ The virtual certainty test lowers the *mens rea* standard from knowledge to recklessness and would attach liability to those who knew or should have known the consequence of an attack.⁶⁵

The first specific intent interpretation insinuates that the

Prosecutor must present evidence demonstrating that the military leaders aimed to cause civilian starvation or were aware that targeting such OIS would result in starvation.⁶⁶ This interpretation would require a showing of the mental motivation of military leaders or the reports they relied on before initiating attacks. Demonstrating and verifying mental motivation or knowledge is difficult under the specific intent interpretation because it requires testimony or written documents containing the accused's reasoning or other evidence demonstrating they knew an attack would lead to deprivation of an OIS.

Alternatively, the virtually certain test develops a standard that punishes the disregard of foreseeable events.⁶⁷ This test is broader than the specific intent analysis because it accounts for attacks where military officials failed to analyze the direct and indirect effects of their actions. In the context of attacks impacting agriculture, this standard would impose a duty for military officials to analyze the virtually certain longer-term impacts on food and fiber production, trade, and the economy as it relates to civilians in the adversary country and world.

Admittedly, attacks contributing to starvation are difficult to foresee because many components of agricultural production are essential to the final distribution of civilian food, fiber, and byproducts but may not seem essential to the untrained eye. For example, burning a substantial amount of hay fields could result in the inability to feed livestock used to sustain civilians. While the hay was not foodstuff, it did supply the input necessary to produce food. Numerous hypotheticals demonstrate the complexity of agricultural production, and military attacks should account for the substantial indirect effects on food security that attacks on agriculture can

cause.⁶⁸

Evaluating three common causes of conflict-induced starvation demonstrates how the specific intent and virtually certain tests have varying results. When evaluating deaths during Yemen's civil war, scholars determined three events primarily caused starvation: "(1) Economic crisis... (2) Military attacks on agricultural and food production that destroy, deny or render useless [OIS], and (3) Blockades of airports and seaports causing obstruction of humanitarian aid."⁶⁹ Under the specific intent analysis, a successful conviction for any of these events is uncertain because it requires evidence demonstrating the perpetrator's mental motivation to purposefully starve civilians or deprive them of OIS. There is no requirement under the specific intent reading to consider indirect effects. It is more likely a successful conviction would come from scenario (2) because civilian well-being directly depends on OIS. Scenario (1) would likely be far too remote to receive a conviction under the specific intent test, and Scenario (3) would be difficult to prove because there are often legitimate military purposes for blockades, thus counteracting the intent to starve civilians.

Under the virtually certain test, prosecution for any of those three scenarios becomes more likely because it shifts the *mens rea* from knowledge to recklessness. Prosecutions of (2) and (3) are achievable, but prosecution based on (1) alone is still unlikely and would just be used for evidentiary support,⁷⁰ because it is a remote cause of starvation. Scenario (2) could singularly lead to prosecution under the specific intent standard because it can be proven "the perpetrators of starvation [knew] or should have known that the sites that they were attack[ing] were civilian targets, [and]... they knew or should have known that the consequence of attacking those

targets would lead to... starvation of civilians."⁷¹ Again, determining criminal intent for (3) is more difficult because a legitimate military purpose increases the lawfulness of the act, so there must be a demonstration that commanding officials knew or should have known that civilians would starve.⁷²

Critics fear the virtually certain test expands liability for wartime decisions. Increasing liability for reverberating international effects would likely receive political opposition for fear of making many aspects of war subject to war crimes prosecution. However, without adopting the reckless standard for WCS, this provision is practically inoperative unless a narrow set of facts occur. Unduly limiting the operation of the WCS provision goes against the intent of the Geneva Convention to "protect people not taking part in hostilities" because there would be little to no protection for civilians facing foreseeable war-induced starvation.⁷³ Additionally, it is foreseeable that military officials could more easily conceal their intent under the guise of attacking agricultural production to undermine military objectives under the specific intent test. Furthermore, famine crimes are not meant to expand liability to omissions by third-party nations' officials aware of the starvation; rather, this test focuses on punishing affirmative actions that create starvation.⁷⁴

Fact Analysis for Distinction and Proportionality

While debate persists over the intent under the WCS, IHL still applies to situations threatening food security during wartime.⁷⁵ Food and other agricultural products are inherently "dual-use" objects because militaries and civilians require those goods to survive. Additional facts surrounding the conflict are needed to determine the proximity between specific agricultural production and military objectives to determine if

agriculture is an appropriate military target. In the context of nations that rely on agricultural exports, one may argue that agriculture is a "revenue-generating target" supporting the nation's economy and, as a result, its military. The principles of distinction and proportionality would protect against attacks impacting agricultural production for civilians. Civilian objects should not be a target, and "any foreseeable incidental harm resulting from the attack [should] not be excessive in relation to the anticipated concrete and direct military advantage."⁷⁶

As compared to Article 8(2)(b)(xxv), violations of distinction and proportionality are more challenging to address because an extensive fact analysis is needed to determine "excessive damage, or how proportionality and the prohibition against starvation could be reconciled."⁷⁷ Since these questions are highly fact-dependent, obtaining evidence will take far more time, resources, and financing than other investigations. Furthermore, the agriculture industry produces additional complications because of the nature of production. For example,

The destruction of a 'wheat field to deny concealment to enemy forces', for example, might be considered proportional to the anticipated military advantage in that instance. However, once the destruction of the same field is considered against the background of the 'attack as a whole', the litmus test is whether the civilian population might or not be foreseeably left 'with such inadequate food or water as to cause its starvation or force its movement.'⁷⁸

Therefore, whether an attack results in the reverberating effect of starvation requires careful consideration by military officials.

Applicability to Russo-Ukraine War

Many scholars have contemplated whether Russia has violated the principles of distinction and proportionality in the Russo-Ukraine War, but WCS historically receives far less attention. The lack of consideration may be because prosecution of a WCS has never occurred, but there are calls for the ICC to focus on starvation crimes.⁷⁹ Additionally, the WCS may require fewer resources to prosecute because this provision demands fewer fact-weighting determinations than alleged violations of the principles of distinction and proportionality.

The specific intent interpretation of WCS *mens rea* would be much more difficult to prove in this context than the virtually certain test proposed in *Lubanga*. The first test would require evidence that Russian military leaders ordered attacks on agricultural production with the intent to deprive civilians of indispensable food or cause starvation. Conversely, the virtually certain requirement would only need a demonstration that military orders would result in food deprivation, regardless of the military objective. It would be far easier to prove a violation under the second standard because numerous attacks on agricultural production and food storage facilities directly led to the starvation of Ukrainian citizens and global citizens relying on Ukrainian exports.

Concerning principles of distinction, finding a violation will require Ukraine's agricultural sector to be considered a civilian object, not a military objective. Michael Schmitt, G. Norman Lieber Distinguished Scholar at West Point's Lieber Institute, argues that "food and associated infrastructure may qualify as a military objective if used, at least in part, for military purposes" and "Ukraine's agricultural sector would arguably qualify as war-sustaining given the extent to which the Ukrainian economy relies upon agricultural

exports."⁸⁰ In his analysis, he also points to opposing opinions on whether war-sustaining objects are military objectives or whether the war-sustaining approach provides a greater opportunity to violate distinction.⁸¹ This evaluation demonstrates the ICC's potential difficulties in determining whether Ukrainian agriculture is a military objective or civilian object.

In terms of proportionality, determining whether agricultural infrastructure provided a military advantage greater than the civilian need is a fact-based judgment. The outcome will be highly dependent on the evidence gathered. This analysis of the Russo-Ukraine War poses a unique consideration because Ukraine is a leading agricultural producer globally. The reverberating effects felt in countries dependent on Ukrainian agricultural exports may serve as supporting evidence proving more significant adverse effects on civilian populations.

Conclusion

Military officials targeting agricultural production must be held accountable, and the WCS offers this capability. Food is "one of the oldest weapons of war," but the Geneva Convention aims to prevent this from impacting civilians.⁸² Current events make the successful conviction of WCS highly likely. The ICC should utilize recent widespread support to prevent civilian starvation and deter future atrocities.

When choosing between prosecuting officials under violations of the principles of distinction and proportionality or WCS, time and cost must be considered. Previous war crimes prosecutions took years to adjudicate fully.⁸³ WCS may be more economical because there is less fact weighing than alleged violations of distinction and proportionality. If prosecuting the WCS

requires less fact-intensive evaluations, it can expedite the process and lower costs.

When the ICC does prosecute a WCS, clarification of the *mens rea* element is required. The ICC should prosecute agricultural-related criminal violations under the WCS and adopt the virtually certain test for indirect effects caused by attacks on agricultural infrastructure. This *mens rea* interpretation does not unnecessarily limit the applicability of the WCS provision like the specific intent interpretation. Therefore, the virtually certain test supports the purpose of the Geneva Convention and ensures that the ICC Prosecutor can obtain a successful conviction.



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Meshing Hoops and Humanity: Can the NBA Do Business in China While Respecting Human Rights?

LEE PERKINS

"Nobody cares about the Uyghurs"
– Chamath Palihapitiya, minority owner
of the Golden State Warriors

While championing social justice at home, the NBA ignores crimes against humanity perpetrated by its largest strategic partner—China. In Xinjiang, the Chinese government is conducting a persecution against its Uyghur Muslim population. The Chinese Communist Party systematically utilizes mass surveillance, internment camps, and torture to strip minority populations of their religious and cultural identities. As these atrocities took place, the NBA opened a player-development academy in Xinjiang in furtherance of its partnership with China. The academy quietly closed in 2019, and American NBA employees—under the cloak of anonymity—reported severe human rights abuses within the academy. One league employee compared the atmosphere in Xinjiang to "World War II Germany".

International human rights law has made significant strides in the last seventy-five years, largely as a response to the atrocities committed by Nazi Germany. Notably, American multinational corporations—aware of the Nazi's religious and ethnic persecutions—continued to do business with Nazi-controlled businesses throughout the war. This ruthless



pursuit of profits, without regard to political circumstances, imposed a costly externality on humanity. While human rights treaties primarily impose binding obligations on states, the United Nation's Guiding Principles on Business and Human Rights provide a useful framework on how international businesses can respect and promote human rights.

This paper will examine the human rights implications of the NBA's relationship with China. In addition, this paper will expound on the NBA's moral obligation to respect human rights. While businesses in general should embrace human rights, the NBA, as an international sporting organization, has

an elevated responsibility in this regard. We suggest the NBA incorporate the Guiding Principles into its own corporate governance, a measure FIFA has already taken. Though incorporating and abiding by the Guiding Principles may alter or even jeopardize the NBA's lucrative relationship with China, the league should embrace its moral responsibility to respect and promote human rights. Furthermore, such action might bring stability to the league's continued international expansions and lend credibility to the NBA's social justice efforts at home.

Introduction

The NBA recently found itself embroiled in a controversy relating to its involvement with China. On October 4th, 2019, Houston Rockets General Manager Daryl Morey tweeted an image of the words “Fight for Freedom, Stand with Hong Kong”, a message highly offensive to the ruling Chinese Communist Party.¹ Though the NBA tried to appease China by distancing the Rockets organization and the league from Morey’s statement, China responded by halting NBA broadcasts, canceling sponsorship deals, and pulling Rockets merchandise from the shelves.² China’s retaliatory response cost the NBA hundreds of millions in revenue.³ Furthermore, the NBA found itself subject to scrutiny in the U.S. for its perceived kowtowing to the Chinese government. Although China resumed its NBA broadcasts 18 months later, the NBA-China relationship remains tenuous. Extreme human rights violations by the Chinese Communist Party against the Uyghur people draw further criticism to the NBA’s relationship with China. Though the Chinese government has consistently denied any such violations in official statements, China’s persecution of its ethnic and religious minorities in Xinjiang is well-documented.⁴ NBA Commissioner Adam Silver has attempted to walk the tightrope, affirming the NBA’s commitment to upholding the free speech of its employees while touting the importance of maintaining engagement with China through basketball.⁵

Where European football clubs have faced similar criticism regarding their relationships with China, the clubs typically appeal to the fundamental ethical principle of the political neutrality of sport.⁶ The idea that sport must be neutral and free of political or social interference is enshrined in the bylaws of the Olympic Charter and

FIFA; nevertheless, the principle, in practice, is far from a steadfast rule.⁷ The very act of enforcing the principle—perhaps by sanctioning an athlete engaging in political activism—may, itself, be viewed as politically motivated. Thus, the neutrality of sport is more viable as a theoretical model than as a practical outcome. Furthermore, the NBA may have waived this diversion by encouraging players and coaches to espouse political and social causes. For example, during the 2020 season NBA players sported social justice messages on their jerseys, including “Black Lives Matter,” “Education Reform,” and “Speak Up.”⁸ In addition, the NBA created the NBA Social Justice Coalition to “give an institutional voice and resources to the activism of the league and its players.”⁹ Thus, the NBA finds itself in a difficult position; the NBA presents itself as a champion of social justice and free expression, yet conspicuously turns a blind eye to the egregious human rights violations of its largest strategic partner.

Silver has repeatedly deflected criticism of the NBA’s partnership with China by pointing out that most major U.S. corporations do business with China: “So the question becomes, why is the NBA being singled out as the one company that should now boycott China.”¹⁰ Silver may be correct in his assertion that American public discourse has treated the NBA more critically than other U.S. corporations; however, there may be strong justifications for this differential treatment. The tremendous platforms the NBA provides players and coaches makes the importation of Chinese censorship an issue unique to the NBA. In addition, sporting organizations may be distinguished from other businesses due to the unique and socially valuable role that sports hold in society. This role is espoused in official FIBA policy. The NBA, as a sporting organization under the FIBA umbrella, has a social responsibility to

“formulate or adopt policies in relation to discrimination” and “[h]ave regard to the public interest in its operation.”¹¹

First, this paper will explore the tenuous nature of the NBA-China partnership. To contextualize the contentious nature of the partnership, this section will discuss China’s egregious human rights violations in Xinjiang, as well as China’s restrictive media environment. This section will then discuss the NBA’s failed player-development academies in China, as well as recent flare-ups in the relationship caused by Morey’s tweet and by the political activism of Enes Kanter Freedom. Second, this paper will explore the normative reasons that the American public may be justified in holding the NBA to a different standard than other U.S. corporations conducting business with China. The NBA—as a sporting body—may have an elevated moral responsibility compared to other businesses. Third, this paper will discuss the relevant human rights law that may influence how the NBA conducts its relationship with China. This body of law includes established human rights norms, as well as the UN’s Guiding Principles on Business and Human Rights. In addition, this section will apply the Guiding Principles’ approach to promoting human rights to the NBA-China relationship.

Fourth, this paper will offer recommendations on how the NBA might navigate these turbulent waters. The NBA-China partnership is highly lucrative, but it also provides tangential benefits grounded in international diplomacy and openness. These societal benefits, however, must be weighed against the societal costs, including the dilution of American free speech values through the importation of Chinese censorship and tacit complicity in the sportswashing of China’s egregious human rights record. Suggesting the NBA incorporate the UN’s Guiding Principles

into its governance and take an aggressive stance in defense of human rights, this section will explore a range of outcomes including complete severance of the NBA-China relationship, on the one hand, and a Chinese reversal of its policies toward its Uyghur population, on the other. The most likely outcome, however, would fall somewhere in between these two extremes.

Examining the Tenuous Nature of the NBA-China Relationship

China is the NBA's most significant growth market. The league reported that 450 million Chinese viewers watched the 2017-2018 season, and the NBA has an estimated \$10 billion invested in the Chinese markets.¹² Given that China accounts for 10% of the league's revenue, the NBA has a tremendous financial incentive to maintain diplomatic relations with China and continue to grow its Chinese business.¹³ Doing business in China, however, necessarily entails a massive political risk. China has one of the world's most restrictive media environments, and the government has repeatedly exerted its censorship powers in response to speech it deems offensive. Furthermore, the government's persecution of ethnic and religious minorities in Xinjiang draws further condemnation to the NBA's relationship with China. First, this section will explore the egregious human rights violations perpetrated by the Chinese Communist Party in Xinjiang. Examining these atrocities is important to contextualize the contentious nature of the NBA's relationship with China. This section will also discuss media censorship in China. Next, this section will examine three episodes that illustrate the tenuous nature of the NBA's relationship with China; the failure of the NBA's Xinjiang Academy, the Daryl Morey incident, and the activism of Enes Kanter.

The Chinese Communist Party's persecution of minorities in Xinjiang constitutes crimes against humanity

The Chinese government is persecuting religious and ethnic minorities in the Xinjiang region.¹⁴ In August 2022, the Office of the UN High Commissioner for Human Rights published the "OHCHR Assessment of human rights concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China."¹⁵ Substantiating prior reports of human rights abuses in the region, the OHCHR Assessment details egregious human rights violations perpetrated by the Chinese Communist Party against the predominantly Muslim population in Xinjiang. In official statements, China has emphasized that its "Strike Hard Campaign" is a necessary national security measure to combat violent terrorism.

Situated in the northwest corner of China and bordering eight countries, Xinjiang is strategically important to China's trillion-dollar infrastructure project, the Belt & Road Initiative.¹⁶ The regional population adopted Islam during the 10th century.¹⁷ In the 1990s, the Chinese government launched a variety of state campaigns in Xinjiang to discourage disloyalty.¹⁸ The Chinese Communist Party severely punished Uyghur separatists and censored expression the state viewed as fostering Uyghur nationalism.¹⁹ After September 11th, the Chinese government made a decision to label its Uyghur population a terrorist threat, and over the last two decades the regime has pursued increasingly oppressive "counter-terrorism" campaigns in the Xinjiang.²⁰ Alleged anti-terrorism measures include a prohibition on extremist ideas, activities, and clothing, but the regulations provide little clarity on what renders these elements "extremist."²¹ Prohibiting "spreading religious fanaticism through irregular beards or

name selection", the legal regulations appear to conflate the practice of Islam with "extremism."²²

The Chinese Communist Party has established internment camps—which it formally calls "Vocational Education and Training Centers" ("VETC" facilitates)—to employ large-scale arbitrary detention of a significant portion of the Uyghur and predominantly Muslim ethnic minorities in the region.²³ The OHCHR interviewed 26 former VETC detainees, two thirds of whom were subjected to torture.²⁴ Detainees reported being beaten with electric batons, placed in prolonged solitary confinement, and forced to sit motionless on small stools for prolonged periods.²⁵ One interviewee described being "forced to sing patriotic song after patriotic song every day, as loud as possible and until it hurts..."²⁶ Consistent themes among the interviewees were descriptions of constant hunger and severe weight loss, as well as the forced administration of regular injections and pills.²⁷ Several detainees described the VETC detainment as psychological torture, and one stated "the worst thing was that you never knew when you would be let out."²⁸

China's restrictive media environment

China has one of the world's most restrictive media environments.²⁹ The Chinese Communist Party has long imposed tight constraints on both traditional and online media, suppressing anti-government speech through both censorship and subsequent punishment. A confidential internal document that was leaked in 2013—Document No. 9—provides insight into the rationale of the Chinese Communist Party's censorship policy.³⁰ The document warns members of "seven perils" that could undermine the party's rule.³¹ These perils include the promoting "universal values" of human rights, promoting a free press, and promoting

Western Constitutional Democracy.³² The Chinese government has accomplished widespread censorship of the domestic internet through the Great Firewall—a vast combination of legislative action and technologies that block access to selected foreign websites and information relating to certain sensitive subjects.³³ The government has blocked the vast majority of Western social media sites, including Twitter, Facebook, Instagram, and YouTube, as well as numerous foreign media websites, including The New York Times, The Wall Street Journal, Bloomberg News, and the BBC.³⁴ In addition, the Chinese government employs libel lawsuits and arrests to force Chinese journalists and media companies to self-censor.³⁵

Flare-Ups in the NBA-China Relationship

Doing business in China necessarily entails collaborating with the Chinese government. The Chinese market system is dominated by state-owned enterprises, and the Chinese government maintains tight controls over its markets. Thus, any foreign enterprise seeking to do business in China must maintain good relations with the Chinese Communist Party or risk being expelled from the region. This section will explore three flare-ups in the NBA-China relationship which demonstrate the moral conundrum of maintaining diplomatic relations with an autocratic state.

The Silent Closure of the NBA-China Development Academies

The NBA's quiet withdrawal from its development academies in China illustrates the political risk of doing business with the Chinese government. Pursuant to the NBA-China partnership, the NBA launched three player-development academies in China in 2016, one of which was in the Xinjiang

region.³⁶ The goal of the project was to help develop young Chinese players for professional basketball by sending American NBA coaches to the region.³⁷ Ultimately, the league hoped these development academies would produce the next Yao Ming.³⁸ Though many details of the project remain shrouded in mystery, a July 2020 ESPN exposé explored the myriad problems the NBA encountered in running these facilities. ESPN's report was based on interviews with several former NBA employees with direct knowledge regarding the league's player-development program in China. Notably, NBA officials requested that current and former employees not speak to ESPN for the article, and those who did spoke under the cloak of anonymity.³⁹ One American coach described the project as "a sweat camp for athletes."⁴⁰ Coaches were frequently harassed and surveilled. One American coach was detained three times without cause. NBA coaches told league officials that their Chinese partners were "physically abusing young players and failing to provide schooling." A former league employee compared the atmosphere in Xinjiang to "World War II Germany."⁴¹

The NBA's involvement in these Chinese player-development academies is significant because it illustrates the need for the league to develop a more robust human rights policy. This was a situation in which the NBA was directly involved in reported human rights abuses. American NBA employees stationed at the facilities both witnessed and experienced severe human rights violations, yet the league swept the issue under the rug in order to preserve its diplomatic relationship with China.⁴² Respecting human rights requires addressing human rights violations when they occur, and the NBA's quiet withdrawal from its training camps in Xinjiang was a significant failure to do so.

The Daryl Morey Tweet Incident

The Daryl Morey tweet incident illustrates the tenuous nature of the NBA-China relationship. On October 4th, 2019, Houston Rockets GM Daryl Morey tweeted an image of the words "Fight for Freedom, Stand with Hong Kong", a message highly offensive to the ruling Chinese Communist Party.⁴³ At the time, protestors in Hong Kong opposed China's attempts to pass an extradition bill they believed would serve to erode Hong Kong's autonomy.⁴⁴ In response to Morey's tweet, the Chinese government demanded that the NBA fire Morey from his job.⁴⁵ China also halted NBA broadcasts, cancelled sponsorship deals, and pulled Rockets merchandise from the shelves.⁴⁶

The Chinese government's harsh response to Morey's adverse political speech placed the NBA in an awkward situation. Suddenly, the tremendous power of a totalitarian government to control speech was placed in the spotlight of the American political conversation. China expected an apology, and Americans expected an affirmation of the values of free expression enshrined in the First Amendment. First, Silver put forth a statement that NBA employees should "educate themselves" before sharing their views and opinions.⁴⁷ In addition, a number of prominent NBA figures tried to mitigate the damage by distancing the Rockets organization and the league from Morey's statement. LeBron James voiced his belief that Morey "wasn't educated on the subject at hand," and James Harden issued a public apology for Morey's tweet.⁴⁸ After public outcry that the NBA's position was too supportive of the Chinese government, Silver issued a second statement to clarify the NBA's stance. This second statement, which touted the NBA's role as a bridge between the US and China, was attacked as a shallow and hypocritical attempt

for the NBA to salvage its business in China.⁴⁹

Ultimately, China's 18-month suspension of the NBA's Chinese business cost the league hundreds of millions in revenue. Furthermore, the incident exposed the NBA to bipartisan criticism in the U.S. for kowtowing to the Chinese Communist Party. The NBA's wishy-washy handling of the situation—first apologizing to China, and later apologizing to the American public—conveys the league's current reactionary approach toward human rights.

The Activism of Enes Kanter Freedom

The political activism of Enes Kanter Freedom caused another flare-up in the NBA-China relationship. Throughout his ten-year NBA career, the Turkish-born center used his platform as a human rights advocate.⁵⁰ Upon becoming an American citizen in 2021, Enes Kanter legally appended his name with "Freedom." Though Kanter's activism began with public condemnations of Turkish President Erdogan, Kanter shifted his attention to human rights abuses in China in 2021.⁵¹ Kanter's attack on the Chinese government was more categorical than Morey's. Addressing Chinese Communist Party leader Xi Jinping as a "brutal dictator," Kanter called for the Chinese government to "return Tibet to the Tibetan people."⁵² In addition, Kanter donned custom-made sneakers with messages including "Free Tibet" and "Free Uyghur."⁵³ China retaliated by wiping the Boston Celtics from Chinese television broadcasts for the remainder of the 2021 regular season. Four months after the "Free Tibet" tweet, Kanter was traded to the Houston Rockets, who waived him four days later. Thirty years old and no longer in the league, Kanter claims the NBA blackballed him in response to his activism related to China's human rights violations.⁵⁴

China's response to Kanter's activism—a boycott of the Boston Celtics—further the idea that the NBA's partnership with China has a chilling effect on employee speech. Though the NBA might publicly espouse support for the free speech of its employees, Kanter proved that speech adverse to the Chinese Communist Party might come with severe financial ramifications for not only the player but for the entire league.⁵⁵

Despite Kanter's claims, the reasons for Kanter's demise from the NBA are far from clear. Silver has denied accusations that the NBA blackballed Kanter, calling comparisons of Kanter to Colin Kaepernick, the NFL quarterback allegedly blackballed for kneeling during the National Anthem, "completely unfounded and unfair."⁵⁶ Kanter's "one-man crusade against China" did not solely target the Chinese government. Kanter repeatedly criticized iconic players like Michael Jordan and LeBron James for their business relationships with Nike, a company with deep ties to China.⁵⁷ Kanter also criticized LeBron for refusing to speak out against the human rights violations of China: "Money over Morals for the 'King.'"⁵⁸ In addition, critics allege Kanter allowed himself to become a pawn for conservative news outlets with ulterior motives for spreading his criticisms of prominent black athletes.⁵⁹ Thus, there is a possibility that Kanter sullied his reputation within the NBA, not merely due to his anti-China views but because his inflammatory rhetoric alienated other players. Last, there is the simple possibility that Kanter's on-court performance at age 30 simply did not merit a roster-spot on an NBA team. Nevertheless, lingering questions surrounding Kanter's departure from the NBA highlight the need for the NBA to adopt clear policy regarding player advocacy and free speech.

The Need for Change

From a business standpoint, China's retaliatory blackouts to NBA employee speech are indicative of the need for the NBA to incorporate clear human rights policy into its corporate governance. The blackouts have directly cost the NBA hundreds of millions in revenue.⁶⁰ Furthermore, the NBA must repeatedly devote time and resources to mending its relationship with China. In addition to these direct financial repercussions, the NBA-China partnership draws negative media attention to the league. Moreover, the potential for future flare-ups with China casts an air of uncertainty over the permissible conduct of the NBA's stakeholders. While Adam Silver publicly champions the free speech of NBA employees, the potential for Chinese retaliation likely carries a chilling effect on NBA employee speech in regard to matters of sensitivity to the Chinese Communist Party. The air of uncertainty extends to stadium employees and broadcasters, who must make ad hoc decisions on how to treat basketball fans wielding "Free Uyghur" signs at NBA games.⁶¹ Through the adoption of clear human rights policy into its corporate governance, the NBA can bring guidance and clarity to its stakeholders in how they should handle future conflicts that might implicate the league's relationship with China. While there are sound business reasons for such action, the NBA also has a moral responsibility to embrace human rights.

Normative Reasons the NBA Should be Held to a High Moral Standard

This section will explore the NBA's moral responsibility to integrate a human rights framework into its corporate governance. The NBA has an influence that can extend far beyond the world of sports.⁶² The UN General Assembly has recognized the power of sport to promote education, health,

development, and peace.⁶⁵ The Universal Declaration of Human Rights indirectly advocates the right to participate in sport through “the right to rest and leisure,” and subsequent international declarations have recognized that the practice of physical education and sport is a fundamental right for all.⁶⁴ Given the vital role that sport holds in society, the NBA—as the world’s most popular basketball league—has a moral responsibility promote human rights.

The principle of the autonomy of sport lends further backing the notion that the NBA has an elevated moral responsibility to respect human rights. In most European countries, sporting bodies enjoy considerable autonomy from government. Sporting bodies like FIFA and the International Olympic Committee are self-regulating bodies that are largely insulated from local and national governments.⁶⁵ One justification for the autonomy of sport is the unique and important role that sports play in society. Non-governmental sporting bodies are an essential basis for the development and continuity of sport, and through sport they contribute to the realization of societies that respect human rights.⁶⁶ Importantly, the NBA does not share the same autonomy from government as these European sports bodies. However, the NBA shares several characteristics with these international sports bodies that may justify imputing a similar moral obligation to promote human rights to the NBA. FIFA promotes soccer, the International Olympic Committee promotes the Olympic values, and the NBA promotes basketball. As the most popular professional basketball league in the world, the NBA has embraced this goal in its mission: “Inspire and connect people everywhere through the power of basketball.” Furthermore, the NBA’s international popularity and global expansion initiatives imbues the league with a sphere of influence that rivals

those of the European sporting bodies.

The prevailing societal expectation is that the NBA embrace this moral responsibility. NBA Commissioner Adam Silver has repeatedly deflected criticism of the NBA’s partnership with China by pointing out that most major US corporations do business with China: “So the question becomes, why is the NBA being singled out as the one company that should now boycott China.”⁶⁷ Silver may be correct in his assertion that American public discourse has treated the NBA more critically than other US corporations; however, there are strong justifications for this differential treatment.

The Importation of Chinese Censorship and the Chilling Effect on NBA Employee Speech

The NBA’s importation of Chinese censorship is a matter of public concern. Importantly, this censorship need not be enforced through official NBA policy. Rather, associating with China—a business partner that punishes subversive speech with swift financial repercussions—may create a chilling effect on all NBA employee speech. One manifestation of this chilling effect was the quiet manner in which the NBA withdrew from its Xinjiang training facility.⁶⁸ The league told NBA employees who had both witnessed and experienced human rights abuses to abstain from speaking with ESPN about the matter.⁶⁹ Another manifestation was the deletion of Daryl Morey’s “Fight for Freedom, Stand with Hong Kong” tweet. Given the immense popularity and social media followings of NBA players, a potential chilling effect on player speech is especially concerning.

Many NBA employees have tremendous platforms which they may, and often do, use to influence civil discourse. The NBA’s business relationship with China, however,

may have a chilling effect on player speech regarding matters sensitive to the Chinese government. Given the paramount value placed on free expression in America, and political expression in particular, this chilling effect is understandably concerning to the American public. The gravity of China’s human rights violations exacerbates the issue. Thus, while Silver’s publicly espouses the NBA’s commitment to free speech, there remains a public perception that NBA employees are muzzled from speaking out against the Uyghur persecution and other Chinese human rights violations.⁷⁰ This perception may undermine player activism more generally.

The Unique Role of Sports in Society

Second, sporting organizations may be distinguished from other businesses due to the unique and socially valuable role that sports hold in society. The Human Rights Council has recognized the right to participate in sport as a fundamental human right intertwined with human dignity.⁷¹ Participation in sport promotes a healthy lifestyle and teaches young people valuable lessons about teamwork, friendship, fair play, and inclusion.⁷² Sports also stand for self-development, providing a venue for people to overcome their physical limitations and cultivate their full potential.⁷³ The Human Rights Council thus recognized the importance of expanding sports participation globally. Because of this tremendous social value that sports hold in society, professional sporting organizations—as promoters of sport—have a social responsibility that is markedly different from that of, say, a microchip manufacturer.

The enormous popularity of the NBA and its star players might explain the why the league receives more criticism than other corporations for its dealings with China. NBA players, at

the apex of the basketball world, serve as role models for millions of youth basketball players around the globe. Because of these social norms, there may exist an implied social contract between the NBA and its fans requiring that players promote human rights and other positive values.⁷⁴ Thus, the NBA's heightened social responsibility provides a normative justification for its "unfair" treatment in American public discourse.

Evaluating NBA-China Relationship in Legal Framework of Human Rights Law

The NBA's close relationship with China, though lucrative, comes with immense financial and political risks. Even if the monetary benefits outweigh the risks, the NBA may have a moral responsibility to alter its relationship with China. The NBA's influence can extend far beyond the world of sports.⁷⁵ Sports have the power of sport to promote education, health, development, and peace.⁷⁶ The Universal Declaration of Human Rights indirectly advocates the right to participate in sport through "the right to rest and leisure," and subsequent international declarations have recognized that the practice of physical education and sport is a fundamental right for all.⁷⁷ Given the vital role that sport holds in society, the NBA—as the world's most popular basketball league—has a moral responsibility to promote human rights. Furthermore, the prevailing societal expectation is that the NBA embrace this moral responsibility.

Overview of The Guiding Principles

The UN's Guiding Principles on Business and Human Rights ("Guiding Principles") set the authoritative global standard on business and human rights.⁷⁸ While the Guiding Principles do not impose binding obligations on businesses, they set

forth a useful framework that business can implement to show they respect human rights in practice.⁷⁹ Built upon the foundational principle that "Business enterprises should respect human rights," the Guiding Principles urge business enterprises to:

1. Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; [and]
2. Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, *even if they have not contributed to those impacts*.⁸⁰

To accomplish these objectives, business enterprises should have in place: (1) a public commitment to respect human rights that is embedded into its institutional culture; (2) an ongoing process of human rights due diligence; and (3) remedial processes for people harmed by the organization's actions.⁸¹

The Guiding Principles urge businesses to adopt a proactive approach to promoting human rights. The NBA's jumbled response to the Daryl Morey incident, and the public outcry that followed, illustrates the pitfalls of the league's current *reactive* approach. While building a corporate culture that respects human rights takes time and resources, such investment is necessary to ensure the organization properly addresses human rights violations when they occur. The Guiding Principles lay out three responses corporations should take in addressing human rights impacts. First, where a business causes or may cause an adverse human rights impact, it should take the necessary steps to cease or prevent the impact.⁸² Second, where a business contributes or may contribute to an adverse human rights impact, it should take steps to cease its contribution and use its leverage

to mitigate any existing impact to the greatest extent possible.⁸³

Third—and most pertinent to the NBA—, where a business has not contributed to an adverse human rights impact, but that impact is nevertheless directly linked to its operations by its relationship with another entity, the situation is more complex.⁸⁴ In this situation, the Guiding Principles outline several factors that must be weighed to determine the appropriate corporate response. These factors include the corporation's leverage over the entity concerned, how crucial the relationship is to the corporation, the severity of the abuse, and whether terminating the relationship with the entity would have adverse human rights consequences.⁸⁵ In any case, for as long as the abuse continues and the corporation remains in the relationship, it should be able to demonstrate its own ongoing efforts to mitigate the impact and be prepared to accept any consequences—reputational, financial, or legal—of the continuing connection.⁸⁶

Applying the Guiding Principles' Sliding Scale Approach to the NBA

The Guiding Principles advise businesses to apply a sliding scale approach to determine the appropriate course of action where a business partner is engaged in human rights violations. This section will apply the sliding Scale Approach to the NBA-China relationship.

The NBA's Leverage over the Chinese Communist Party

The first factor that must be evaluated is the NBA's leverage over the Chinese Communist Party. The NBA is the most popular professional sports league in China, with a reported 450 million Chinese viewers watching the 2017-2018 season.⁸⁷ Thus, were China to completely blackout the NBA from Chinese

broadcast media, the popularity of the Chinese regime might suffer. In theory, such a blow could fuel civil unrest and eventually serve as a contributing factor to a change in regimes. Nevertheless, the NBA, on its own, likely does not have sufficient leverage over the Chinese government to significantly influence China's human rights policy. China's willingness to blackout NBA broadcasts in response to critical speech indicates the ruling party does not fear the public outcry that might follow the severance of the NBA-China relationship. Alternatively, however, the Chinese Communist Party's willingness to repair the relationship and resume NBA broadcasts indicates the NBA-China relationship might serve a mutually beneficial purpose.⁸⁸

John Ruggie's commentary to the Guiding Principles indicates that it is important to think creatively about leverage and how to use it.⁸⁹ While the NBA's leverage over the Chinese government might seem negligible, the NBA might wield influential power when coupled with other commercial pressures. Considering China's powerful position within the United Nations and its unwillingness to address accusations of severe human rights violations, traditional human rights channels are unlikely to resolve the violations.⁹⁰ Under these circumstances, internal public outcry coupled with foreign commercial pressure may be more effective in forcing change.⁹¹ Due to their immense popularity and unique place society, sporting organizations like the NBA are in a rare position to foment such public outcry.

Assuming the NBA's primary leverage over the Chinese government is its power to influence public opinion of the ruling regime, the measurement of the Chinese public response to NBA blackouts would be a useful metric. Chinese public opinion—and dissenting opinion in particular—

however, is a difficult variable to gauge. First, the Chinese government's control of television broadcasting and censorship of the internet produce an environment where public opinion is profoundly influenced by government control.⁹² Although authentic nationalist sentiment may sincerely be felt by the public, as a practical matter it may be difficult to ascertain what portion of this sentiment is attributable to government propaganda and censorship. Furthermore, most Chinese citizens with views at odds with the government's official line are unlikely to publicize them for fear of subsequent punishment.

The importance of the NBA-China relationship to the NBA

Next, we must evaluate how crucial the NBA-China relationship is to the NBA. The Guiding Principles stipulate that a relationship may be crucial if it provides a product or service essential to the enterprise's business and for which no reasonable alternative exists.⁹³ Under this framework, the NBA-China relationship is probably not crucial to the NBA. The relationship, though lucrative, does not provide a product or service essential to the NBA. Furthermore, severance of the NBA-China relationship would not prevent the league from expanding into other growth markets. The NBA has hosted regular season fixtures in the U.K. and Mexico since 2011, and the NBA's success in China has led the league to pursue growth opportunities in other Asian countries.⁹⁴

Nevertheless, there is a countervailing argument that the NBA-China relationship is "crucial" to the NBA. As of 2019, the NBA has an estimated \$10 billion invested in China, and NBA-China accounted for 10% of the league's total global revenue.⁹⁵ Furthermore, whereas revenues have stagnated, revenues from China are on the rise. Though the NBA-China relationship may not be crucial to

the survival of the league, it is certainly crucial to the NBA's growth in the near term. In addition, it is important to acknowledge that the NBA's prevalence in the Chinese market did not occur overnight. When the NBA reached a point of market saturation in the US in the 1990s, Commissioner David Stern made global development a point of emphasis:

"We think global development is happening. But what we do, we'll do slowly, quietly and build it up. Our growth at home didn't happen overnight and it's going to happen even more slowly around the world. But happen, it will."⁹⁶

As Stern prophetically suggested, building a large audience in China was a long-term strategy that will be difficult and costly to replicate in other growth markets.⁹⁷ Thus, the opportunity cost of nixing the NBA-China relationship must include not only lost revenues and investment but also the significant time and resources that must be devoted to penetrating new markets.

Nevertheless, in the context of the Guiding Principles, the NBA-China relationship is probably not "crucial" to the NBA. Though the relationship is certainly lucrative, the league would certainly survive without its partnership with China. That the league continued to thrive during China's blackouts illustrates this point.

The severity of China's human rights abuses

The third factor we must weigh is the severity of the abuse. This is the strongest factor weighing in favor of a corporate response by the NBA. In Xinjiang, the Chinese government's persecution of its Uyghur Muslim population constitutes crimes against humanity.⁹⁸ The Chinese Communist

Party systematically utilizes mass surveillance, internment camps, and torture to strip the minority populations of their religious and cultural identities.⁹⁹ These actions constitute abuse of the utmost severity.

Furthermore, the Chinese government conducts these action in violation of numerous human rights treaties to which it is a party: the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC), and the International Covenant on Economic, Social and Cultural Rights (CESCR).¹⁰⁰ The Chinese government is also bound by international human rights norms, including the right to life, the prohibition of discrimination based on race, religion or sex, and the right to freedom of religion.¹⁰¹ Last, the Chinese government acts in violation of multiple peremptory norms from which no derogation is permitted. These include the prohibitions of arbitrary deprivation of life, torture, slavery, arbitrary detention, racial discrimination, and the commission of international crimes including crimes against humanity.¹⁰²

Adverse human rights consequences of terminating the NBA-China relationship.

The last factor to be weighted is whether terminating the relationship with the entity would have adverse human rights consequences.¹⁰³ In the case of NBA-China, this factor is highly pertinent, though evaluating the adverse consequences requires significant speculation. Sport has the power to unite people, and tangential benefits of the NBA-China relationship include international diplomacy and openness. Thus, complete severance of the NBA-China relationship could have

the effect of pushing China towards isolation. Although broadcasting the NBA in China will not cause the Chinese Communist Party to adopt a Western view on human rights, a shared interest in basketball opens avenues for the communication and exchange of ideas between the two countries.¹⁰⁴ It is difficult to say that an isolationist China would be more forward-thinking on human rights than one with diplomatic relations with the West. In addition, NBA stars maybe able to use their platforms to positively impact human rights in China without directly criticizing the Chinese government. Furthermore, the NBA-China relationship has the effect of drawing media attention toward China's human rights violations. Although improvements in China's human rights policies may not come about immediately, any such changes might be delayed by boycotting China.

Demonstrating Ongoing efforts to mitigate impact, and be prepared to accept consequences

Considered together, the sliding scale approach does not provide a clear indication of how the NBA should proceed. Not only would complete severance of the NBA-China relationship fail to resolve China's human rights abuses, but it could also have the detrimental effect of pushing China towards isolation. According to the Guiding Principles, under such circumstance the NBA may continue its partnership with China, but the league should conduct itself with a measured approach.¹⁰⁵ To continue doing business with China while respecting human rights, the NBA should be able to demonstrate its ongoing efforts to mitigate the impact of China's human rights violations.¹⁰⁶ This obligation raises a substantial concern; there is a strong possibility that any efforts by the NBA to mitigate China's human rights

violations would undermine the NBA-China relationship. Any mitigation efforts necessarily require open dialogue about the human rights violations, yet the Chinese Communist Party has made it clear that criticism of its policies will be met with retaliation.

Potential Outcomes

This section will explore several potential outcomes were the NBA to incorporate the Guiding Principles into its corporate governance. By incorporation of the Guiding Principles into the NBA's corporate governance, the NBA would take the important step of publicly recognizing its commitment toward promoting human rights. Mere incorporation of the Guiding Principles without additional steps to actually observe them, however, would of course have little impact. This speculative analysis will explore the potential outcomes that might unfold if the NBA not only incorporates the Guiding Principles but also makes a serious attempt to abide by them.

Under the Guiding Principles, the NBA may continue its relationship with China provided the NBA be able to demonstrate ongoing efforts to mitigate China's human rights abuses.¹⁰⁷ As part of their mitigation efforts, the Guiding Principles recommend that organizations undertake to perform human rights due diligence.¹⁰⁸ The due diligence process includes ongoing efforts to quantify and assess actual and potential human rights impacts. In addition, the Guiding Principles urge businesses to communicate externally about how they are addressing human rights impacts.¹⁰⁹

Scenario 1: The end of NBA-China

There is a possibility that the NBA's incorporation and pursuance of the Guiding Principles spells the end of the NBA-China relationship. Strict

adherence to the mitigation and due diligence measures imposed by the Guiding Principles would likely hinder the NBA's ability to continue amicable relations with China. For example, the NBA's withdrawal from its Xinjiang training camps would have played out differently had the league taken the mitigation measures required by the Guiding Principles. First, the NBA would have been obligated to track and report the human rights abuses that occurred. In the Xinjiang training facility, NBA employees experienced arbitrary harassment. Furthermore, Chinese child athletes at the camps experienced physical abuse and were deprived of schooling. The NBA withdrew from these training camps silently, brushing these violations under the rug so as not to destabilize the league's relationship with China. Under the Guiding Principles, however, the NBA would have been obligated to track and report these human rights violations. Doing so would have drawn negative attention towards the Chinese government's oppressive policies. China has repeatedly shown its willingness to suspend NBA broadcasts due to adverse speech from NBA employees, and the likely result of the NBA's human rights due diligence would be the suspension of the NBA-China relationship.

In addition, the Guiding Principles outline a due diligence process that includes meaningful consultation with potentially affected groups. In the case of the Xinjiang training camps, this provision might require the NBA to conduct interviews with players who experienced abuse. The NBA no longer operates training academies in Xinjiang. The termination of these academies widens the nexus between the NBA-China partnership and China's oppressive policies in Xinjiang. Nevertheless, if "potentially affected groups" within the due diligence provision is interpreted broadly, the NBA might be obligated to

open dialogues with oppressed Uyghur people and shed light on the situation in Xinjiang.

The recent flare-ups in the NBA-China relationship reveal a pattern: China censors NBA broadcasts, the league issues an apology, and once tempers subside the parties resume their relationship. The Guiding Principles, however, require regular assessments of human rights impacts. If the NBA operates to regularly draw attention toward China's human rights abuses, the Chinese government might decide that continuance of the relationship is no longer beneficial for the ruling party.

Scenario 2: Significant progress in China's human rights policy

Alternatively, there exists the possibility that the NBA's commitment to promoting human rights could push China to take steps toward improving its human rights record. This outcome hinges on the assumption that the NBA's immense popularity in China grants the league some leverage over the Chinese Communist Party. Thus, were China to completely sever its ties with the NBA and blackout NBA broadcasts, the popularity of the Chinese regime might suffer. Importantly, the Chinese Communist Party may not value the popular opinion of the Chinese people. Furthermore, the regime might believe that its tight grip over the Chinese media could be used to mitigate any public outcry arising from the censorship of American basketball. In theory, however, complete erasure of the most popular sports league in the country could fuel civil unrest and eventually serve as a contributing factor to a change in regimes.

While the NBA, alone, might not have sufficient leverage to change China's human rights policies, the NBA might wield significant influence when coupled with other commercial

pressures. The relationship between the US and China has experienced heightened military and economic tensions in recent years, and these pressures present a threat that other multinational corporations might cease operations in China. Considering China's powerful position within the United Nations and its unwillingness to address accusations of crimes against humanity, traditional human rights channels are unlikely to resolve the violations.¹¹⁰ Under these circumstances, internal public outcry coupled with foreign commercial pressure may be more effective in forcing change.¹¹¹ Due to their immense popularity and unique place society, sporting organizations like the NBA are in a rare position to foment such public outcry.

An NBA boycott of China might be compared to the sporting boycott of South Africa during the apartheid era. Apartheid was system of institutionalized segregation in South Africa between 1948 and the early 1990s, and numerous sporting bodies boycotted South Africa during this period. While it is difficult to quantify the contribution of these sporting sanctions to the ending of apartheid, there is strong evidence that the boycotts not only influenced important policy actors but also fulfilled an important symbolic function.¹¹² An NBA boycott of China might serve a similar symbolic function, signaling to the world that the Chinese government cannot expect normal international relations while perpetuating human rights violations of the utmost severity.

Probable Outcome: Initial shockwave, followed by slow and measured progress

Were the NBA to incorporate the Guiding Principles into its corporate governance, the most likely outcome would fall somewhere between these two extremes. Though China might

at first react negatively to the NBA's public commitment to promoting human rights, this reaction would likely provide only a temporary barrier to the continuance of the relationship. Overall, the NBA-China relationship is a mutually beneficial one. While the NBA gleans substantial revenues from China, the partnership benefits China by furthering the international perception that China has a free and open economy.

The NBA might take a more measured approach to its relationship with China so as not to trigger an adverse human rights impact that might require further inquiry. For example, the NBA would be unlikely to open a training facility in Xinjiang if the Guiding Principles applied. Put another way, incorporating the Guiding Principles might encourage the league keep China at arm's length. The mere acts of broadcasting NBA games and selling merchandise in China, alone, would not implicate the league. The importation of Chinese censorship, however, presents a separate issue. While the league might publicly support the free expression of its employees, the NBA would likely interpret the Guiding Principles to be silent on chilling effect on speech caused by China's retaliatory measures. Thus, the NBA's incorporation of the Guiding Principles would probably allow for the NBA-China relationship to continue. The move would be an important step for the NBA toward respecting and promoting human rights; nevertheless, the actual impact of such a move would likely be minimal in Xinjiang.

Conclusion

The NBA's billion-dollar business in China comes at a steep moral price—tacit complicity with China's egregious human rights violations. As the Chinese government systematically persecutes its Uyghur Muslim population, most NBA employees remain conspicuously

silent on the issue. The NBA's concerted social justice efforts at home make this complicity all the more troublesome. Viewed in a positive light, the NBA-China relationship carries the benefits of international diplomacy and openness. From an alternate perspective, maintaining the relationship requires the importation of Chinese censorship and collaboration with a violent and oppressive regime. Given the complexities of the NBA-China relationship, the NBA's moral culpability is difficult to assess—there is a moral distinction between the rope-seller and the hangman that must not be overlooked.

To navigate these turbulent waters, the NBA should incorporate clear human rights policy into its corporate governance—a measure FIFA has already taken. The NBA, as a sporting body, has a moral responsibility to respect and promote human rights. Because NBA athletes serve as role models for children around the world, there may be an implied social contract between the NBA and its fans requiring that players promote human rights and other positive values. Furthermore, sports serve an important social function in society that justifies holding the NBA to an elevated moral standard.

Incorporating the Guiding Principles on Business and Human Rights would signal to the world that the NBA embraces this responsibility to respect human rights. Moreover, incorporating the Guiding Principles would carry significant benefits from a business standpoint. First, the move could guide the league's conduct when flare-ups with China inevitably arise. Second, publicly embracing human rights could lend credibility to the NBA's social justice efforts at home.



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We welcome all members to join us at next year's Institute.





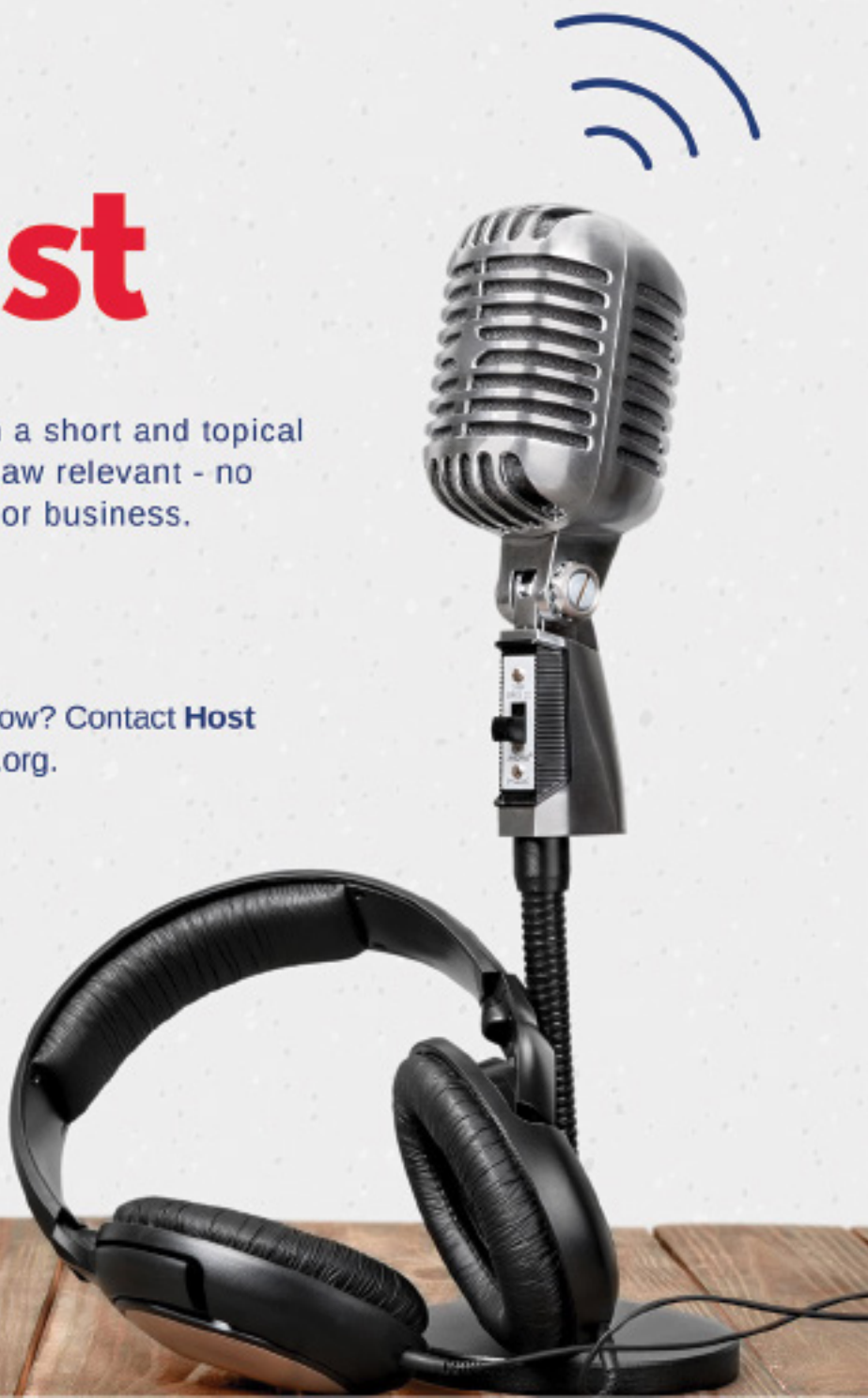
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To contribute, please email submission inquiries to:

Joshua J. Newcomer
Editor-In-Chief
jnewcomer@mckoolsmith.com

Richard Munoz
Chair
rmunoz@buckner.org



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