IBA GLOBAL INSIGHT
June/July 2015

Mediterranean migration crisis

Assessing root causes of the humanitarian disaster as the EU struggles to find effective solutions

Defending an open internet
Commercial realities and regulation at the new frontier

Great Charter, future challenges
Rule of law 800 years after Magna Carta

Witnessing atrocity
IBA harnesses technology to bring perpetrators to justice

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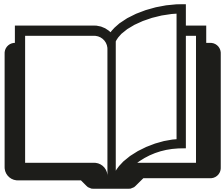

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Contents

IBA GLOBAL INSIGHT JUNE / JULY 2015 Vol 69 No 3 ISSN 2221-5859

Massimo Sestini / eyevine

ON THE COVER

The Mediterranean migration crisis

Despite the increasing death toll in the Mediterranean, there's no sign that numbers of migrants seeking entry to the EU are dwindling. In light of emergency talks between EU leaders, *Global Insight* assesses what can be done to address the humanitarian crisis.

Witnessing atrocity

The IBA's mobile app

Defending an open internet

Commercial realities and regulations

MAGNA CARTA

Great Charter, future challenges

'Every one of us must be prepared to stand up for justice'
Aung San Suu Kyi

WEBCAST

James Palmer, senior partner, Herbert Smith

'Law firms are smart commercial organisations, but we are also part of a profession'

features

Contents

NEWS ANALYSIS

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On the cover: Massimo Sestini / eyevine

Editorial

As this edition of *Global Insight* went to press, the European Union continued to wrestle with the consequences of a tragic and ongoing migration crisis unfolding in the Mediterranean (see feature, page 16). When 950 people died in one weekend attempting to cross the Mediterranean to enter Europe, prompting international outcry, EU leaders convened emergency talks. Our coverage doesn't attempt a full assessment of the various proposals regarding quotas and other responses to the immediate crisis. This remains a moving target: at press time, plans to redistribute 40,000 asylum seekers across the EU were under review.

Instead, the emphasis of our coverage is on those issues that must be addressed to prevent the crisis becoming habitual. Sternford Moyo, Chair of the IBA's African Regional Forum and formerly Chair of the IBA's Human Rights Institute suggests some of the key issues that lie behind the exodus. 'The root causes of the inexorable and relentless drift from Africa to Europe and other parts of the developed world, which is also the root cause of illicit trafficking,' he says, 'include: the poverty and under-development of Africa; armed conflict in many parts of Africa; ineffective international intervention, which has, at times, left power vacuums in countries previously controlled by dictators; and human rights abuses and dictatorship in parts of Africa.' And further afield, of course.

These themes chime with our coverage of the rule of law issues facing the international community 800 years after the sealing of Magna Carta (page 23) and the IBA's own moves to assist in bringing perpetrators of atrocities to account ('Witnessing atrocity', page 37). Until the international community (including both states and non-state actors) takes full responsibility for delivering lasting solutions to the underlying causes of this type of migration – poverty and underdevelopment, human rights abuses and lack of rule of law – such crises look all too likely to become the recurring theme of the 21st century. The Millennium Development Goals, intended as one means of addressing such deep rooted failings, expire this year and their successors – the Sustainable Development Goals (SDGs) – are due to be announced in September (see 'Sustaining the future', page 30). Getting them right is more pressing than ever.

James Lewis

ONLINE

This month's online highlights:

- International trade: focus increases on TTIP dispute mechanism
- Azerbaijan: Western inaction breeding 'culture of impunity' for free speech abuses
- Freedom of expression: lese majeste laws prove a popular tool for Thailand's military junta

IN FILM

This month's film highlights:

- Myanmar's reform process – interviews with leading figures including Aung San Suu Kyi
- An introduction to the International Bar Association's Human Rights Institute
- Interview with Nobel Peace Prize-winning Iranian lawyer, Shirin Ebadi

ON THE MOVE

The *Global Insight* app is moving to a new, improved platform.

Details of how to access the new app will be published on the IBA website at **www.ibanet.org**.

Brussels shows its hand in Google competition investigation

JONATHAN WATSON

The EU has taken the initiative in a long-running investigation into Google's dominance of internet search. On 15 April, the European Commission sent a 'statement of objections' to Google, accusing it of anti-competitive behaviour. The statement claims that the US search giant abuses its market dominance by promoting its own shopping services ahead of those of rival companies. Google has ten weeks from the date the statement was issued to provide a formal response.

'Google's conduct has a negative impact on consumers and innovation,' the Commission said. 'It means that users do not necessarily see the most relevant comparison shopping results in response to their queries.' Brussels believes that Google's behaviour discourages rival firms from innovating, because they know even compelling products will take second place when search results are displayed.

The Commission's statement follows a five-year investigation into Google and marks the start of a legal process that could culminate in the search engine being fined billions of euros. The Commission has also launched a separate investigation into Android, Google's mobile operating system, focusing on allegations that it forces device makers to give its smartphone apps preferential treatment.

'Google's product is systematically displayed prominently at the top of the search results, even when there are competing services [available] that are more relevant to search queries,' says Thomas Höppner, a competition specialist with Olswang. Höppner is representing the German press publishers associations BDZV and VDZ and the shopping portal Visual Meta (an Axel Springer subsidiary) as formal complainants in the Google investigation.

Defending the company, Amit Singhal, Senior Vice-President of Google Search, says that internet users have more choice than ever before. They can use other search engines, such as Bing and Yahoo; they can go straight to well-known websites like Amazon and eBay to start shopping; and they can get information from social media, such as Facebook and Twitter.

In addition, Singhal argues that mobile users often use apps to find what they want, rather than searching the internet. Seven out of every eight minutes spent on mobile devices are spent using apps, according to Singhal. He also notes that companies like Axel Springer, Expedia, TripAdvisor and Yelp – all of whom have complained to the Commission about Google – have reported impressive growth in recent years.

Björn Gustavsson, Vice-Chair of the IBA Technology Law Committee, makes clear the importance of the case. 'The Technology Committee naturally follows closely what the likes of Google are up to and the legal implications of new developments,' he says, adding that, as the focus is antitrust, this is the sort of area that the IBA Technology Law and Antitrust Committees ought to work jointly on going forward.

> "The statement of objections sends a clear signal to Google
>
> Christian von Köckritz
> *Gleiss Lutz*

According to Christian von Köckritz, Counsel at Gleiss Lutz in Brussels and an expert in antitrust law, 'the statement of objections sends a clear signal to Google that the Commission is determined to go ahead and adopt a prohibition decision if Google cannot dispel [its] concerns, or an agreement on a suitable remedy cannot be reached.'

The Commission must now 'show its hand' and clearly spell out its objections, along with the underlying theory of harm. 'Google will now have access to files and see all the evidence the Commission intends to use against it,' von Köckritz says. 'This could enable the company to defend itself more effectively.' As the case and the discussion over remedies had been dragging on for such a long time, von Köckritz believes adopting a statement of objections was a good way to give the case new momentum.

Margrethe Vestager succeeded Joaquín Almunia as EU Competition Commissioner in November 2014. She has said the case could establish 'a broader precedent as to how we enforce EU competition rules in other instances if we find a favouring of related services in markets closely related to the market for general search'. This means that, although the current focus is on Google Shopping, further steps relating to services like Google Hotel Finder, Google Local, Google Maps and YouTube could be taken.

One challenge for the Commission is to show how Google's conduct has harmed consumers, who do not always suffer as a result of practices that harm competitors. 'I assume one way to look at this is that consumers are to some extent "deceived", since they assume that Google would only show the most relevant results to their search query,' says von Köckritz.

Arguably, however, the complaint has more to do with unfair competition or consumer protection than antitrust. Another angle might be to argue that Google's practices prevent 'better' service providers from developing a market position, and that this may unduly reduce innovation and dynamic competition, thereby restricting consumer choice.

Rather than tinkering with specific details and designs of Google's search engine results, as had been attempted in the previous commitment proposals, Vestager is urging the company to introduce 'principles' that will ensure it does not give its own services preferential treatment. It would have to treat external services in the same way it treats its own, and rank them exclusively on the basis of relevance.

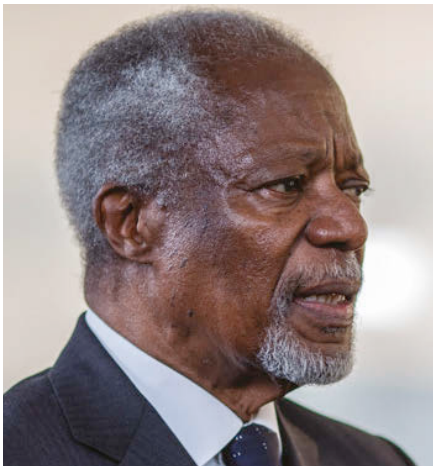
If upheld by the General Court of the EU, this principle of equal treatment would force Google to fundamentally alter its business model. 'It could no longer display so called "Universals" or "OneBoxes" at the top of its results page if these are fed exclusively by its specialised search services,' Höppner says.

Instead, Google would have to open up these special search results to all websites and rank results within those boxes on the basis of a general relevance algorithm, which it uses to assess and rank all websites. 'For this to work, Google may have to first make its own services crawlable, so they can be indexed and ranked by its general algorithms,' Höppner says.

Google has also been under attack for many years from Europe's publishers for using news article 'snippets' in its search results without payment. Two weeks after the Commission issued its objections over Google Shopping, the company made an attempt to deal with this issue by setting up the Digital News Initiative, a partnership with eight publishers that includes a working group focusing on product development and a €150m innovation fund. While some may dismiss this as pure PR, it seems clear that Google has realised it needs to deal with its European image problem.

Vienna LPD Showcase to feature Kofi Annan and John Ruggie

Vienna 4–9 October 2015
ANNUAL CONFERENCE OF THE
INTERNATIONAL BAR ASSOCIATION



The LPD Showcase session at this year's IBA Annual Conference will feature former United Nations Secretary General Kofi Annan and former UN Special Representative on Business and Human Rights John Ruggie. As the originators of the UN Guiding Principles on Business and Human Rights (UNGPs), Annan and Ruggie will discuss continuing efforts to mobilise the legal profession to integrate the UNGPs into daily practice.

The session will provide the opportunity to discuss the relevance to lawyers of Kofi Annan's work with the Africa Progress Panel, including on transparency, tax responsibilities and the need for governments to adopt more robust policies with regards to business and human rights.

A 90-minute session featuring CEOs and international organisations will follow. It will discuss the speakers' experiences and perspectives on the UNGPs. Speakers will share their experiences and views on the role of lawyers in implementing the Principles. The focus will be on the increasing effects of the Principles on policies, laws and regulations, international standards influencing business conduct, the advocacy strategies of NGOs and in the policies and practices of companies worldwide.

The session marks the 15th anniversary of the UN Global Compact and supports the launching of the IBA Guide for Bar Associations and Lawyers on how corporations can respect human rights, in keeping with the UNGPs.

Full details of this and all other sessions can be found in the Preliminary Programme, available online at **tinyurl.com/IBA-Vienna-2015**

LPD Working Group develops Principles relating to digital identity

New forms of communication and business transactions, for personal and professional purposes, are creating a wide variety of information relating to users, known as a digital identity. The Legal Practice Division Working Group has recently developed and published a set of high-level Principles concerning the collection, use and sharing of digital identity information.

The Principles will serve as the basis for engaging in further discussion with all relevant stakeholders. The 20-page draft report can be downloaded from tinyurl.com/IBADigitalIdentity.

Mediation Committee publishes new e-book

The LPD's Mediation Committee has published a new e-book entitled *Promoting Further Mediation*. The book is divided into three sections. The first explores how to encourage uptake of mediation in nine civil law jurisdictions. The second assesses how to build on the progress already made in nine common law jurisdictions. The third looks at working across borders. The e-book is part of the Committee's work to promote the use of mediation globally. It is available for purchase, priced at £20 for IBA members and £30 for non-members.

For further information, please see **tinyurl.com/PromotingFurtherMediation**

Chile: leading the Latin American renewable energy sector

ÁNGELA CASTILLO

Chile offers a compelling case for investors in the non-conventional renewable energy (NCRE) sector. As the country lacks fossil fuels, it imports large amounts of oil and gas, resulting in the Latin American region's highest electricity prices. It has a friendly business environment coupled with a regulatory framework that encourages open competition. It has also seen record economic growth, mainly driven by a voracious appetite for commodities, which has translated into a deficit between energy produced and power demanded. This has further increased the need for renewable energy projects.

A key juncture for Chile's energy sector came in 2008. The gas supply crisis in Argentina prompted a reassessment of Chile's power infrastructure investment scheme, as well as important regulatory changes to foster the diversification of the energy mix. Key legislation enacted in April 2008 – Law No 20,257 – aimed to promote NCRE sources, such as geothermal, wind, solar, tidal, biomass and small hydroelectric plants. Through an amendment in 2013, it established an ambitious target of 20 per cent renewables by 2025.

Patricia Nuñez is founding partner at Santiago-based law firm Nuñez Muñoz Verdugo & Cia and Chair of the IBA Energy, Environment, Natural Resources and Infrastructure Law Section (SEERIL). She believes that the amendment, which also stated that power generators should meet certain annual targets for NCRE or pay fines, 'explains to a large extent the quick development of the industry in recent years'.

Juan Francisco Mackenna is a partner at Santiago-based law firm Carey and a SEERIL Council member. He suggests Law 20/25 has been a unique incentive. 'Our policy-makers ignored global trends that pointed towards the implementation of a feed-in tariff scheme and other kinds of subsidies and, in doing so, they genuinely fostered competition. Any investor could come to Chile, be it a local or an international player, and develop their renewable energy project.'

According to Clemente Pérez, partner at Guerrero Olivos, the latest energy reforms introduced by the Energy Minister, Máximo Pacheco, have been influential in opening up the energy market. These have enabled smaller developers to enter the sector. 'Not long ago, 97 per cent of electricity was produced by a handful of companies,' he says.

In December, the Chilean Energy Commission (CNE) announced the results of its tender for companies to feed power into the Interconnected Central System (SIC). Three renewable energy providers won 17 out of 19 power contracts: Acciona, Abengoa and EDF.

Pedro García, partner at Morales & Besa, believes that these power purchase agreements (PPA) will have a positive impact in financing long-term projects. 'Securing a PPA means renewable energy projects will be bankable,' he says.

> "Our policy-makers… genuinely fostered competition. Any investor could come to Chile, be it a local or an international player, and develop their renewable energy project
>
> Juan Francisco Mackenna
> *IBA SEERIL Council member*

As the demand for commodities has shrunk, so has the demand for fossil fuels. This should compel NRCE developers to become more cost-competitive to remain in the race for energy generation. In fact, there is considerable scope for cost reductions in the NCRE sector. The global cost of crystalline silicon PV projects (which help convert solar power into electricity) was $315 per unit in 2009. This had fallen to $129 per unit by 2015, a decrease of almost 60 per cent. Over the same period, the costs for onshore wind dropped from $96 to $85 per unit.

Conversely, forecasts point to a slowdown in economic growth and electricity consumption. 'But, there is plenty of room for development in the coming years,' Mackenna says. 'Chile consumes only a third of the electricity used by country members of the Organisation for Economic Co-operation and Development (OECD). Also, we pay three times more than the OECD average.'

The country has an installed capacity of 17,000 MW, of which 74 per cent comes from the SIC; 25 per cent from the Interconnected System of Norte Grande (SING), and less than one per cent is spread over the Aysén System and the Magallanes System. Plans for connecting the former two systems by building a 3,000km transmission line, are expected to be completed by 2017.

The interconnection will yield positive results for renewable energy developers in the Northern area as 'they will have access to more consumers', says Mackenna. He adds that it will have a positive impact on stabilising the system and prices. Besides, it should also make many of the Northern Chile mining projects viable. These had either been abandoned or put on hold.

Some NCRE developers will face obstacles as a result of a growing NIMBY ('Not in my backyard') movement. 'As wind farms have a visual impact and are located near populated areas they could suffer more, whereas solar projects located in the north are unlikely to be affected,' says Mackenna.

NCRE projects encounter less resistance from the local community than conventional power plants, Pérez notes. 'Most of the problems our clients have had to deal with are related to the grid and, specifically, with the construction of transmission lines that go through third parties' properties,' he says.

However, an emerging litigation culture could affect the development of new renewable energy projects. 'This "judicialisation" not only entails the opposition of environmental groups, but any sort of litigation involving NCRE projects. For instance, a wind project in Chiloé is stalled because of the discovery of an indigenous ancestral burial ground. There is also a geothermal project in San Pedro de Atacama that encountered opposition from local communities,' Pérez says.

Finally, hydroelectric projects, regardless of their size, spark rejection as a consequence of Chile's HidroAysén dam experience, which prompted major protests about its environmental impact and the lack of transparency in the decision-making. 'The key problems with the HidroAysén project were the long-distance transmission lines, which affected several communities along their way, and its location in the Patagonia region,' says Nuñez.

Nonetheless, experts agree that nowadays, NCRE projects are much more likely to run smoothly in comparison to conventional fossil fuel-fired power projects.

First African programme of IBA Women Business Lawyers Initiative

The first African programme of the IBA Women Business Lawyers Initiative took place in Livingstone, Zambia from 21–22 April 2015. The programme, entitled 'African women in law rising', was presented in partnership with the Law Association of Zambia and with the support of the IBA African Regional Forum.

The event opened with an inspiring keynote delivered by IBA 2014 Woman Lawyer of the Year Dr Tukiya Kankasa-Mabula, who spoke to delegates about her own career path and asked the thought-provoking question: 'What are we rising to?' She urged women not to close the door behind them when they rise, but to take the door off its hinges to allow other women to follow.

The programme continued with a series of sessions addressing key concerns in modern legal practice. These included marketing in a digital age, the art of advocacy, effective networking, risk averseness among women lawyers, practice areas and specialisations, law firm management and expanding your firm from being a locally recognised to an internationally recognised law firm. The panels on law firm management in particular resonated with many of the delegates owning their own small- or medium-sized firm.

The final day concluded with an insightful closing address on gender differences in leadership by Kondwa Sakala-Chibiya, Immediate Past President of the SADC Lawyers Association. Sakala-Chibiya reflected on the challenges faced by women as they look to advance themselves. She ended by urging delegates to be


Kondwa Sakala-Chibiya

authentic and true to themselves on their own leadership journey. The IBA was pleased to welcome delegates and speakers not only from Zambia, but also from Zimbabwe, South Africa, Nigeria, Kenya, Ghana, Malawi, the UK and the US.

IBA website developments to aid networking

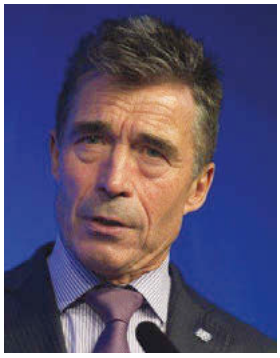
Developments have been introduced to the MyIBA section of the IBA's website to facilitate networking between members. The enhanced platform enables members to build a profile that presents their professional CV, accomplishments and IBA contributions as well as the ability to interact with other members online. Public profiles are available to be viewed by any IBA member. As part of the improvements, members will be presented with a selection of suggested contacts, based on similarity of practice area, committee membership, location and conference attendance. Enhanced functionality includes:

- Full member profiles that can be searched by IBA members
- Upload a photograph and biography detailing your expertise
- Update your practice areas and ensure your contact details are current
- Join committees that best reflect your practice and interests
- View suggested contacts based on your membership details and activity
- See the conferences other members have attended/plan to attend
- Research forthcoming events
- Interact with other members and participate in discussion forums

Log in to MyIBA account to start creating your profile

IBA Annual Conference 2015: conversations with leading figures in international affairs


José María Aznar


Anders Fogh Rasmussen


Fatou Bensouda

The IBA Annual Conference in Vienna will continue to host the popular 'Conversation with…' interviews. These lunchtime events – open to all conference delegates – will take place from Monday to Thursday of Annual Conference week. Enquiring minds will have the opportunity to listen to personal insights about some key issues facing our world today, from distinguished guests, including: José María Aznar, former President of the Government of Spain (1996–2004), member of the Board of Directors of News Corporation, and member of the International Advisory Board of the Atlantic Council of the United States; Anders Fogh Rasmussen, former Secretary General of NATO, former Prime Minister of Denmark and former Danish Minister of Economic Affairs; and Fatou Bensouda, Prosecutor of the International Criminal Court. All 'Conversation with…' events include a Q&A session, providing the audience with the opportunity to directly address the high-level guests.

Further details of these and other Vienna events can be found on the IBA website at **tinyurl.com/IBA-Vienna-2015**

Nepal earthquake: Bar Association report on relief effort

When the destructive earthquake – magnitude 7.6 – struck Nepal in April, the government, friendly nations, national and international institutions initiated efforts to address the damage that has resulted in a death toll estimated to exceed 8,000. A second earthquake on 12 May caused further damage to property and fatalities. The Nepal Bar Association (NBA) received consent from the Prime Minister's office to form central and district-level committees to monitor operations.

The NBA has gathered findings from visits to affected areas, and from NGOs, stakeholders and victims. The following are some key aspects of the reality on the ground, based on the initial report compiled by Sunil Kumar Pokhrel, NBA General Secretary.

At Sindhupalochow

- In a country always at risk from earthquakes, the government should have been prepared. The NBA has raised serious concerns on this issue. It's a basic right of the people to seek the presence of the government in such a desperate situation and it's also the primary duty of the state to provide safety to its people. There were not sufficient laws, structures or resources for disaster management.
- The relief and rescue operation has been adversely affected due to poor coordination between civil service structures and security institutions (the army and police).
- The international aid and rescue was poorly implemented and coordinated in an unplanned manner.
- After the first earthquake, the relief operation was initiated promptly based on the information available – a positive move, to an extent. However, there was no plan of action regarding steps to be taken – no assessment of the resources that were available locally. It was ineffective in utilising the immediate support and relief materials that were received from other nations.
- We have experience of 'fake victims' claiming relief materials and people with power and influence taking advantage – such that the relief material does not reach the people who truly need them. In such a situation, the state would need to identify the victims, keep them on the priority list and distribute relief material accordingly. There does not seem to be proper attention given to this. The truly needy people are not going to get the relief. There is the additional possibility of discrimination and corruption in distribution of relief materials.
- The relevant beneficiary should be aware of the state's policy, programme and management of the disaster relief operations. It is the people's right to know from where, when and how much relief material they can receive. This also relates to transparency. The state did not seem to disseminate such information properly.
- People from different countries have been helping the Nepalese people. The government's 'one-door' policy means people who provide help are beginning to have doubts. Distribution could be unfair if relief distribution is unmanaged. But the state mechanism delays distribution with political interference and abuse of such assistance in areas where no elected representatives are available at the local level. The state needs to get help from the local institutions and administration to identify the affected areas and the victims for relief operations. Those involved in distribution of relief need to coordinate properly with the state. Since donations are voluntary by nature, it would not be appropriate for the state to have a policy of 'either give only to us or do not give at all'.
- In the areas monitored, the NBA observed only minimal relief materials from the state reaching the victims. The private sector institutions, donors and international agencies did a commendable job of distributing food and relief materials to areas that were accessible by road transport. Not enough tents have been distributed to families whose houses have been destroyed.
- In areas monitored, temporary camps were created by relief teams from China, Korea, Israel and Thailand. Remarkable service was provided by the Nepal Army, Nepal Police, local institutions and a limited number of political cadres (*karyakarta*). Among the areas of massive destruction where the NBA was monitoring, almost zero involvement in the relief operations by the Nepal government and its administrative backbone of civil servants was observed.
- Rescue work has been comparatively satisfactory, but relief work itself is found to be very weak, ineffective and controversial. Everyone seemed to reach areas easily accessible by road, and very few seemed to be reaching remote and risky areas.

View film of the recent BIC session on how lawyers and bar associations can deal with disasters at **tinyurl.com/disaster-BIC**

Key recommendations include:

- Importance of identifying remote areas where rescue work is urgently needed and directly coordinating from the centre
- Need for clearly defined government policy and control over resources, such as helicopters, from private sector and other countries
- Immediate provision of one tent per family in the earthquake-affected areas
- Provision of a minimum of 15 days' stock of food for each affected family
- Necessity of including additional items of daily use for people that need additional support: women, elderly, children and sick
- Need to spray antiseptic medicine immediately in the affected areas to limit risk of spreading epidemic disease from human corpses and dead animals
- Designate the local government official as the focal person for coordination of relief efforts to make distribution process more transparent and fair
- Government should take ownership of managing relief camps in public places
- Immediately start constructing temporary structures for school and college education
- Buildings, including the Supreme Court, district court, Bar Association unit buildings in the affected areas, and government lawyer offices are not operational. This has adversely affected the rights of the people to receive prompt justice. It's necessary to provide the resources and materials required to establish temporary structures so that these institutions can start to provide their services as soon as possible

IBAHRI calls on UK government to retain formal link with European Court of Human Rights

On 7 May, UK Prime Minister David Cameron was returned to office at the head of a majority Conservative Party government. Much of the debate during the election campaign was focused on the key issues of the economy, the National Health Service, immigration and continued EU membership. Something that formed a key part of the Conservative's manifesto, but went largely unnoticed by media and voters alike, was the new government's proposals to 'scrap the Human Rights Act and curtail the role of the European Court of Human Rights'. Despite little discussion of this pre-election, it now appears to be one of the key policies that Michael Gove, the new Lord Chancellor and Secretary of State for Justice, will hope to push through parliament.

In an open letter to Prime Minister David Cameron and Justice Secretary Michael Gove, the IBAHRI expresses grave concerns about the potential effects that such a policy could have on 'law in the United Kingdom and the rights of people within it'.

In the strongly worded letter, signed by IBAHRI Co-Chairs Baroness Helena Kennedy and Ambassador Hans Corell, the IBAHRI asks the new government to 'continue to respect and adhere to universally accepted human rights and to work with European partners to reform the European Court of Human Rights, rather than break any formal link with this institution'. It reminds Cameron and Gove of 'the universality with which human rights law is enshrined' stating that 'human rights can only be an effective mechanism for protection if they apply to all people in all cases'.

The letter concludes with the IBAHRI expressing concern that the new government's plans to repeal the Human Rights Act, and replace it with a new British Bill of Rights, appear to be 'vague, at best, and misguided, at worst'.

To read the IBAHRI's open letter in full, visit **tinyurl.com/myf375p**

Protection of lawyers in Pakistan called for after murder of Samiullah Afridi

The IBAHRI has unequivocally condemned the murder of lawyer Samiullah Afridi on 17 March, who was reportedly shot dead in an attack on his way home in Peshawar, Pakistan, and called for the protection of lawyers in the country. In 2013, Samiullah Afridi stated that he had received several death threats from militant groups due to his involvement representing Pakistani doctor Shakil Afridi (no relation), who, it is alleged, ran a false vaccination campaign aimed at assisting the CIA in their search for, and subsequent assassination of, Osama bin Laden. Last year, Afridi stopped representing Dr Afridi due to the numerous death threats he had received.

Read more at **tinyurl.com/SamiullahAfridi**

IBAHRI Council's Beatrice Mtetwa listed in *Fortune*'s 50 greatest leaders 2015

Prominent human rights lawyer Beatrice Mtetwa has been named one of 50 greatest leaders of 2015 by business magazine *Fortune*. Mtetwa is renowned for representing human rights campaigners, opposition politicians and journalists in Zimbabwe. In 2014, an inspiring documentary film entitled 'Beatrice Mtetwa and the Rule of Law' was launched and distributed to bar associations, law societies, law firms, non-governmental organisations and schools across Africa. Its aim is to promote discussion about the rule of law. For more details about the film, see tinyurl.com/MtetwaFilm

20 International Bar Association's Human Rights Institute
1995–2015 • 20TH ANNIVERSARY

Get involved with the IBAHRI

For the last 20 years, the IBAHRI has been bringing together lawyers, judges, NGOs, civil society groups, academics and students to promote and protect human rights and the independence of the legal profession worldwide. We would not be able to carry out this important work without the generous support that we receive from our many members and funding bodies. As we continue to expand our range of activities and look to the future, your support is more important than ever.

To find out how you can support the work of the IBAHRI by becoming a member, see **tinyurl.com/JoinIBAHRI**

IBAHRI urgently calls on Azerbaijani Government to review sentencing of human rights lawyer Intigam Aliyev

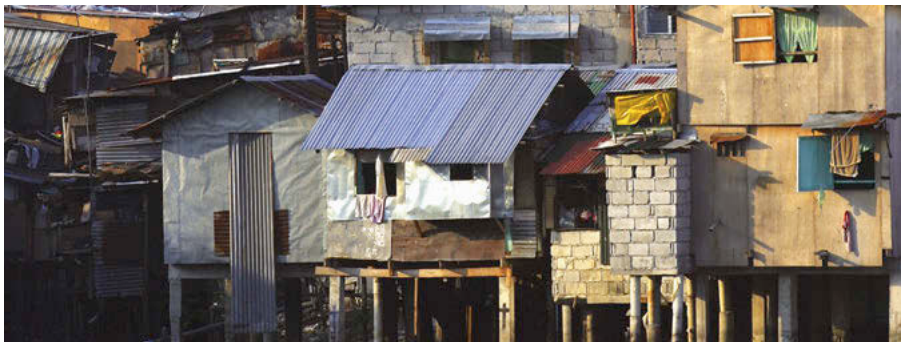

Azerbaijan Government building

The IBAHRI strongly condemned the sentencing of Azerbaijani human rights lawyer Intigam Aliyev and has called on the Government of Azerbaijan to review it as a matter of urgency.

Aliyev is an award-winning human rights activist working to defend the rule of law in Azerbaijan who has represented more than 100 victims of alleged human rights breaches before the European Court of Human Rights. The head of the Legal Education Society, an Azerbaijani civil society organisation, he was arrested in August 2014 and charged with tax evasion, 'illegal entrepreneurship', and abuse of authority. On 15 December 2014, the prosecution brought additional charges of misappropriation and services forgery. He was pronounced guilty on 22 April by the Baku Grave Crimes Court and was sentenced to seven-and-a-half years' imprisonment and a three-year ban from holding public office leadership positions.

Aliyev was convicted following proceedings that have been criticised for not adhering to fair trial standards. His conviction is based on the alleged non-registration of foreign aid grants with the Azerbaijani Ministry of Justice. However, documentary evidence of the necessary registrations was ignored during his trial.

IBAHRI examines taxation, economic and social rights in Zambia



A delegation of top human rights experts and tax specialists, convened by the IBAHRI, recently concluded a fact-finding mission in Zambia. The delegation examined the extent to which tax policies, regulations and practices by mining companies affect the realisation of the economic and social rights.

Zambia is ranked 141st (out of 187) on the United Nations Development Programme Human Development Index. Sixty per cent of its population lives in poverty and the average life expectancy is 49 years. It is also the fourth largest copper producing nation in the world, holding six per cent of the world's copper reserves. In 2012, Deputy Finance Minister Miles Sampa said Zambia is losing as much as $2bn annually to tax avoidance, with the mining industry being responsible for a large proportion of the loss.

This fact-finding mission to Zambia is the most recent initiative following the publication of the IBAHRI's 2013 landmark report *Tax Abuses, Poverty and Human Rights*. The report examined the relationship between illicit financial flows, tax abuses and human rights. The mission's findings will be published later this year.

For more details on the Tax Abuses, Poverty and Human Rights report, see **tinyurl.com/TaxAbusesHumanRights**

Human Rights Law Working Group's filmed interview series

The Human Rights Law Working Group has been conducting a series of filmed interviews with prominent human rights lawyers and advocates highlighting the challenges of protecting human rights in the 21st century. Films include an interview with Stephen J Rapp, US Ambassador-at-Large for Global Criminal Justice and former Prosecutor at the International Criminal Tribunal for Rwanda.

The latest film in the series is an interview with Professor William Schabas, a world expert on the law of genocide and international law and former UN Commissioner in Sierra Leone and Gaza. Schabas discusses the relationship between human rights law and humanitarian law, and covers important questions relating to targeting and proportionality, as well as the definitions of genocide, aggression and crimes against humanity.

To view the films, go to **tinyurl.com/HRLFilms**

Malaysia: legislation is dangerous move in name of combatting terrorism

ABBY SEIFF

At 2:30am on 7 April, 12 hours after the debate began, a weary parliament voted into effect the Prevention of Terrorism Act (POTA).

Despite days of growing backlash by opposition lawmakers and human rights groups over what they said was a violation of due process, the controversial legislation passed with 79 to 60 votes. POTA, which has been described as 'draconian' by its critics, gives the Malaysian government sweeping powers in the name of combating terrorism.

While judges must rubber-stamp detention orders, which can initially last up to two years then be renewed indefinitely, they are given no discretion. Instead, a Prevention of Terrorism Board carries out all hearings, issuing binding decisions that are not subject to judicial review. Those arrested, meanwhile, are stripped of the most fundamental rights to counsel or indeed even to being told the reason for arrest.

'There is no provision for the person remanded to be informed of the grounds of arrest, nor is there any guarantee that legal representation will be permitted,' stated Steven Thiru, President of the Malaysian Bar, an IBA member organisation, in a statement issued last month. 'The Malaysian Bar remains steadfastly opposed to detention without trial. As such, we view the POTA as a backward step,' he added.

Rupert Abbott, Amnesty International's Research Director for Southeast Asia and the Pacific, tells *Global Insight* that the law would doubtless lead to abuses. 'The provisions in the Prevention of Terrorism Act on detention without trial and the sweeping powers granted to the law enforcement authorities are very dangerous. There are no sufficient safeguards to prevent abuses and ensure accountability for human rights violations,' he says.

'POTA was not only rushed. It was bulldozed through. Apparently, Malaysia is about to be attacked by terrorists,' said Parti Keadilan Rakyat (People's Justice Party) MP Wong Chen in early May.

Malaysia has long used legislation as a means of silencing critics. Many have noted the similarities between POTA and the defunct Internal Security Act 1960, which was installed to battle a communist insurgency, but then frequently used on the political opposition until its repeal in 2012.

Malaysian Prime Minister Najib Razak

> "The Malaysian Bar remains steadfastly opposed to detention without trial. As such, we view the POTA as a backward step
>
> Steven Thiru
> *President, Malaysian Bar*

More recently, the government has used its controversial Sedition Act to arrest some of its most outspoken critics and produce a chilling effect among would-be dissenters. According to the UN, at least 78 people were investigated or charged under the Sedition Act last year and 36 in the first three months of 2015 alone. That number is likely to rise in coming months after parliament voted to amend the Act with tougher penalties and a broader reach that includes internet content.

Similarly campaigned against, the Sedition Act amendments were passed just three days after POTA. 'The Malaysian government claims that it is pushing forward with the POTA, amendments to the Sedition Act, and other legislation to protect national security and deter racial or religious unrest,' says Abbott. 'But in reality, it seems that these laws – and the slew of sedition arrests of academics, political activists, lawyers and journalists – are designed to clamp down on freedom of expression. They are about silencing dissent, weakening the opposition, and limiting public debate on a range of political and economic issues.'

In Malaysia, the outcry over POTA has been fierce. News media, lawyers and the opposition have called the law a thinly veiled restoration of the Internal Security Act. Scores of Malaysians have been imprisoned for association with Islamic State, and just one day before the bill was passed, 17 people were arrested on suspicion of a terrorist plot.

But many argue the threat of terrorism has been overblown and that laws already in place have adequate provisions to deal with it. The Malaysian Bar, the Sabah Law Association and the Advocates' Association of Sarawak – a trio of organisations representing every practising lawyer in Malaysia – urged the government to withdraw the law. '[We] reject this attempt by the government to revive detention without trial, repeated renewals of such detention, the ouster of the jurisdiction of the judiciary, and the limitation or denial of the rights of suspected persons to due process of law,' they said.

Stressing that they supported the fight against terrorism, the law organisations argued that the 'reach of the legislation is extremely wide and lends itself to abuse'. Crucially, the law targets anyone 'engaged in the commission or support of terrorist acts', a vague and ill-defined group. The UN, too, has weighed in, noting there are far too few safeguards to prevent abuses in light of the lack of judicial oversight.

Such criticisms are falling on deaf ears. 'Only those who raise the threat of violent extremism can be detained under this new Act,' Prime Minister Najib Razak said during a speech in March. 'There is no such thing as absolute freedom,' he added, repeating an oft-cited claim.

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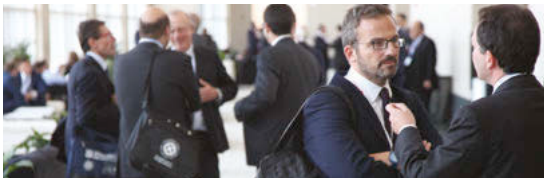

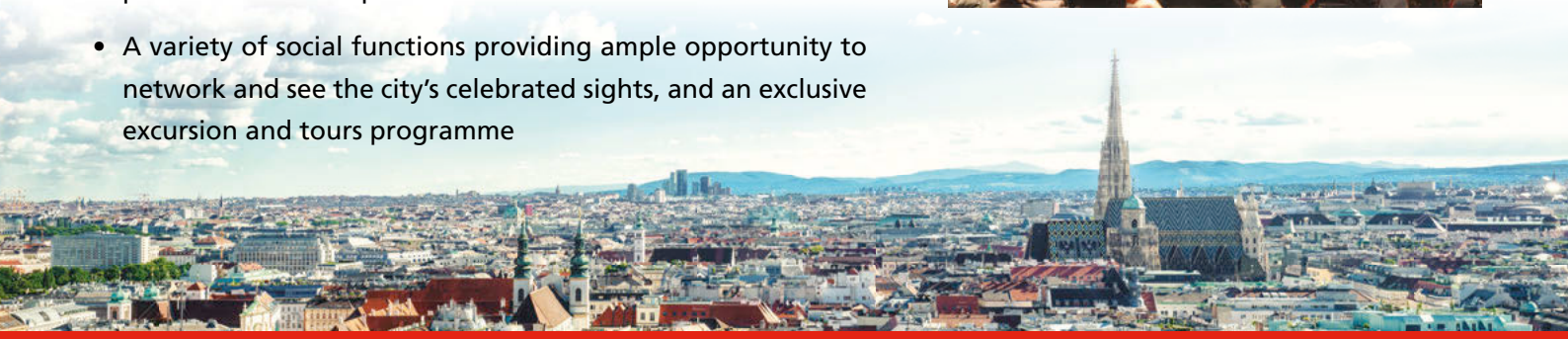

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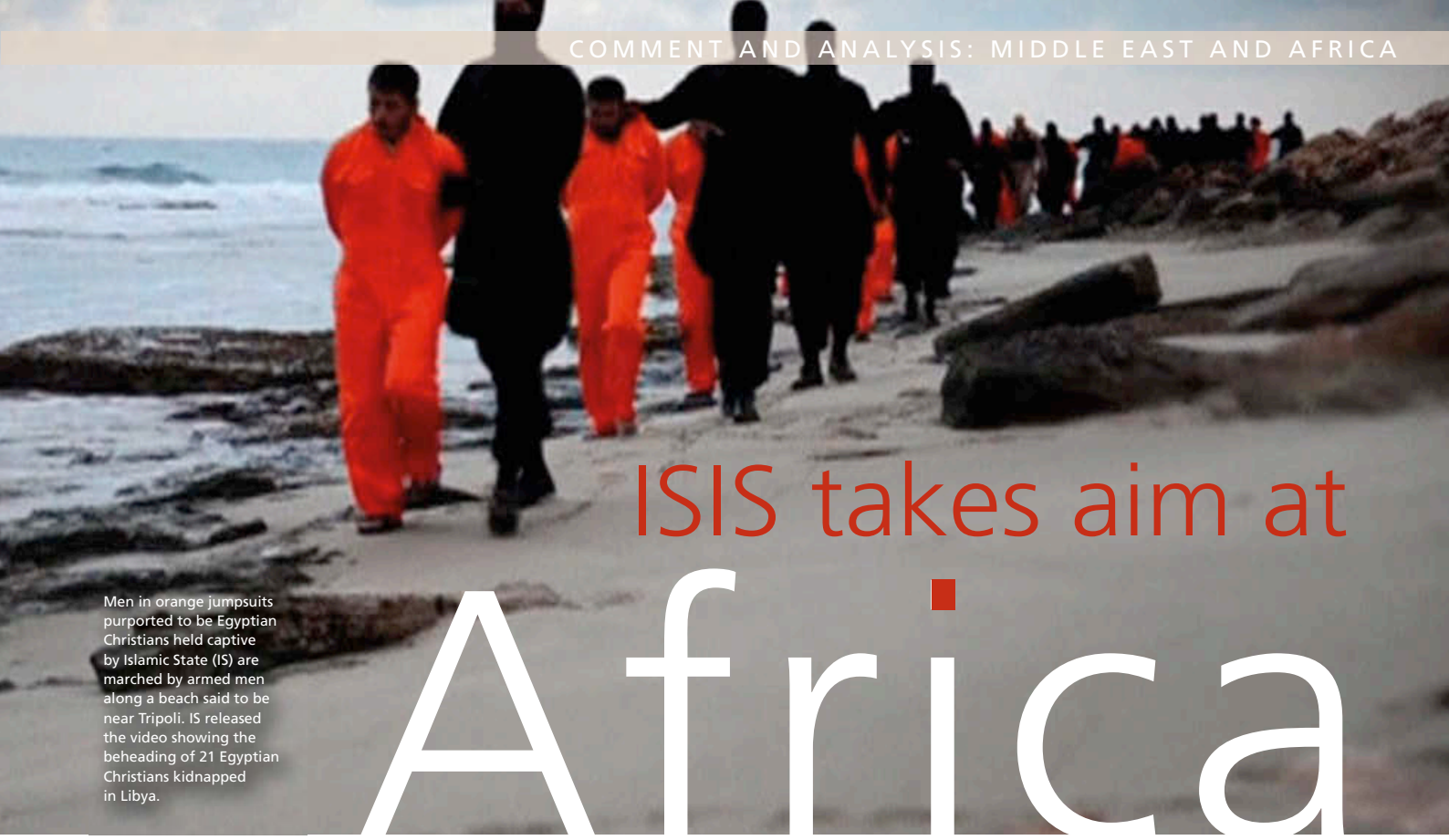

Men in orange jumpsuits purported to be Egyptian Christians held captive by Islamic State (IS) are marched by armed men along a beach said to be near Tripoli. IS released the video showing the beheading of 21 Egyptian Christians kidnapped in Libya.

ISIS takes aim at Africa

The influence of Islamic State is spreading, with as many as 30 fundamentalist groups pledging allegiance, particularly in North and West Africa. *Global Insight* assesses the root causes, implications for the rule of law and likely responses.

ANNE MCMILLAN

The optimism that attended the early days of the Arab Spring has vanished. Indeed, it seems like winter has descended on parts of the Middle East and North Africa. Political turmoil and armed conflict has left thousands dead, destroyed towns and cities, and created dismay, fear and refugees.

This is due in no small measure to the barbarous activities of the Islamic State of Iraq and Syria (ISIS). From the group's roots in the conflict in Syria and Iraq, its influence seems to be spreading. Other fundamentalists groups (perhaps as many as 30 worldwide) have pledged allegiance to ISIS, including some in Africa.

Not least because of ISIS, the rule of law is under threat in many places. According to Hans Corell, Co-Chair of the IBA's Human Rights Institute, the rule of law requires four basic elements. These are 'democracy; proper legislation that respects international human rights standards; institutions, including impartial and independent courts, to administer this legislation; and, perhaps most difficult of all, individuals with the knowledge and integrity necessary to manage these institutions'.

Weak state structures, porous borders, armed conflict and poverty combine to produce a breeding ground for organisations like ISIS. Sternford Moyo, Chair of the IBA African Regional Forum believes that such conditions, which particularly flourish in the power vacuums that follow the collapse of some dictatorships, have 'made it easy for terrorist groups to enter poorly regulated countries and capitalise on the desperation and resentment' in parts of Africa.

A caliphate in Africa?

Earlier this year ISIS released a 'recruitment magazine' aimed at Africa. Under the title 'Sharia Will Rule Africa', the magazine refers to West Africa, Algeria, Tunisia, Nigeria, the Sinai and Libya. Libya is at the core of the problem right now. The lawlessness that befell the country after the toppling of Gaddafi's regime continues, exacerbated by the fact that there are two competing 'governments' vying for authority.

The execution of Egyptian Christians on a beach in Libya mirrors the tactics being employed by ISIS in Iraq and Syria. Likewise, the military response from Egypt echoes the air attacks made by some countries against ISIS in the Middle East. Attacks on Christian minorities in the region led the Vatican to call for the UN to intervene and protect them – if necessary by force. ISIS shock tactics, such as beheadings, seem designed to provoke a response from outside the country.

The question is whether foreign intervention is the best approach to the problem and, if it is, when and how. It's a delicate problem when attacks from abroad feed the idea that ISIS is defending Islam from the West – and Christianity – in the Middle East and Africa, which in turn helps ISIS swell its ranks with volunteers.

The recruiting propaganda employed by ISIS is polished and designed to burnish the idea of a re-emergent caliphate, not only in the Middle East, but across the north African littoral, as well as in Sub-Saharan Africa. A map produced by ISIS applies names to parts of Africa that existed during an earlier period of Islamic cultural and religious hegemony, which ISIS grandly purports it will recreate by 2020.

If the number of groups in Africa pledging allegiance to ISIS is any gauge, such propaganda is successful, at least where the aims of ISIS overlap with aims of local groups. Groups on the continent which have pledged allegiance to ISIS such as Boko Haram in Nigeria, have adopted names to conform with the ISIS vision of Africa, such as 'The Islamic State's West African Province' or 'The Province of Sinai' in Egypt.

The law

But it is not just a question of religion or archaic names on a map. Dr Abiodun Williams, President of the Hague Institute for Global Justice, has underscored the pull of groups like ISIS where the Rule of Law is weak. 'Extremist groups like ISIS appeal to new recruits when a perception of unequal treatment before the law takes hold,' he says.

ISIS, arguably the most violent and wealthiest terrorist group in the world, has hobbled efforts to spread the rule of law in parts of the Middle East and North Africa. This begs the question of whether the international community has been taking its foot off the gas too soon in its efforts to promote stability and the rule of law in fragile states.

Corell has noted the importance of timing. 'Experience tells us that when dictators or corrupt rulers are ousted there will be a very critical transition period that can threaten peace and security both at the national and international level,' he says. 'A necessary ingredient here is transitional justice… not least through legal technical assistance.'

His views are echoed by Moyo, who believes that a concerted effort by the international community to promote and enforce human rights can 'remove resentment and the temptation to join violent terrorist groups in pursuit of revenge', especially when combined with assistance aimed at alleviating poverty and promoting development.

The law has another role to play as well. ISIS is wealthy because it extorts, trades oil and loots antiquities for sale abroad. Preventing ISIS from extorting money from the unfortunate populations under its control is difficult. The UN passed a resolution in February this year targeting ISIS's finances from oil and cultural artifacts. However, its effects appear to be limited. Even if ISIS is cut off from international markets, the group has the potential to raise some revenue from areas under its control by a combination of taxes, extortion and internal trade.

> "When dictators or corrupt rulers are ousted there will be a very critical transition period that can threaten peace and security both at the national and international level. A necessary ingredient here is transitional justice
>
> Hans Corell
> *Co-Chair, IBA's Human Rights Institute*

A coordinated approach

The violent scourge of ISIS is most likely to be eradicated by a combination of actions carried out with determination by a coalition of states, including redoubled efforts to bolster the rule of law in countries like Algeria, Tunisia and Libya.

A knee-jerk, uncoordinated and predominantly military response to ISIS will not do. 'Incomplete interventions tend to create power vacuums', as Moyo has noted. Such voids allow armed groups to operate, undermine enforcement of the law, and culminate with 'degeneration into anarchy'.

There has been much discussion of how best to deal with the phenomenon of ISIS. Military, diplomatic and political strategies – and combinations thereof – are continually debated. ISIS must be contained by providing aid and technical assistance (including legal) in the regions where ISIS and its affiliates are operating.

At the same time, terrorist groups must be weakened by turning off as much of their revenue as possible using diplomacy and the law to stop oil and other commodities flowing out and money flowing in.

Finally, once contained and weakened, ISIS will most probably need to be eliminated on the ground by military action, preferably sanctioned by the UN Security Council and led by the countries in the region rather than by a western coalition that would be labelled as a latter-day 'crusade'.

Anne McMillan is former senior legal officer at the IBA ICC Programme in The Hague and a freelance writer. She can be contacted at **mcmillan.ae@gmail.com**

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A migrant climbs onto an Armed Forces of Malta ship after being transferred from a trawler, around 80 nautical miles south of Malta

The Mediterranean migration crisis

Despite the ever-increasing death toll in the Mediterranean, there's no sign that numbers of migrants seeking entry to the EU are dwindling. In light of emergency talks between EU leaders, Global Insight assesses what can be done to address the humanitarian crisis.

ISOBEL SOUSTER

The Mediterranean is fast becoming the world's deadliest migration route. Images of refugees fleeing across the sea from northern Africa to the shores of Europe in rickety, unseaworthy and overcrowded boats have come to symbolise the tragic side of the global migration trend. They flee in immense numbers: in 2014 approximately 218,000 people crossed the Mediterranean to reach the European Union.

Today, one in seven people is a migrant, accounting for approximately one billion people globally. According to statistics from the United Nations High Commissioner for Refugees (UNHCR), around 3,500 of those attempting to cross the Mediterranean last year lost their lives on the journey. The figures for 2015 are even more devastating. As of the end of April, nearly 2,000 people are estimated to have perished, compared with 96 fatalities in the same period last year – a 20-fold increase. The number of people crossing the Mediterranean in an attempt to enter the EU is ever-expanding. The situation has reached one of humanitarian crisis.

Crisis point

The worst death toll in a single crossing of the Mediterranean – 950 in one weekend – prompted international outcry. EU leaders were summoned to emergency talks at the end of April to discuss the rising death toll and how to respond to the crisis. Before this, there had been division among the bloc's 28 countries on how to deal with the issue, and these summits were the first sign of solidarity. Julia Onslow-Cole, partner, Legal Markets Leader & Head of Global Immigration at PricewaterhouseCoopers, currently represents the International Bar Association as Chair of the Human Rights Institute Trust. 'EU leaders finally seem to be realising that they need to work together to address this crisis,' she says.

Sternford Moyo, Chair of the IBA African Regional Forum and former Co-Chair of the IBAHRI Council, agrees that unity between nations will play a vital role in alleviating the problem. 'A concerted effort by the international community is needed to ensure a vigorous promotion and enforcement of human rights in Africa and other parts of the developing world,' he says.

Risks worth taking?

Despite the risk of fatality and life-threatening conditions aboard the boats, it is, perhaps, not difficult to understand why so many people embark upon the perilous journey. 'The first step is to try and understand why people are making these journeys in such large numbers,' says Onslow-Cole. 'They undoubtedly appreciate the terrible risks that they're taking. Nobody would take those risks, and no parents would take those risks with their children, as so many have done, unless they were truly desperate.'

Among a complex set of causes, the devastating effects of poverty, conflict and human rights abuses stand out as significant motivating factors. 'The root causes of the inexorable and relentless drift from Africa to Europe and other parts of the developed world, which are also the root causes of illicit trafficking,' says Moyo, 'include: the poverty and under-development of Africa; armed conflict in many parts of Africa; ineffective international intervention, which has, at times, left power vacuums in countries previously controlled by dictators; and human rights abuses and dictatorship in parts of Africa.'

The number of people around the world who are displaced by conflict and violence today is the highest since the Second World War. Corrado Scivoletto is a Rome-based officer of the IBA Immigration and Nationality Law Committee. 'Conflicts and political instability have only boosted an already existing scheme,' he suggests, 'most probably managed by organised crime, to move migrants to Italy from North Africa… because of the proximity of borders.'

In 2015, the largest number of migrants coming to Europe is from Syria. Fighting between government forces and rebel groups has raged in the country since early 2011, with its beginnings in the chaos of the Arab Spring protests. More than 6.5 million Syrians have been displaced during the civil war and, as of April 2015, the death toll is estimated to be 310,000.

Libya is another significant country of origin for many migrants attempting to cross the Mediterranean, and the last point on one of the main routes out of Africa to Europe. The 300-mile crossing between the Libyan coast and Italy may well be the final stage for migrants on an arduous and dangerous journey across the Sahara from West Africa or the Horn of Africa at the hands of human traffickers.

Libya, now a failed state following the fall of Colonel Gaddafi in 2011 and the consequent power vacuum, is experiencing increased lawlessness and anarchy. Such circumstances have enabled the disturbing phenomenon of

Young migrants arrive at the Sicilian harbour of Augusta in April 2015.

> "Nobody would take those risks, and no parents would take those risks with their children, as so many have done, unless they were truly desperate
>
> Julia Onslow-Cole
> *Head of Global Immigration, PricewaterhouseCoopers*

people-trafficking to grow as smugglers are able to exploit refugees desperately seeking escape.

Most operations to rescue stranded vessels take place in the international waters about 40 nautical miles off the Libyan coast. In 48 hours, over the first weekend of May 2015, nearly 6,800 people were rescued off the Libyan coast. 'The lack of effective state institutions such as border guards means there is something of a free for all at Libyan border posts, not to mention corruption,' says Elspeth Guild, European immigration law expert and partner at Kingsley Napley. 'There are no longer any scheduled ferry crossings or even flights from Libya to the EU, which means that irregular crossing is the only option.'

Other migrants flee human rights abuses in Eritrea, where, according to Human Rights Watch, arbitrary detention, torture and severe restrictions on freedom of expression are routine. Sternford Moyo describes the rate of human trafficking across the Mediterranean into Europe as 'rampant' and carrying 'serious violations of human rights'. 'Among the rights violated is the right to life itself,' he says. 'Some unscrupulous traffickers have been known to empty their human cargo into the sea to face their certain death.'

Save Our Sea

Moyo refers to a shipwreck off the Maltese coast in September 2014 caused by smugglers deliberately ramming the migrants' boat, killing at least 300 migrants. A similar disaster occurred in October 2013, the Lampedusa tragedy, in which more than 360 people drowned. After this crisis, the EU Home Affairs Commissioner, backed by the Council of Europe Commissioner for Human Rights, the International Organization for Migration and the UNHCR, called for the launch of a European search-and-rescue operation across the Mediterranean. Despite all nations with Mediterranean shores having responsibility for rescue efforts along their shores, Italy alone mounted Operation Mare Nostrum, sending naval boats to patrol the sea and assist distressed vessels off the Libyan coast. It is estimated that Mare Nostrum saved at least half of the 218,000 people who reached Europe by sea in 2014.

However, bearing sole responsibility for Mare Nostrum, which cost up to €300,000 a day, was unsustainable for the Italian authorities. The operation was called to a halt at the end of 2014 amid criticism that it was encouraging higher levels of boat migration, with the possibility of rescue acting as an incentive. 'Simply said, Mare Nostrum has saved lives (and many of them), which is per se a great achievement,' says Scivoletto, but he believes it 'has not represented a political or legal answer to the problem'.

Mare Nostrum was replaced by a smaller rescue effort, Operation Triton, run by the EU external border agency, Frontex, on a third of Mare Nostrum's monthly budget. Frontex's primary mandate, however, is border control and enforcement, not search-and-rescue; it operates solely within 30 miles of the Italian coast, whereas most Mare Nostrum missions were carried out along the Libyan coast. Moyo is critical: 'Powerful European nations have tended to focus on protection of their borders instead of focusing on protection of human beings, human rights and elimination of root causes of people fleeing their own countries.'

> "A concerted effort by the international community is needed to ensure a vigorous promotion and enforcement of human rights in Africa and other parts of the developing world
>
> Sternford Moyo
> *Chair, IBA African Regional Forum and former Co-Chair of the IBAHRI*

In the face of the shocking rise in the migrant death toll during the first four months of this year, with the Mediterranean described as a 'cemetery', the EU leaders had to act. The outcome of the talks in April was, in theory at least, positive. The agreed plan is three-fold: to provide more boats and aircraft to patrol the Mediterranean to step up the capacity of the rescue operation; to triple funding for rescue efforts run by Frontex; and to assess ways in which the smugglers' boats could be targeted with military strikes. Onslow-Cole reflects that 'EU leaders now need to translate their stated good intentions into reality'. There is no sign that numbers are dwindling, so the immediate and primary concern is to save lives. 'It is time to reverse the decision to cut back the EU's role in patrolling the Mediterranean,' says Onslow-Cole. 'The recent tragic drownings suggest that scaling back the rescue patrols has done nothing to cut the flow of migrants.' It was this decision that brought the credibility

of the EU into question, which the emergency talks have restored to some extent.

Controversial options

Important questions remain, however. Will the EU plans prove to be sufficient? Pumping more funding into rescue efforts will only be sustainable as a short-term measure. There are strong grounds for the argument that immigration laws, as they stand, are not fit for purpose. A way to alleviate the problem, and ease passage for those seeking asylum in the EU, is to change immigration law, which is arguably not equipped to deal with the continuous flow of migrants. 'This kind of immigration requires a political approach. Immigration law, including the provisions on asylum seekers, can barely cope with the problems raised by the mass of people that is daily moving to Italy,' says Scivoletto.

The failure of the law to cope with the flow of migrants, combined with the lawlessness in departure countries such as Libya, constitutes a global rule of law crisis. The answer may well lie in modifying current laws. Kingsley Napsley's Elspeth Guild considers the options being discussed to solve the issue. 'The most controversial is that the EU, in response to the crisis in Syria and Eritrea, ought to amend the Community Visa Code and remove both countries from the mandatory visa list,' she says.

> "The lack of effective state institutions such as border guards means there is something of a free for all at Libyan border posts, not to mention corruption
>
> Elspeth Guild
> *Kingsley Napley*

According to research by the Oxford University academic, Dr Hein de Haas, no one drowned in boats in the Mediterranean before 1990 and the introduction of Schengen visa requirements on North Africa. 'His research indicates that there is a legal dimension to the current crisis and it is inextricably linked to the EU's visa policy,' says Guild.

Under the Schengen Convention, the concept of free movement between EU and EFTA Member States was implemented. For non-members of the Schengen Area, there is a mandatory visa requirement for citizens of certain countries to enter the Schengen Zone. Libya, Syria, Eritrea and Jordan, among many others, are all on this list. If they were removed, says Guild, 'this would mean that people who are in flight could for instance get a plane from Amman [Jordan's capital] to Rome for about €300 instead of paying (at the UNHCR estimate) $7,000 for a place on a leaky and unsafe boat.' A key priority is to ensure that there are safe and legal channels by which refugees can enter the EU.

A profitable industry

For most migrants, the only available option for escape is human trafficking, which has been identified as a form of modern slavery. A major investigation carried out by Italian prosecutors has revealed how lucrative a business trafficking is. Investigators estimate that it costs $5,000 to be transported to the Libyan coast from West Africa or the Horn of Africa, and a further $1,000 to $1,500 for a place on a boat to Italy. The investigators estimate that there are as many as one million people waiting on the shores of Libya to be transported to Italy. Guild offers another solution. 'A less controversial proposal which a number of Member States have put forward, including Sweden which is currently carrying it out, is to increase not only resettlement places for the vulnerable in camps in Turkey, Jordan and Lebanon, but to send officials to the camps to issue resettlement visas and assist travel. In terms of EU law, the adoption of a common measure on resettlement of refugees would be one step.'

There is undoubtedly a growing consensus that Europe cannot leave the countries on the frontline – Italy and economically floundering Greece – to cope with the problem alone: it is an EU-wide issue. Data from Eurostat and UNHCR shows that the majority of the approximately 170,000 migrants reaching or being brought to Italy in the 14 months before January 2015 are not applying for asylum there. Throughout January to November 2014, only 455 asylum applications were submitted by Syrians in Italy, while over 28,000 applications were submitted in Germany during the same period.

In theory, EU law requires refugees to seek asylum in the country they land in first. The current situation, however, is an exceptional crisis and there are suggestions that normal rules should be reconsidered. Onslow-Cole urges a flexible approach. 'Relaxing the usual rule under EU law that claims for refugee

protection should be considered in the country where the refugee first arrives would be fairer to Italy and Greece,' she suggests, 'who bear the brunt of irregular migrants trying to reach the EU across the Mediterranean.'

Akira Kawamura, partner at Anderson Mori & Tomotsune in Japan and former IBA President, calls on the international community to collaborate to alleviate the problem. 'Not just the EU, but also the nations of other parts of the world should work together to bring about the peace and the well-being of the people in the Middle East and Africa,' he says.

> "Simply said, Mare Nostrum [Italy's rescue scheme] has saved lives (and many of them)… but has not represented a political or legal answer to the problem
>
> Corrado Scivoletto
> *Rome-based officer, IBA Immigration and Nationality Law Committee*

Reports of migrants' boats stranded between Europe and Northern Africa continue to emerge daily. Onslow-Cole is hopeful, however. 'This will not be a long-term problem if we take collaborative steps to reduce the push factors,' she says. 'But, in the meantime, our response must accord with our obligations under international law, and with our collective conscience, to treat these desperate people with humanity.'

Of paramount importance at this time is ensuring that safe and legal channels to protection are open to all those in need. The longer-term solutions will lie in reinstating order and the rule of law in Libya, Syria, and other countries where the situation has been allowed to get so dire that migrants feel their best option is to face the dangers of crossing the Mediterranean.

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Migrants are disembarked from the Italian navy ship Vega in the Sicilian harbour of Augusta, southern Italy, in May 2015.

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Great Charter, future challenges

800 years after Magna Carta was sealed, serious rule of law challenges remain, including lack of corporate accountability, widespread corruption and poor access to justice. *Global Insight* assesses what can be done to rekindle the Great Charter's true spirit.

REBECCA LOWE

When King John agreed to Magna Carta at Runnymede on 15 June 1215, he had no intention of honouring the agreement. A battle-hungry monarch accustomed to doing exactly as he pleased, the idea of submitting himself to a common set of rules was both absurd and unreasonable. He swiftly had it annulled, and the country erupted into civil war. A year later, with conflict still raging, he died from dysentery.

With such an inauspicious start, few would have imagined Magna Carta assuming iconic status. Indeed, some historians claim the cult of the Great Charter is based on a myth. The original document was not even 'Magna', they point out – just a humble charter – and hardly a clarion call for democracy and human rights. It applied solely to the nobility, was dominated by dozens of dull, administrative clauses (feudal obligations, fish weirs) and contained particularly

unattractive articles undermining women and Jewish bankers.

Yet to view Magna Carta in this way is to miss the point. It is a living instrument and its significance does not stem from elitist grandstanding at Runnymede, but from 800 years of development and interpretation. Reissued around 50 times, it gradually assumed enormous importance for future generations – including, notably, the early US settlers who went on to demand 'no taxation without representation' and draw up a Constitution of their own.

The most famous clause, which remains enshrined in English law today, guarantees justice for all, without favour or arbitrariness: 'To no one will we sell, to no one deny or delay right or justice' [see box on opposite page]. These have become core principles of the rule of law reflected in national jurisdictions across the world, as well as in international covenants such as the Universal Declaration of Human Rights.

However, while the world today is undoubtedly faring better than our elders of 800 years ago in putting such principles into practice, huge challenges remain. Drawing on the discussions of leading experts at the Global Law Summit, held in London earlier this year to mark the 800th year of Magna Carta, *Global Insight* assesses some of the core concerns facing, not just the legal profession, but the world today. To name a few: lack of corporate accountability, widespread corruption, poor access to justice and toothless international legal mechanisms.

In many states, it is arguably the vainglorious legacy of King John, rather than the document he was forced to agree to, that endures. But this must change, stresses Lord Thomas, the Lord Chief Justice of England and Wales. Whatever the obstacles, all have an ongoing duty to uphold the Magna Carta ideals of rule of law and accountability. 'None of the issues raised by the two principles of the rule of law and access to justice are easy. Some are very uncomfortable, not merely to governments, but to others such as corporations with immense economic power. But the task requires commitment from us all: governments, legislatures, lawyers, judges, businesses and citizens,' he says.

Business and human rights

Ethical business is no longer merely about paying lip-service to corporate social responsibility (CSR), but is instead concerned with embedding values into companies' core operations, according to Cherie Blair QC, human rights barrister and wife of former British Prime Minister Tony Blair, who recently founded international legal consultancy Omnia Strategy. 'For a long time, CSR was a nice little extra which companies did and it made them feel good. But that is not what business and human rights is about,' she says. 'It isn't an optional add-on, it is about the DNA of the company.'

The United Nations Guiding Principles on Business and Human Rights (UNGPs) – which impose a duty on states to protect human rights and a responsibility on corporations to respect them – were endorsed by the UN Human Rights Council (UNHRC) in June 2011, but are not legally binding. However, the distinction between so-called 'soft' and 'hard' law is rapidly breaking down. 'States are increasingly turning to soft law instruments in order to push rules into new and highly contested and complex fields,' says Harvard professor John Ruggie, who developed the Principles. 'So the job of a lawyer is not simply to look at black letter law, but also to understand these soft law rules and regulations that emerge.'

Many of the provisions in the UNGPs have already been translated into domestic black letter law. Parts of the 2010 Dodd-Frank Act in the US and 2014 EU Directive on non-financial reporting requirements have been 'traced back' to discussions on the Principles, he says, while Ruggie-inspired legislation imposing due diligence requirements on companies operating overseas is currently under discussion in France.

> "International justice faces many challenges… Accusations of victor's justice, double standards, bad prosecutorial policy and case management, and also of potentially jeopardising fragile peace in post-conflict situations

Patricia O'Brien
Former Under-Secretary General for Legal Affairs, United Nations

However, the third pillar of the UNGP framework – the responsibility to provide a remedy for business-related abuses – has come under criticism for being weak and unenforceable. In many jurisdictions, prosecuting corporate crime is extremely difficult and such difficulties are magnified at the international level. Corporations, unlike states, are not subject to international treaties and there is currently no global court to hold them to account.

One avenue for cases where wrongdoing occurs overseas has been US domestic courts

Magna Carta today

Although Magna Carta contained 63 clauses when it was first granted, only three remain part of English law today.

Clause 1: The liberties of the English Church

'First, that we have granted to God, and by this present charter have confirmed for us and our heirs in perpetuity, that the English Church shall be free, and shall have its rights undiminished, and its liberties unimpaired.

'That we wish this so to be observed, appears from the fact that of our own free will, before the outbreak of the present dispute between us and our barons, we granted and confirmed by charter the freedom of the Church's elections – a right reckoned to be of the greatest necessity and importance to it – and caused this to be confirmed by Pope Innocent III. This freedom we shall observe ourselves, and desire to be observed in good faith by our heirs in perpetuity.

'To all free men of our Kingdom we have also granted, for us and our heirs for ever, all the liberties written out below, to have and to keep for them and their heirs, of us and our heirs.'

Clause 13: The privileges of the City of London

'The City of London shall enjoy all its ancient liberties and free customs, both by land and by water. We also will and grant that all other cities, boroughs, towns, and ports shall enjoy all their liberties and free customs.'

Clauses 39 and 40: The right to trial by jury

'No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

'To no one will we sell, to no one deny or delay right or justice. No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled. Nor will we proceed with force against him except by the lawful judgement of his equals or by the law of the land.'

via the Alien Tort Statute (ATS). However, this suffered a potentially fatal blow last year when the Supreme Court ruled in *Kiobel v Royal Dutch Petroleum Co* that the law contained a 'presumption against extraterritoriality'. The law should be used only if 'the relevant conduct' occurred within the US, the Court said, regardless of whether the parent company of the accused party is headquartered there.

In June 2014, a resolution to work on a legally binding treaty for multinationals, drafted by South Africa and Ecuador, was adopted by the UNHRC. Fourteen countries, including the US and UK, opposed the measure – as, significantly, does Ruggie. The proposal is 'part of an anti-globalisation, anti-corporate campaign', he says, and would be far less effective than 'focused legal instruments targeted at specific governance gaps'. What may be feasible, he suggests, is a treaty focusing solely on gross human rights abuses, such as war crimes and crimes against humanity, which have already been tried and tested against individuals in international tribunals.

Interestingly, the resolution was not the first time the UK has shown reluctance to champion human rights accountability. While it often boasts of being one of the first countries to adopt the UNGPs, Ruggie reveals that the government originally put up strong objections to the idea of states having a duty to protect human rights. UK legal advisers reportedly argued it was 'treaty specific', prompting lengthy conversations in Whitehall as Ruggie tried to convince them otherwise.

However, what surprised Ruggie as he pitched his Principles across the world was the involvement of corporate lawyers. They understood quickly that his proposals were a useful approach to managing social risk and reputation. UN Global Compact General Counsel Ursula Wynhoven echoed this sentiment. 'In-house lawyers have sometimes, unfortunately, been the brakes rather than the accelerators on their firms' engagement on topics like human rights,' she says. 'But I'm pleased to say lawyers are playing an increasingly important role in advising companies on these issues.'

In October 2014, the IBA published its draft business and human rights guidance for bar associations and lawyers and is currently encouraging feedback. John F Sherman III, Chair of the IBA Business and Human Rights Working Group, says: 'This guidance is designed to support those bar associations and business lawyers to understand the implications of the Guiding Principles to effectively counsel their clients and ultimately help business enterprises to fulfil their responsibility to respect human rights.'

The UNGPs clearly impose significant burdens on companies. However, Ruggie suggests that such burdens should ultimately prove lucrative. Unbeknownst to them, businesses are haemorrhaging huge amounts of money every year through failures to address issues with

potential human rights repercussions, he says. One major oil company he has assessed was reportedly losing around $3.2bn a year.

The key is having long-term vision, according to Blair. 'Study after study show that companies that respect the environment, respect their employees and act as part of a community significantly outperform companies that don't get it. It's not just about lip-service.'

Bribery and corruption

The same is true where bribery and corruption are concerned. In December 2008, US authorities fined the German engineering group Siemens a record $800m to settle a long-running slush fund scandal. The company subsequently cleaned up their act, put in place stringent compliance systems and fired all their intermediaries. 'And you know what?' World Bank General Counsel Anne-Marie Leroy asks. 'After a couple of years, their business had increased. You would think that was counter-intuitive. But it turned out these intermediaries were not exactly helpful.'

UK Solicitor-General Robert Buckland agrees. 'I take the view that transparency, honesty and anti-corruption measures are actually good for business in the long-run. It makes trade easier. What is good for human rights and anti-corruption is good for business.'

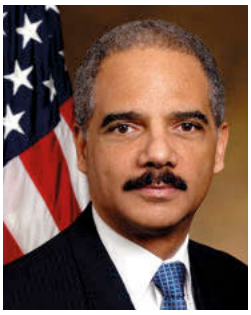
No company wants to be on the sharp end of an anti-corruption investigation. Chris Vaughan, General Counsel of infrastructure group Balfour Beatty, discovered this first-hand. In October 2008, his company paid £2.25m to settle bribery allegations over a £100m contract in Egypt. 'It's incredibly damaging to your reputation,' he says. 'You don't just lose money in terms of fines and damages, but your share price can drop so dramatically in one day that this can actually outweigh the amount of the fines.'

Corruption clearly remains a huge problem across the world. The World Economic Forum estimates the cost of corruption to be more than five per cent of global GDP ($2.6tn), while the World Bank believes more than $1tn is paid globally in bribes each year.

Former US Attorney General Eric Holder has personal experience of the devastating impacts of corruption. The first African American to hold the post, he was inspired to enter the law in 1963 after being glued to a small black and white TV in his basement watching President John F Kennedy and his brother, Attorney General Robert Kennedy, 'bend the course of history towards justice' by allowing two black students to enrol in a segregated Southern university – one of whom later became his sister-in-law. A decade later, Holder took a job at the US Department of Justice (DoJ) and spent the next dozen years prosecuting corrupt public officials. 'I witnessed the acutely corrosive nature of official corruption,' he says. 'And I saw how it can imperil our values, undermine the rule of law and impose costs that are immense and long-lasting.'

> "I witnessed the acutely corrosive nature of official corruption. And I saw how it can imperil our values, undermine the rule of law and impose costs that are immense and long-lasting

Eric Holder
Former US Attorney General



Corruption is evidently much more than a developing world problem. Balfour Beatty has been offered bribes in several developed countries, including the UK, Vaughan says, and Transparency International UK Chief Executive Robert Barrington cautioned against Western arrogance. 'Ten years ago, when a lot of the international treaties were being negotiated, there was a belief by developed countries that the people they were dealing with in developing countries were a significant part of the problem. What I think we see today is that some of the governments taking the strongest anti-corruption stances – China, India – are in the emerging markets. The dialogue has shifted.'

Barrington emphasised that so-called 'facilitation payments' – payments demanded in exchange for providing a service to which the payer is entitled – are no different from bribes and are defined as such under British law. 'There is a close intertwining between small bribes and grand corruption,' he says. 'So you may be thinking you're just paying a few facilitation payments, but you're actually propping up a corrupt system.'

Western complacency is also problematic where the judiciary is concerned. Sir Geoffrey Vos, a judge in the Court of Appeal of England and Wales, refers to a recent discussion among a group of European judges, who laughed when an English judge says he was confident

his colleagues did not take bribes. 'So there's a question of perception and difference of view, and it's very, very hard to get facts and figures as to whether you have an impartial, independent tribunal,' he says. 'And that is the most important thing anywhere in the world.'

For Indian barrister Harish Salve, judicial integrity cannot be compromised. 'There is no such thing as being a little bit corrupt in the judiciary. It's like being slightly pregnant. One corrupt decision is one too many.'

Poverty and the rule of law

Just as responsible business is likely to mean profitable business over the long term, countries with a strong rule of law tend to be those that prosper economically. In a survey by the Bingham Centre, law firm Hogan Lovells and Investment Treaty Forum of the British Institute for International and Comparative Law, rule of law considerations are said to 'routinely influence' foreign investment decisions, with China, Brazil and Bangladesh being named as the biggest cause for concern.

Announcing the preliminary findings of the survey, which assessed 2,000 companies with global annual revenues of at least $1bn, the Bingham Centre Director, Sir Jeffrey Jowell QC, says: 'Of course, governments of any hue, in all parts of the world, want to get things done without too many impediments, delays or challenges… They should realise, however, that impediments to the rule of law come at a price, to development for sure, but also to the enduring benefit of a culture of accountability and of respect for human dignity.'

Patricia O'Brien, Ireland's Ambassador to the UN and former Legal Counsel to the UN, outlines how undermining the rule of law can lead to the disintegration of whole societies. 'Investment dries up. Public services diminish. Jobs vanish, especially among young people. Distinct or outright hostility against the state grows… Societies fragment under the stresses of increasing lawlessness. This is not just theory… We are witnessing the breakdown of the rule of law every day.'

Economic growth is only one criterion for gauging the success of a society, Jowell says. Equatorial Guinea is the richest country per capita in Africa, he pointed out, but is one of the most corrupt states in the world, with 60 per cent of its population earning less than $1 a day. For former South African Constitutional Court judge Catherine O'Regan, who stepped down as Chair of the UN Internal Justice Council in 2012, it is important to think of economic development as how it affects all members of society, not just the richest. Using the example of a recent Commission of Inquiry she led into policing in Khayelitsha, an impoverished suburb of Cape Town, she outlines how the rule of law and economics are inextricably entwined for marginalised communities. The unemployment rate is nearly 40 per cent, she says, while rates of murder, sexual offences and armed robbery are among the highest in the country. A third of respondents surveyed said they had decided not to start a small business due to fear of robbery.

'These people cannot afford lawyers,' says O'Regan, a member of the IBA's Human Rights Institute Council. 'Police do not treat them with respect. They cannot afford to protect themselves… We should never underestimate how the absence of the rule of law in poor communities fundamentally impairs the capacity of poor people to become economically active, to establish livelihoods that will sustain them.'

At the core of rule of law concerns is access to justice, a problem affecting almost every jurisdiction in the world and worsening in the face of ongoing austerity. In the UK, the legal aid budget has been slashed by a quarter, to £1.5bn, while the number of contracts for on-call lawyers attending magistrates' courts and police stations is due to be halved. 'Justice will not be provided by trusted solicitors, but conglomerates and supermarket lawyers,' says Tony Cross, Chair of the Criminal Bar Association of England and Wales. 'This will lead to injustice for victims and defendants alike.'

Governments have a duty to ensure access to justice is maintained, Lord Neuberger, President of the UK Supreme Court, emphasises. But the legal profession must play its part too, he says.

> "For a long time, CSR was a nice little extra which companies did and it made them feel good. But that is not what business and human rights is about… It isn't an optional add-on, it is about the DNA of the company

Cherie Blair QC
Founder, Omnia Strategy

'Subject to commercial realities, lawyers owe a duty to make legal advice and representation for people as clearly and cheaply as possible. And judges have to be ready to help to ensure that court proceedings are as quick and cheap as they can be. All those involved with the law have a duty to ensure the rule of law.'

International (in)justice

The tension between expediency and justice is felt at its starkest, not within state borders, but on the global stage. There has clearly been significant progress in international law over the past few decades, manifested most overtly in the International Criminal Court (ICC), now 13 years old. Yet great challenges remain. At the heart of global justice lie the five permanent members of the UN Security Council: the US, China, Russia, France and the UK – an anachronistic grouping harking back to the 1946 world order. Three – the US, China and Russia – have not submitted to the jurisdiction of the ICC, while maintaining significant power to force others to do so.

Competing national interests among these global powers regularly supersede rule of law concerns. The Responsibility to Protect (R2P) doctrine, which requires the international community to intervene when a state fails to protect its citizens, has been seriously challenged as disagreements among the Security Council – which must authorise such action – deepen. These calls are far from easy to make, of course: Syria lies in ruins following international paralysis, while Libya has collapsed, despite an R2P intervention. However, without a workable system, unhindered by blinkered realpolitik, future progress is far from guaranteed.

While stressing the world has taken 'great strides' in the sphere of international justice, O'Brien is clear about the challenges that remain. 'We have had to deal with accusations of victor's justice, double standards, bad prosecutorial policy and case management, and also of potentially jeopardising fragile peace in post-conflict situations.'

Where global atrocities are concerned, early engagement is preferable to later intervention, O'Brien says, and the legal profession is paramount. 'International lawyers have an important role to play, not only in ensuring accountability for atrocity crimes, but also in the prevention of these crimes in the first place… As lawyers, we can also help to build the foundations based on the rule of law which are needed in order to ensure that the gains achieved post-conflict are irreversible.'

For OECD Secretary-General Ángel Gurría, new approaches to international law are long overdue. The negotiation of agreements is 'often slow and painful', he says, as well as overly sector specific, and greater integration and innovation is needed. Most importantly, international law should go hand in glove with accountabilty. 'Commitments should be acted upon in good faith. For that to happen, we should push for much greater monitoring of implementation. Countries should be accountable vis-à-vis the international community, whether they are acting in the context of the G20, the UN or the OECD.'

> "States are increasingly turning to soft law instruments in order to push rules into new and highly contested and complex fields. So the job of a lawyer is not simply to look at black letter law, but also to understand these soft law rules and regulations that emerge

John Ruggie
Author of the UN Guiding Principles on Business and Human Rights

One international arena that has proven particularly problematic where accountability is concerned is the shadowy realm of sanctions. Asset freezes and travel bans imposed by the UN, EU and US have historically been inflicted with minimal explanation for maximum effect. The systems provide very little information about the processes behind blacklisting decisions and the evidence relied upon, while means of challenging those decisions are severely limited. In recent years, the European Court of Justice has started to overturn listings it deems unfair, but cases can last for years with no interim relief and costs can run into hundreds of thousands of pounds.

Arguably more effective than the courts has been a revolutionary system implemented to deal with UN Al-Qaeda sanctions: an Ombudsperson office, which can receive and assess petitions for delisting. Since 2011, Kimberly Prost has had the power to make recommendations for delisting that are binding unless all 15 committee members disagree. To date, none have been refused.

Though she cannot compel evidence from states, Prost is authorised to view sensitive material. However, there is ongoing debate over the best system to employ in the European courts. Under new rules agreed in February, judges are permitted

Magna Carta: a brief history
Lord Judge, former Chief Justice of England and Wales

What we have to grasp hold of as we sit here 800 years later is that Magna Carta was intended to fail. When the King's seal was attached to it in June 1215, he swore an oath that it was in good faith, but he'd had not the slightest intention of abiding by his Charter. He immediately asked his feudal lord, Pope Innocent III, to relieve him of the burdens. Bear in mind this was medieval Christendom, the Pope was the spiritual head of the Church and he had no hesitation about acting. He declared the Charter was void and using his words, not mine, it was utterly reprobated and condemned, and the King was forbidden to observe it. The Charter, its safeguards, all the things we rely on now, were entirely abolished […].

When this Great Charter was annulled, a civil war broke out, and what Magna Carta was and was seen as then was a peace treaty between the King and the rebels and it failed almost before the wax on the King's seal had hardened. But by the time it was annulled it had been proclaimed throughout England. Copies had been written. It had been distributed. We still have four of the Charters to this day. And listen to its attractive terms; these are words of constitutional, political importance, even as I use them today. Liberties, customs, rights, justice, lawful judgment, the law of the land (which became due process), the common counsel of the realm (which became Parliament security). That was the rule of law in gestation.

And, more importantly, just as the King agreed to be bound by its terms, so he got in a clause that said the barons had to give the same rights to their feudal vassals and it was to be observed by all men of our Kingdom. And that was another principle, equality before the law, in gestation.

Some of these ideas were revolutionary. A medieval King agreed that he was subject to the law, no longer an absolute king answerable only to the Pope and God. Justice would not be delayed, denied or sold. Courts would be in fixed places. Very importantly, the King's enforcement officers – the sheriffs and the bailiffs and the coroners – should not be judges. It was the first sign of the separation of powers. Most important to its survival, though, the King should not raise tax without consent, the consent of his Council.

to review classified evidence – a step back from the UK system, where special advocates who represent claimants are also granted security clearance, but still problematic for governments with concerns over confidentiality.

For former UK Attorney General Dominic Grieve, the issue is far from resolved. 'It's one thing to hand over evidence to a national tribunal, where there is a strong assurance that state secrets will be protected,' he says. 'It's quite another to extend that to an international tribunal where the state ultimately has no control over judges.'

> "Every one of us must be prepared to stand up for justice"
>
> Aung San Suu Kyi
> *Nobel Peace Prize winner*

Prost acknowledges that the current system is far from perfect. However, she warns against calling for an end to sanctions in lieu of a model form of due process. 'While the use of sanctions unquestionably raises these human rights issues, they are also essential measures for the protection of fundamental rights,' she says. 'So, to my friends in the human rights community, I always say "be careful what you wish for".'

Charting a future path

A swift glance across the world is sufficient to reveal that we are far from achieving the enduring ideals of Magna Carta. Violence and aggression are widespread. Injustice and exploitation remain commonplace. Inequality is on the rise. And, every day, gross violations of human rights are committed with impunity.

However, progress has been made. International tribunals may be flawed, but their very existence is a remarkable achievement. Both globally and nationally, calls for accountability and justice are echoing where people historically took to the battlefield. Even corporations, once impervious to human rights concerns, are being forced to join the dots between responsible business and the bottom line.

Ultimately, as Nobel Peace laureate Aung San Suu Kyi puts it, it is the duty of every individual to ensure such progress continues. 'Every one of us must be prepared to stand up for justice… As we try to establish the rule of law, we have discovered the most important quality that is necessary in our people is simply one of courage.'

Rebecca Lowe is Senior Reporter at the IBA and can be contacted at **rebecca.lowe@int-bar.org**

Sustaining the future

A set of Sustainable Development Goals that aim to transform the world by 2030 will be announced in September, but states are yet to agree what should be included. *Global Insight* talks to leading experts to get their views.

Lord Mark Malloch Brown

Former UN Deputy Secretary-General and an author of the Millennium Development Goals

It is evidently a good thing that the rule of law has slipped its way into the Sustainable Development Goals (SDGs) as goal 16. And long may it live and survive any last minute counter-attacks. As an author of the original Millennium Development Goals (MDGs), and having headed the UN Development Programme, which has championed human development for many years, I have regretted the rule of law's previous absence, along with a broader commitment to political rights.

Human development is a concept of development in the round, which includes political freedom under the law and prosperity as equal components of the emancipation from poverty. So well done those who have pressed for this, including George Soros' Open Society Foundation, whose board I am on.

Nevertheless, the inclusion of this goal is part of a wider proliferation of the original MDGs that will have costs to their future usefulness. First, there are now too many to provide a simple shared road map of development success. The original eight MDGs transformed development from an arcane closed debate to one where there were widely understood and shared objectives.

It is not just that there are now too many of them. Rather, it is that they have jumped the tracks from being simple measures of development outcomes – less poverty and hunger, more kids in school – to being prescriptive inputs about what kind of development policies countries should follow. No self-respecting development strategy could successfully encumber itself with all 17 goals and 169 related targets.

Although important new topics such as environmental sustainability, inequality, energy, water and sanitation are now covered, it is at the expense of development coherence. We must anticipate that development priorities will be set locally as governments and others pick and choose from this menu. It will drive development back to its à la carte past, not the fixed menu of the MDGs. That may enhance local ownership, but the price may be an end to an extraordinary common global journey where poverty has been tackled with a consistency and coherence – and success – that has never been seen before.

José Ugaz

Chair of Transparency International and former Ad-Hoc State Attorney of Peru

Finding a framework to replace the eight MDGs has been approached with the spirit of recognising what the MDGs did well and what they did not. The 17 goals effectively cover the areas that were absent or not explicit in the previous development framework.

However, the one area that remains without a goal is human rights. One could argue that the targets bring in human rights concerns, but given all the global commitments on the issue and how critical human rights are for development, it seems an oversight.

The proposal for 17 goals should be seen as a culmination of a process that started in 2012 and has taken us to this point of a negotiated agreement. In any negotiation, there will always be winners and losers. Fortunately, it seems that there are more winners than losers since 17 goals (and 169 targets) are on the table for approval. Trying to reduce the number of goals at this stage in the process would lead to increasing the losers over the winners and putting forward a set of commitments that does not fully capture a universal and transformative agenda.

Part of the shortfall of the MDGs was the failure to set goals that looked at broader context issues, such as governance. The absence of governance has been corrected in the new goals and the proposal currently on the table for goal 16. It also has a specific target on corruption and another on illicit flows.

Transparency International (TI) is working hard to make sure that these proposals are turned into commitments. We do not want the next 15 years to take governance and corruption out of the equation. The high prevalence of bribery has directly and significantly affected country progress on key goals, such as maternal and child health, as well as education. To end poverty, we must end corruption.

> “We do not want the next 15 years to take governance and corruption out of the equation… To end poverty, we must end corruption
>
> José Ugaz

The process has seen many innovations in ensuring that it has been more open, accountable and participatory. Draft texts of agreements have been shared openly, discussions have been webcast and civil society has been in the room, even during intense government debates. Also, the government co-chairs of the negotiation process – and the Open Working Group that produced the 17 goals – have held briefings with civil society and made themselves highly accessible. These are important steps forward.

However, there is still a way to go to make civil society an equal partner at the table and ensure concerns raised through consultations with civil society are addressed through government decisions.

Muhammad Yunus

Nobel Peace Prize winner and founder of Grameen Bank

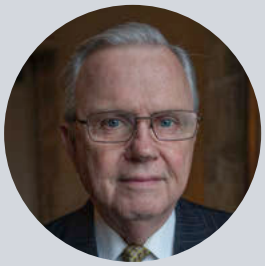
> “We must achieve ‘three zeros’ by 2050: zero poverty; zero net carbon emissions; zero unemployment
>
> Muhammad Yunus

I am 100 per cent behind all 17 SDGs and I hope they are adopted. I do, however, have my own set of goals that I would like to propose.

1 Every company in the world must devote one per cent of their profit to social business (social business being a non-dividend company to solve human problems).
2 We must achieve ‘three zeros’ by 2050: zero poverty; zero net carbon emissions; zero unemployment.
3 Nobody in the world should be outside the reach of affordable financial services, such as credit, savings, insurance, guarantees etc.
4 The education system should be redesigned to bring up young people as job creators instead of job hunters.
5 Above a certain level of wealth ownership, half the wealth should go to social business funds after the death of the owner to create social businesses around the world.

Image credits: José Ugaz © Ángel Álvarez Rodríguez/Presidencia República Dominicana; Richard Goldstone © UN Photo/Jean-Marc Ferre

> “If you look at conflicts around the world and ask why they exist, the answer is the same: no democracy, no rule of law
>
> Hans Corell



Hans Corell

Co-Chair of the IBAHRI and former Legal Counsel to the UN

The SDGs seek to complete the unfinished business of the MDGs and respond to new challenges. I therefore view the SDGs as part of a continuing process.

I do not believe there are goals missing. There is, however, one goal that should be further elaborated and expanded: namely, goal 16 on access to justice for all. Among the actions mentioned in connection with this goal are promoting the rule of law at the national and international levels, and reducing corruption and bribery in all their forms.

These elements are overarching and of a much broader character than ‘access to justice for all’. Goal 16 should therefore, in my view, be reformulated, bringing in the need for international peace and security, democracy and the rule of law. These components are absolutely necessary for implementing all the other SDGs. Democracy and the rule of law are indispensable components in modern world governance.

I reiterate what I have said so many times before. If you look at conflicts around the world and ask why they exist, the answer is the same: no democracy, no rule of law. By way of example, let me mention Ukraine. If you look at the SDGs and the need to work for protecting the human habitat on the globe, what is happening in Ukraine at present is unforgiveable. Something like this should not be allowed to happen in the 21st century. Where is the statesmanship?

It is true that there are many goals. But if you look at them individually, you realise that they are all important. The most significant are the first five ones, focusing on the human person, including empowerment of women. In view of my past experiences, I am also looking with particular attention at goals 13 to 15, focusing on the protection of the human habitat. There is an absolute need to combat climate change and to use the oceans, seas, and marine resources in a sustainable manner.

The question now is whether this process will be driven forward with sufficient determination and efficiency.

Richard Goldstone

Former Chief Prosecutor for the International Criminal Tribunals of Rwanda and the former Yugoslavia

In goal 18, I would have preferred the inclusion of an explicit reference to democracy and the rule of law. They are there only by implication and that is a less effective message. That said, I do not believe that there are any important goals that have not been included.

However, I would have preferred fewer goals and would suggest that this could have been achieved by consolidating a number of them. I would refer in particular to those that incorporate sustainable development, climate change and social and economic goals.

In my opinion, the most important goals are those that refer to the eradication of hunger, improved health care, achievement of gender equality, achievement of universal education and ensuring sustainable development.

The process by which the 17 SDGs have been selected is certainly more democratic than that which resulted in the MDGs. A process that was anything but transparent has been replaced by one in which there has been wide consultation between Member States of the UN.

One of the inevitable consequences is the more numerous and less well-defined list of goals. I would suggest that this cost is justified. Ownership of the goals is essential to their being taken seriously.

David W Rivkin

IBA President and Co-Chair, Dispute Resolution, Debevoise and Plimpton

The IBA is particularly pleased that the SDGs include a focus on gender equality, food security, inclusive and equitable quality education, urgent action to combat climate change and access to justice. Another important goal for attaining sustainable development is ensuring appropriate recording of property ownership. Without this, it is difficult for people to obtain value from it and to be mobile.

The number of goals proposed by the Open Working Group is an acknowledgment that an effective agenda for sustainable development must be both holistic and integrated. The number of goals also reflects the broader scope and universal ambition of the post-2015 development agenda, as it recognises the interlinking roles of environmental protection, good governance, social justice, economic development and peace and security, among others. Clearly defined goals accompanied by measurable targets render the attainment of the SDGs more tangible and less remote. In this way, states and other actors will be incentivised to take positive steps towards achieving them.

Certain goals have the potential to have a greater impact on other goals. I believe that number 13 – the need to 'take urgent action to combat climate change and its impacts' – is a critically important goal for these reasons. As the UN Secretary-General noted in his Synthesis Report on the Post-2015 Sustainable Development Agenda, climate change exacerbates other threats to sustainable development and makes 'delivering on the sustainable development agenda more difficult because it reverses positive trends, creates new uncertainties and raises the cost of resilience'. In addition, goal 16 is very important. Without the rule of law, many of the other SDGs are simply not attainable.

The consultation process has been, to echo the words of the UN Secretary-General, unprecedented in its scale and breath. The consultation extended far beyond the UN system to canvass the views of civil society, businesses and experts, as well as direct engagement with over one million people through consultations. The inclusiveness and transparency demonstrated throughout the process supports the legitimacy and universality of the goals and will assist in successfully meeting them.

Lucy Scott-Moncrieff

Co-Chair of the IBA Access to Justice and Legal Aid Committee, former Chair of the Law Society for England and Wales and Director of Scott-Moncrieff & Associates

The first 15 proposed SDGs envision what a good world would be like: free from poverty and hunger, with everyone healthy and educated and able to access clean water, sanitation and affordable energy. Decent work is available for all, gender equality has been achieved and countries work together to combat climate change and use the oceans and land sustainably.

Goal 16 is more conceptual, aiming to 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels'. Within this goal is also a commitment to promoting the rule of law at national and international levels.

Goal 16 is not only an end in itself, but, by including the promotion of the rule of law and access to justice for all, contains the means to achieve all the other goals. In this way, it becomes the most important goal, without which the others will falter or fail.

The mere existence of legal rights says nothing about the lives of the beneficiaries of those rights unless the law is fully enforced. It is not enough to make promises, or even back up those promises with laws. Where access to justice is limited, inadequate or absent, the individual tragedies of poverty, hunger, ignorance and ill health will continue, as will the global tragedies of climate change and the destruction of habitat and species.

Access to justice was not an MDG, but its importance in promoting human dignity and social and economic development has no doubt been a driver for the successes achieved under the MDGs. Making its importance and relevance explicit by including it in the SDGs can only help achieve those goals.

And, of course, it means that lawyers all over the world will know that they can contribute to the SDGs by continuing to promote access to justice and the rule of law, locally, nationally and internationally.

The Sustainable Development Goals explained

The Sustainable Development Goals (SDGs) are designed to frame the policies of United Nations Member States from 2016 to 2030. They expand on the eight Millennium Development Goals that are due to expire at the end of 2015.

The MDGs comprised: reducing poverty and hunger; achieving universal education; promoting gender equality; reducing child and maternal deaths; combatting HIV, malaria and other diseases; ensuring environmental sustainability; and developing global partnerships.

While the MDGs enjoyed some success, they have been criticised for being too narrow and failing to view issues holistically. The SDGs aim to remedy this. Within the goals are 169 targets – including promoting the rule of law and equal access to justice – designed to provide greater detail and guide states on implementation.

An Open Working Group with representatives from more than 70 countries was established after the 2012 Rio+20 UN Conference on Sustainable Development to draw up a draft set of SDGs. The UN also conducted dozens of national and international consultations with civil society across the world. The final draft of 17 goals was published in July 2014.

Opinions on the SDGs among governments, individuals and civil society organisations are mixed. Some believe there are too many; others say it is better to be comprehensive than risk omitting a key issue. Member States are currently undertaking final discussions on the content of the SDGs, and the final goals and targets are due to be announced in September.

The proposed 17 goals:

1 End poverty in all its forms everywhere

2 End hunger, achieve food security and improved nutrition, and promote sustainable agriculture

3 Ensure healthy lives and promote wellbeing for all at all ages

4 Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all

5 Achieve gender equality and empower all women and girls

6 Ensure availability and sustainable management of water and sanitation for all

7 Ensure access to affordable, reliable, sustainable and modern energy for all

8 Promote sustained, inclusive and sustainable economic growth, full and productive employment, and decent work for all

9 Build resilient infrastructure, promote inclusive and sustainable industrialisation, and foster innovation

10 Reduce inequality within and among countries

11 Make cities and human settlements inclusive, safe, resilient and sustainable

12 Ensure sustainable consumption and production patterns

13 Take urgent action to combat climate change and its impacts (acknowledging that the UN Framework Convention on Climate Change is the primary intergovernmental forum for negotiating the global response to climate change)

14 Conserve and sustainably use the oceans, seas and marine resources for sustainable development

15 Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification and halt and reverse land degradation, and halt biodiversity loss

16 Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels

17 Strengthen the means of implementation and revitalise the global partnership for sustainable development

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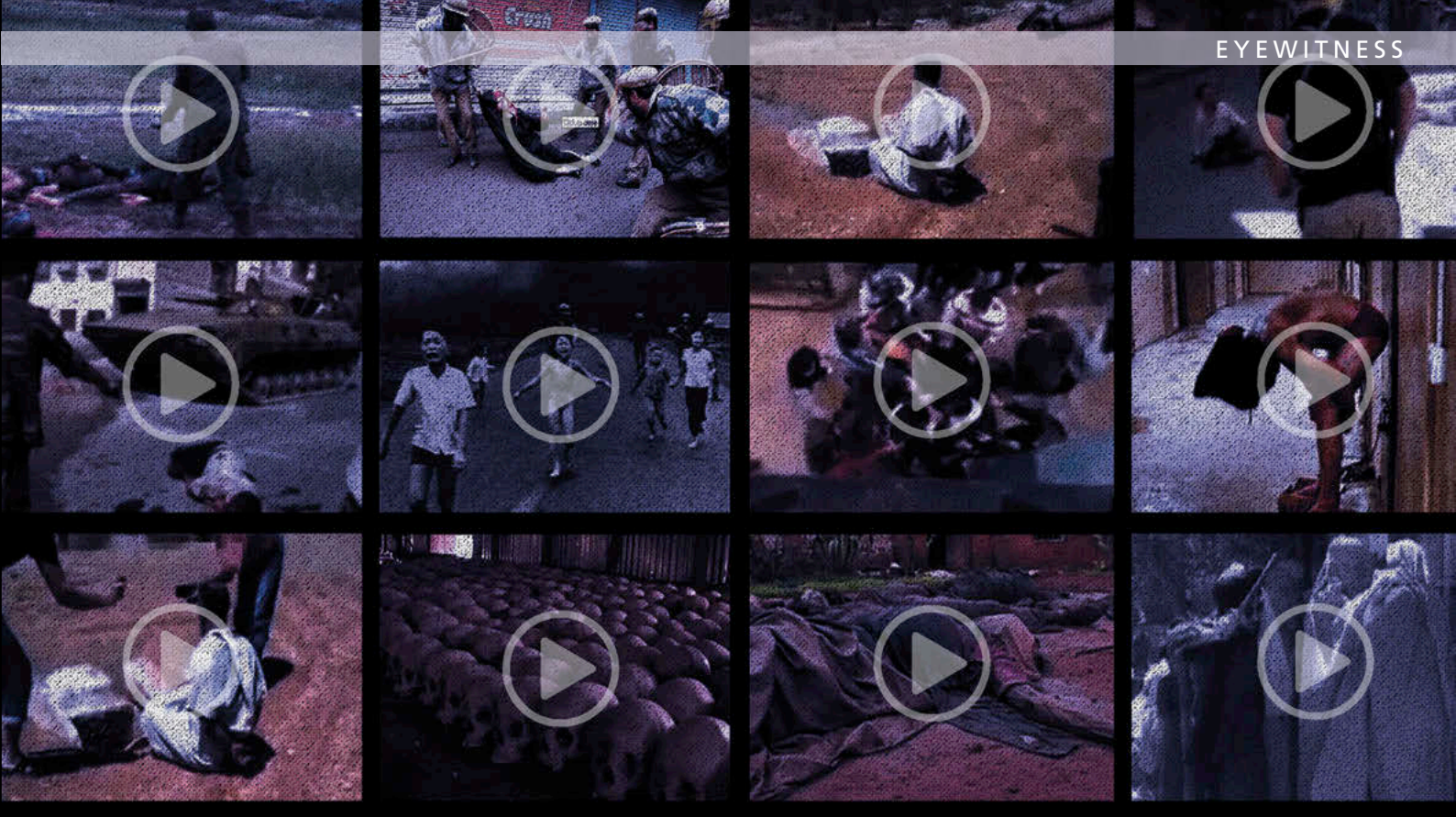


Witnessing atrocity

Social media is increasingly flooded with material purporting to show human rights abuses, but it is often challenging to prove what is genuine. Now a new mobile app, eyeWitness, aims to help bring perpetrators of atrocities to justice by verifying footage and ensuring it is admissible in court.

REBECCA LOWE

The soldier laughs and casually shoots a naked prisoner, bound and blindfolded, as he lies on a muddy track. Nearby, another soldier approaches a man and executes him at point-blank range. Bodies litter the ground. Panning left, the camera reveals at least seven women lying dead and undressed. Unseen onlookers sneer and make lewd comments, laden with innuendo. The strong suggestion is the women have been raped.

Obtained by UK broadcaster Channel 4 in November 2010, this harrowing footage seems to show Sri Lankan troops executing Tamil prisoners in the closing stages of the 26-year civil war. The film was a longer version of a video received 16 months earlier, sent to the channel by a group of exiled Sri Lankan journalists who claimed it was shot on a soldier's mobile phone.

The reaction from the Sri Lankan government was fierce and unequivocal. The films were fake, they announced, and the product of the 'anti-Sri Lankan separatist lobby'. A group of UN experts thought otherwise. Following rigorous analysis, the footage 'appeared accurate' and constituted 'credible evidence', they concluded. Further reporting by Channel 4 corroborated this verdict.

Overall, the process of verification took several months and significant manpower. The films were scoured for detail, every frame inspected, every source exhausted, every potential witness contacted. But even then, the truth could not be guaranteed. Experts are far from infallible, and even the best make mistakes. A degree of doubt will always remain, wielded like a weapon by the alleged perpetrators to beat back their adversaries.

For Mark Ellis, Executive Director of the International Bar Association, one of the international lawyers asked to examine the

2010 video, there had to be a better way. What if humans could largely be taken out of the equation? 'A news agency had a powerful piece of evidence, but without being able to verify its authenticity it would have little relevance for a court proceeding,' he says. 'Watching that film was a catalyst for the idea that an app could be created to act as a tool of verification and allow the video to be admissible in a court of law.'

So began a four-year effort to create such technology. The result is eyeWitness to Atrocities, a mobile app with the unique capability to authenticate and securely store footage of gross human rights abuses, while maintaining the anonymity of the user. Minimal extra analysis is necessary – no UN panel, no media probe. In the meantime, those caught in the spotlight, used to swatting away irritatingly observant social media saplings with a cursory cry of 'fake!', are advised to be on guard.

'This is a game changer,' says US lawyer and academic David Scheffer, who served as the first US Ambassador-at-Large for War Crimes Issues in the 1990s. 'Unverified data is an enormous problem in human rights and atrocity crime cases. Prosecutors have to rely on witness testimony, forensic evidence or, if available, documents. These can be challenged by defence counsel.'

'The big challenge in this age of social media is that there is too much criminal information and other data – almost a tsunami of data – most of which is useless in a court of law,' adds US law professor David M Crane, former Chief Prosecutor of the Special Court for Sierra Leone, responsible for indicting the then-President of Liberia, Charles Taylor. 'A tool like eyeWitness will assist in putting the data in a format to be analysed for possible verification and development into useful evidence.'

Security and integrity

Examples of unreliable and falsified material on social media are manifold. In 2004, the editor of UK tabloid newspaper the *Mirror*, Piers Morgan, resigned after photos published of British troops abusing Iraqi prisoners transpired to be a hoax. In 2011, western media widely disseminated a film of Syrian soldiers allegedly beating detained protesters, before it emerged the incident had been filmed in Lebanon four years earlier.

It is hoped the eyeWitness app can set honest activists, journalists and citizens apart from potential fraudsters, giving them the credibility and security they deserve as they seek to shine a light on gross human rights violations across the world.

The way it works is simple. The user takes a photo, films a video or records audio through the app, which then embeds a body of metadata: GPS coordinates, date and time, sensory and movement information and a pixel count, as well as nearby Bluetooth and Wi-Fi networks. Additional information can be provided afterwards, such as tagging individuals or describing what can be seen in the footage.

Data is encrypted via a unique digital key, which verifies that the image was taken with the eyeWitness app. It can then be sent over the internet or taken via SD card to a secure repository hosted by LexisNexis. There, one copy of the material remains encrypted, while another is decrypted and analysed by legal experts. If anything is received that might constitute evidence of a human rights atrocity – namely, war crimes, genocide, crimes against humanity or torture – it is sent to the relevant jurisdiction for further investigation.

> "This is a game changer. Unverified data is an enormous problem in human rights and atrocity crime cases
>
> David Scheffer
> *Former US Ambassador-at-Large for War Crimes Issues*

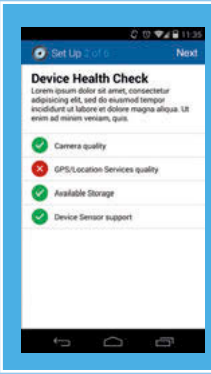
For Diane Orentlicher, Professor of International Law at American University and former Deputy for War Crimes Issues in the US Department of State, security is paramount. 'The security features of this tool are crucial given the risks faced by eyewitnesses to horrific crimes,' she says, adding: 'A tool that enables eyewitnesses to record and securely transmit evidence of atrocities… could not only aid future prosecutions, but also enhance efforts to respond to atrocities in real time.'

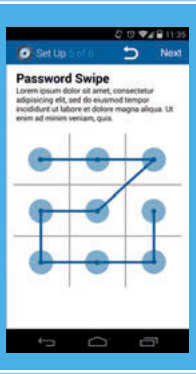
How eyeWitness copes in the face of potential cyberattacks is yet to be seen. So far, tests have proved encouraging. Tech security firm Dionach tried and failed to hack the encrypted material, while LexisNexis is confident in its cyber defence systems. Where the device itself is concerned, there are a few handy tools to help keep data secure. The app is hidden on the phone and its secure gallery is only accessible via a passcode swipe on an invisible keypad. Both footage and the app itself can also be swiftly deleted should the user find themselves in a dangerous situation.

'We've created a secure cloud environment for the storage and management of data uploaded by eyeWitness users,' says Ian McDougall, LexisNexis Executive Vice-President and General Counsel. 'Our facilities and operations teams around the globe have aligned resources to provide 24/7 data security, systems support and operations management, and data replication for disaster recovery purposes.'

eyeWitness explained

eyeWitness to atrocities



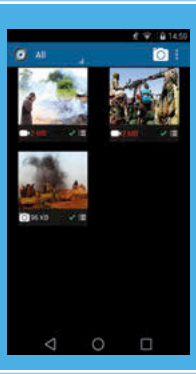


Installing the app

- app conducts health check to confirm device can support all features
- user takes six photos to establish signature for encryption and verification
- user provides username and optional email address
- user creates passcode swipe needed to access secure gallery

Capturing footage

- user takes a photograph, films a video or records audio
- pixel count of footage generated so it cannot be secretly doctored
- app engages device sensors to record and bundle metadata with footage
- footage encrypted and stored in secure gallery, not in device's standard photo gallery



Submitting footage

- user accesses secure gallery via passcode swipe
- user selects footage to annotate and submit
- user transmits footage to eyeWitness secure depository via internet or saves it to SD card for hand delivery
- user retains copy of footage without metadata, which can be shared to social media

Analysing footage

- eyeWitness repository verifies app signature against key obtained during registration
- eyeWitness repository compares pixel count at time of receipt against count generated at point of capture, to ensure footage has not been doctored
- legal experts analyse footage and determine whether it shows evidence of human rights atrocities
- footage showing alleged abuses sent to relevant jurisdiction for further investigation
- footage potentially sent to media outlets for broadcast
- copy of encrypted footage retained indefinitely in secure repository

Ellis acknowledges that in the modern world of Big Brother surveillance, data can never be 100 per cent secure – and, should such a breach occur, the buck would stop with eyeWitness. However, he believes the cost-benefit analysis weighs firmly in the app's favour. 'If you have a government sophisticated enough, there is little doubt they would be able to break through the system, so we would never give a 100 per cent guarantee,' he says. 'But human rights advocates who rely on social media to bring attention to atrocities currently have very little protection. This gives them a degree of security that does not exist right now.'

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> Diane Orentlicher
> *Former Deputy for War Crimes Issues in the US Department of State*

Accountability and advocacy

One chief concern during the development of eyeWitness was protecting the privacy and identity of individuals appearing in the footage. Privacy claims could in theory be filed both under British jurisdiction or where the alleged offence took place, and are likely to be determined on a case by case basis. eyeWitness contends it could not be held liable because it did not capture the footage, but concedes that ultimately only the courts can decide. Certainly, alleged perpetrators attempting to sue are likely to run into difficulties, with many jurisdictions having a criminal justice exception for such suits.

Protection for victims and bystanders is a key priority, stresses eyeWitness Project Director Wendy Betts. 'eyeWitness has an ethical obligation to do no harm and we take the protection of these individuals very seriously. We will take all possible measures to ensure our use of the collected footage does not put anyone at risk and respects the privacy of innocent victims and witnesses appearing in the videos.'

The hope, however, is that privacy concerns will pale in comparison to the broader purpose of the app: an end to impunity for the most severe human rights violations. All its tools and features are geared towards this end, designed to ensure the footage is admissible in a court of law. Extensive research was carried out by DLA Piper's pro bono arm, New Perimeter, into admissibility standards at international, regional and national courts, including the International Criminal Court, International Criminal Tribunal for Rwanda, International Criminal Tribunal for the former Yugoslavia and the Extraordinary Chambers of the Courts of Cambodia, alongside key national courts with jurisdiction to hear international crimes.

The findings revealed that the most important factors are knowing the source of the footage, ensuring it has not been tampered with and verifying the date and location. While the courts had slight differences in standards, the app has been designed to be applicable across the board. 'We have ensured it is generic enough to work in these main jurisdictions,' says Ellis. 'Some may need additional information, but only very little. It was extremely important we got that right as this was the foundation for the whole app.'

'We were immediately excited by the app's potential,' says New Perimeter Director Lisa Dewey. 'Through social media, "citizen journalists" are able to raise public awareness of atrocities as they occur. However, increased awareness has not yet led to a corresponding rise in successful investigations and prosecutions of those responsible... The eyeWitness app can change this.'

While eyeWitness is designed to address the gravest atrocities, Ellis stresses that lesser crimes will not be discounted. Should evidence emerge of a potential domestic offence, such as police

brutality against a civilian, the appropriate authorities will be contacted where possible. Agreements may also be put in place with certain NGOs to help them in the investigation of alleged human rights abuses.

In addition, the legal experts analysing the data will have the option of sending material to the media as well as prosecutors, Ellis says. 'We have to be realistic that the legal process takes time. In the meantime, if we feel there is merit to show the footage to the media, we would be prepared to do so. We can advocate for the victims – those tortured, killed and abused – to help bring the perpetrators to justice.'

> "It is important for eyeWitness to be widely publicised as a safe and secure and, most importantly, anonymous means of recording events. If there is confidence in the system, it could become an important tool for holding perpetrators to account
>
> Richard Goldstone
> *Former Chief Prosecutor at the ICTR and ICTY*

An eye to the future

$1m of funding has been provided to eyeWitness by the IBA Management Board to support the project. IBA President David W Rivkin says he is 'very proud' the IBA has donated such 'substantial resources'. He adds: 'eyeWitness will have a lasting impact by bringing perpetrators of war crimes to justice and by bringing to light atrocities when they occur in a meaningful and verifiable manner.'

With more than two billion social media users across the world, there are high hopes that eyeWitness will be more than just a flash in the pan. Much hinges on its popularity among activists, journalists and youngsters across the world – yet how many will be prepared to add it to their overflowing social media arsenal of YouTube, Twitter, Facebook and co is yet to be seen.

Richard Goldstone, former Chief Prosecutor at the ICTR and ICTY, urges people to accept the protections provided by the app, and spread the word to others. 'It is important for eyeWitness to be widely publicised as a safe and secure and, most importantly, anonymous means of recording events,' he says. 'If there is confidence in the system, it could become an important tool for holding perpetrators to account.'

International criminal lawyer Steven Kay QC, of 9 Bedford Row Chambers, and Jonathan Grimes, a partner at Kingsley Napley, echo Goldstone's appeal. 'Modern technology that provides film evidence of the perpetration of crimes can help justice by providing the truth,' say the Co-Chairs of the IBA War Crimes Committee. 'We encourage as many human rights groups as possible to circulate it around the globe.'

As the spotlight on international crimes intensifies, technology clearly has a vital role to play. The digital age has unleashed an ever-expanding maelstrom of data on the world. Now, perhaps, it can help manage, store and secure it – and, ultimately, convert it into a language the law courts understand. 'We desperately need this kind of evidence in the courtroom,' says Scheffer. 'Years from now we will be asking ourselves what it was like when the visual record did not exist.'

Rebecca Lowe is Senior Reporter at the IBA and can be contacted at **rebecca.lowe@int-bar.org**

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Our work around the world

Work carried out in 2014 | Work carried out prior to 2014

Left to right: Russian President Vladimir Putin, Indian Prime Minister Narendra Modi, Brazilian President Dilma Rousseff, Chinese President Xi Jinping and South African President Jacob Zuma.

Rule of law 'critically important' to BRICS success

Russia will chair the BRICS' seventh summit in July this year. As these growing economies become more influential and look to work together, establishing rule of law across all five members is more important than ever.

RUTH GREEN

When it was first coined in 2001, the term 'BRIC' seemed little more than a quirky acronym. Since then, the term has quickly become universal shorthand for the emerging markets' ascent in the global economy.

Brazil, Russia, India and China – and South Africa since it joined the fold in 2010 – have all come a long way since former Goldman Sachs Chief Economist Jim O'Neill first spotted their potential 14 years ago. Despite riding out the global financial crisis remarkably well, the mighty BRICS have not been left completely unscathed. The average growth rate of each country has slipped by more than two percentage points over the past decade.

At a recent IBA conference, From BRICS to MINT… and Beyond!, O'Neill said that China was the only one of the original BRICS that hadn't disappointed him, clocking an average growth rate so far this decade of eight per cent. Although he acknowledged weaker commodity prices were partly to blame for poorer performances in Brazil and Russia, he maintained his view that rule of law is vital for economic success. If all these countries can 'succeed in doing all the things that are necessary for rule of law, then they're going to get somewhere', he says.

David W Rivkin, IBA President and Co-Chair of Debevoise & Plimpton's international dispute resolution group, agrees. 'Developing a credible devotion to the rule of law, for businesses as well as individuals, is critically important to the continued economic development of the

BRICS countries.' Lawyers themselves have a vital role to play in promoting the rule of law. 'The expertise of lawyers is needed to modernise the laws in BRICS countries, and elsewhere of course,' he adds.

In the chair

Russia currently chairs the BRICS group and is set to host the seventh summit in July. However, its economy has been struggling recently, as the fallout from the conflict in Ukraine takes its toll.

> "Developing a credible devotion to the rule of law, for businesses as well as individuals, is critically important to the continued economic development of the BRICS countries
>
> David W Rivkin

Russia still has considerable work to do when it comes to establishing the rule of law. Dominic Sanders is a partner at Linklaters in Moscow and spoke at the IBA conference. 'Building confidence in the rule of law is a long-term process,' he says. 'The commercial legal infrastructure supports and underwrites business practice, and in Russia markets have developed greatly since the fall of communism. However, building institutions has been a challenge in Russia and there is still some way to go in the creation of a genuinely independent and technocratic judiciary, backed by credible processes for the enforcement of judgments.'

Recent changes to the Russian civil code and procedural rules are critical to the country's development. 'In my view there comes a point beyond which the development of an economy is constrained if local businesspeople do not have a basic level of trust in their own courts' ability to resolve commercial disputes in a consistent, fair and timely manner,' says Sanders.

Although a large volume of dispute resolution has historically been 'outsourced' to international arbitration centres, the move by Russia to push investors towards local courts poses its own challenges. 'While this can be achieved in part by amending procedural rules to force investors to submit disputes to the local courts, it is also necessary to improve confidence in the legal system,' says Sanders. 'This depends on judges' qualifications, consistency of enforcement of judgments and the absence of bias or corrupt practices. I expect that this is as relevant to a greater or lesser extent in the other BRICS and MINT countries as it is in Russia.'

Combined force

Although China is still the clear frontrunner in terms of economic growth, recently there have been several moves to bring together the BRICS' combined financial strength. Last year, the grouping announced plans to establish a $100bn New Development Bank (NDB) as an alternative to the World Bank and the International Monetary Fund (IMF).

Edmund Sim is Chair of the IBA International Trade and Customs Law Committee and a partner at Appleton Luff. 'The question with the BRICS bank will be with the funding,' he says. 'Of the five BRICS members, only China and perhaps India are strong enough financially to devote meaningful funding at the moment. This might be a case of the ambition of political and diplomatic objectives outpacing the funding and support.'

The five BRICS countries also recently pledged to establish a $100bn reserve fund to provide financial support when required. China is currently expected to contribute the most to the fund, at $4bn, followed by Brazil, India and Russia all shelling out $18bn and South Africa contributing just $5bn.

> "In my view there comes a point beyond which the development of an economy is constrained if local business people do not have a basic level of trust in their own courts
>
> Dominic Sanders
> *Linklaters, Moscow*

As well as forging stronger financial ties, China, India and Russia have announced plans to re-establish the economic corridor

across Eurasia via their 'One Belt, One Road' project. Russia could be set to benefit considerably from the project.

'Russia has traditionally looked more to the West than the East, but there are many obvious advantages for [it] in developing its trading and investment flows with Asian countries,' says Sanders.

'In the abstract Europe will benefit if these commercial relationships are functional, not overly politicised and do not exclude Russia's relationship with Europe,' he continues. 'For example, it makes sense that Gazprom should develop its Asian customer base. Perhaps a lower level of dependence on European customers by Gazprom would ultimately be healthier for everyone.'

Russia has also shown it is prepared to go further afield and has been working to boost trade relations with Latin America. In late April, state-owned Vnesheconombank inked a deal with Banco de la Nación Argentina, which will see Russia invest $2bn in Argentina's nuclear power sector and Gazprom will invest a further $1bn in exploring oil and gas fields in the country.

Although Argentina is not one of the coveted BRICS grouping, the move could be a prudent one. While Russia is looking to offset the ongoing economic impact of US and EU sanctions, Argentina's beleaguered economy is also keen to attract foreign investment as its government is locked in an ongoing battle with US hedge funds. The unlikely allies may well prove to be a judicious match.

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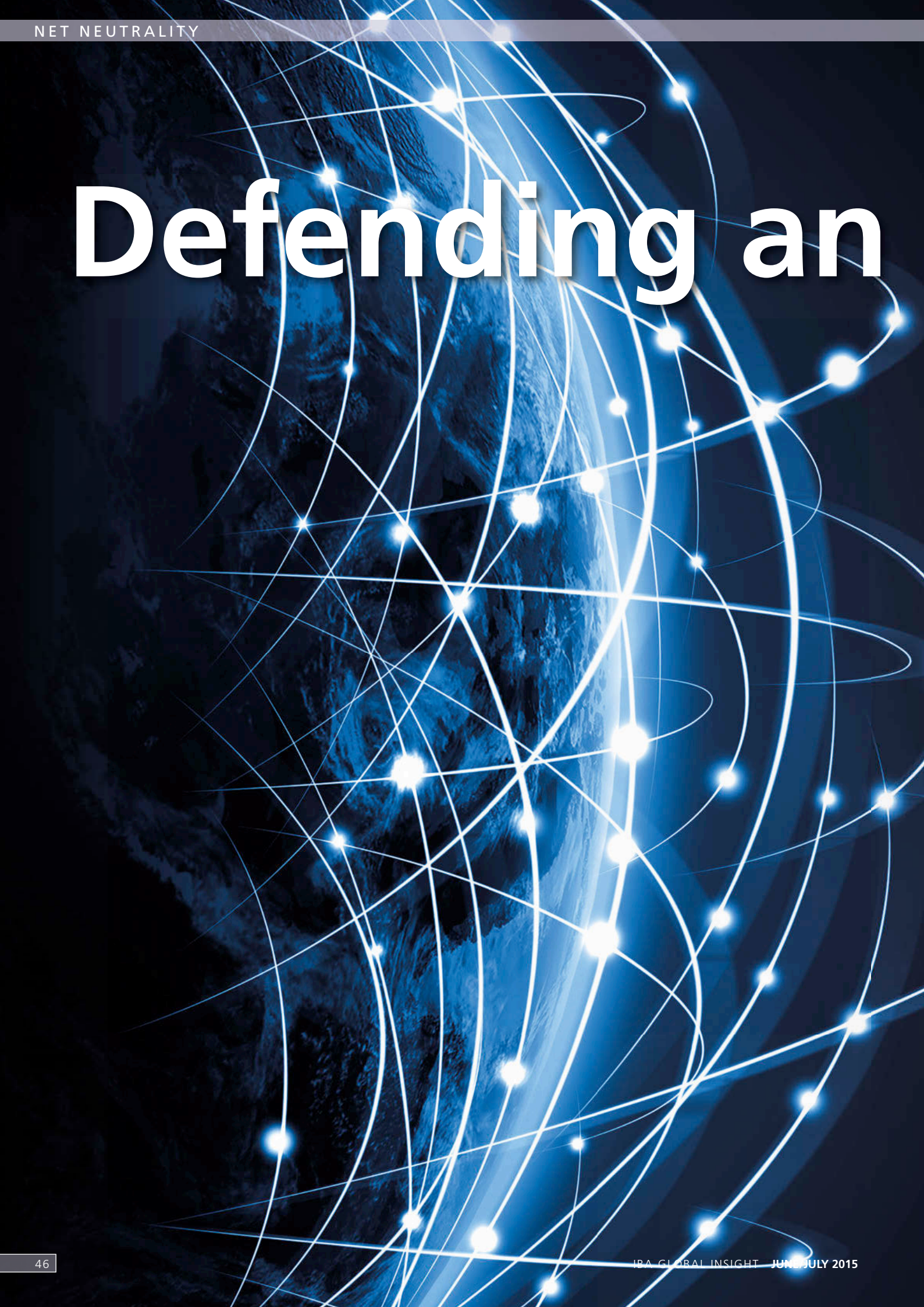
Defending an



open internet

The US Federal Communications Commission has introduced new rules to promote the ideal of net neutrality, taking on the practices of broadband providers. Both service providers and content generators claim they support an internet free from interference. This battle is far from straightforward, and already heading to court.

ARTHUR PIPER

The race to decide who makes money from the internet, and how, reached a significant landmark in February 2015 when the Federal Communications Commission (FCC) in the United States unveiled fresh rules to secure net neutrality for consumers. These rules outline stronger regulation of the internet by effectively treating it as if it is a strictly regulated public utility, rather than a more lightly regulated information service (see Rules for an open internet). Broadband service providers such as AT&T, Comcast and Verizon will now have to make sure consumers can access all content and applications on the network, regardless of where it came from, and without favouring or blocking particular products or websites. If they fail to do so in future, they will be held to account by the Commission.

The main complaint against the broadband operators has come from the so-called over-the-top (OTT) businesses, such as Google and Netflix, which provide content to consumers over these networks without owning the actual tubes by which their services are delivered. They support tougher regulation because they say broadband companies can, and sometimes do, arbitrarily block or slow down access to their services. Netflix, for example, has struck several confidential deals to pay internet service providers to access so-called fast lanes to reach customers quickly when networks are congested. Critics say Netflix has been forced into such contracts because internet service providers have shunted its services onto slower lanes – a charge denied by the network owners. In 2014, Netflix signed separate deals with Comcast and Verizon to prevent its customers receiving poor quality reception of its film-streaming service. It argues that these payments are unfair, because its subscribers already pay for access to the internet.

OTT businesses welcome the FCC's stricter stance. 'Today's order is a meaningful step towards ensuring ISPs cannot shift bad conduct upstream to where they interconnect with content providers,' Netflix said in February. 'Net neutrality rules are only as strong as their weakest link, and it's incumbent on the FCC to ensure these interconnection points aren't used to [outmanoeuvre] the principles of an open internet.'

Not surprisingly, the broadband industry's reaction to the three-to-two vote at the Commission to accept the new rules has precipitated a flurry of legal action. Broadband service providers say they are also open internet campaigners and supporters of net neutrality. Without payment from OTT businesses, they argue, the cost of fast networks will be passed on to consumers.

Google's antitrust challenge

In Europe, Google is under pressure to prove that its search engine practices and mobile Android software play fair with consumers.

On 16 April 2015, the European Union's Competition Commissioner, Margrethe Vestager, launched the first ever formal antitrust legal attack on the company. She claimed in a Statement of Objection that Google diverts traffic from rivals to favour its own offerings, in particular, by ranking its services more favourably than competitors in shopping searches.

In an email sent to staff, leaked to the UK's *Financial Times* the day before the statement was served, the company denied the allegations and pointed out that there was a broad range of competition in the consumer internet markets, including from Amazon, Ebay, Facebook and Twitter – all of whom provide reviews, advice and information on products and services.

'While Google may be the most used search engine, people can now find and access information in numerous ways – and allegations of harm, for consumers and competitors, have proved to be wide of the mark,' the company blogged the next day.

The move is the latest of four attempts by the European Commission to resolve antitrust allegations against Google. The company has ten weeks to respond, although it could take up to two years to decide the issue – that's if Google does not reach a settlement in advance. If the EU establishes antitrust practices, they could carry fines as high as €6bn or 10 per cent of the company's global annual revenue. Google would most likely appeal if it lost the case.

However, commentators do not think the Commission is looking to break up Google or to share the intellectual property embedded in its search engine algorithms. 'When you look at the statements of objection and the proposed remedies, they are not that far away from where Google is at the moment,' says David Balto, a former policy director of the Federal Trade Commission and a public interest attorney. 'They want Google to structure things in such a fashion that all search results are treated equally.' Balto says that it is more a question of tweaking the presentation of search results than of altering the structure of how Google operates. While the technological fix may involve complex adjustments to the search engine's presentation of results, the case is not likely to be complicated from a legal, antitrust perspective.

'If the case were litigated, it could raise some controversial issues – but I don't think that's the direction it is going in,' Balto continues. While he accepts that the opponents of Google would like to see draconian regulation brought to bear on the technology company, Balto believes the Commission accepts that such measures are antithetical to the way the internet works. 'It's a delicate balance that the Commission is trying to make, but there are accommodations that can be met to fulfil that balance,' he adds.

The same day Vestager announced her antitrust proceedings, she also said she was launching an investigation into whether Google imposes uncompetitive terms on handset makers to favour its own apps, such as YouTube. She said that regulators would look into whether Google had abused its dominant position by pre-installing its apps and services onto smartphones.

'Smartphones, tablets and similar devices play an increasing role in many people's daily lives,' Vestager said, 'and I want to make sure the markets in this area can flourish without anti-competitive constraints imposed by any company.'

Large cellphone makers like Samsung bundle Google Android and other apps for free on their systems. Android is the world's largest operating system, according to the technology analyst IDC, and by the end of 2014 held roughly an 81 per cent market share. Apple comes second at 15 per cent, with Microsoft trailing on less than 3 per cent. Analysts say that if the investigation finds antitrust practices, it could force the cellphone industry to alter its business model: bundling proprietary apps and services as part of the mobile software offering is currently standard practice.

'The list of antitrust cases throughout the world that say free is bad is a non-existent list – it's not something you learn in antitrust law that giving things away free is bad,' Balto says. An enforcement action would run headlong against two common sense notions of how markets work most effectively, and what consumers want: free is good, bundling is efficient. The US lawyers Hagens Berman, who brought an antitrust lawsuit against Google's bundling practices in the US, voluntarily withdrew their case in April 2015. Judge Beth Labson Freeman agreed with Google's arguments that there was no evidence to support the case that bundling restricted consumer choice or hindered innovation.

The USTelecom Association, a trade group that represents some of the nation's largest internet service providers, filed a complaint in March in the US Court of Appeals for the District of Columbia. It says the FCC's action violates federal law and is 'arbitrary, capricious and an abuse of discretion'.

'As we have said throughout this debate, our member companies conduct their business in conformance with the open internet principles, and support their enactment into law,' USTelecom President Walter McCormick said. 'We do not believe the Federal Communications Commission's move to utility-style regulation invoking Title II authority is legally sustainable.'

Mobile trade group CTIA, cable trade group the National Cable and Telecommunications Association (NCTA), and the American Cable Association, which represents small cable operators, have also filed lawsuits, as has AT&T, among others.

> "Net neutrality rules are only as strong as their weakest link, and it's incumbent on the FCC to ensure these interconnection points aren't used to [outmanoeuvre] the principles of an open internet
>
> Netflix statement

What is open?

The crux of this battle revolves around the definition of 'open' when it comes to the internet. Both sides support the concept that the internet should be free from interference from outside agencies: the broadband companies point to the regulators as the interferers; the content providers point to those that own the broadband infrastructure as the culprits. That's why each can paradoxically argue that they are the defenders of an open internet.

'Congress clearly intended for the internet to evolve unencumbered by complex, inefficient government regulations,' says Theodore Olson, a lawyer representing the NCTA. 'Instead of letting regulators play the central role in determining how the internet evolves, they wanted these decisions to be left to the creativity of entrepreneurs, engineers and consumers.'

The road to taking the Title II route to regulation has been long (see Timeline for an open internet) and comes at a time of increased competition in the industry. There will be serious financial consequences for the broadband businesses if the rules are upheld.

'Regulated operators have been losing revenues from services to OTT providers for some years now,' says Camila Borba Lefèvre, partner at Vieira Rezende Barbosa e Guerreiro in São Paulo and Co-Chair of the IBA Communications Law Committee. 'This FCC decision is another step which forces operators to change their business model in order to generate revenues from other sources.' If the revenues from charging OTT businesses to use fast lanes disappear, network operators will need to invent new services, risk falling profits, or face hiking charges to consumers.

She says that the decision by the FCC to attempt to regulate the industry under Title II rests on a broad interpretation of that law. 'Legislators are not able to adapt the law at the same pace as technological development happens,' she says. 'Therefore, it is natural that regulators try to interpret the law broadly in order to react to technological developments.'

Investment

Broadband operators say that the FCC's ruling will impact the level of future investment in internet infrastructure projects. On 19 November 2014, Patrick Brogan, USTelecom's Vice-President of Industry Analysis wrote to the

TIMELINE FOR OPEN INTERNET

OCTOBER 2007

Senator Barack Obama pledges support for net neutrality to protect a free and open internet if elected President

NOVEMBER 2008

Obama elected President of the United States

DECEMBER 2010

The FCC passes the first ever rules to regulate internet access – FCC Open Internet Order 2010 – saying internet service providers cannot not block websites or impose limits on users

JANUARY 2011

Verizon Communications files a federal lawsuit saying that broadband service providers could not be treated as 'common carriers', and so the FCC does not have the jurisdiction to impose the new rules

TIMELINE FOR OPEN INTERNET (CONTINUED)

JANUARY 2014

A Federal Appeals Court rules in favour of Verizon and strikes down the FCC's 2010 rules. But the Court agrees that broadband providers represent a threat to internet openness and development without rules similar to those in the FCC Open Internet Order 2010 being put in place

JANUARY 2014

A user creates a petition on the White House's 'We the People' platform, to 'Restore Net Neutrality By Directing the FCC to Classify Internet Providers as "Common Carriers"'. 105,572 people sign the petition

MAY 2014

The FCC issues a notice of proposed rulemaking on internet regulatory structure, opening a period during which the public could submit comments on the rule

FCC's Secretary Marlene Dortch. Brogan said that wireline capital investment could drop by 17.8 per cent to 31.7 per cent, if the FCC went ahead with its plans to regulate under Title II. The company's most recent research estimates that US broadband providers invested $75bn in network infrastructure in 2013 – the latest available year for which figures are available – a 10 per cent increase from 2012. In one study

> "We do not believe the Federal Communications Commission's move to utility-style regulation invoking Title II authority is legally sustainable
>
> Walter McCormick
> *USTelecom President*

Brogan cites investment would drop by between $28bn to $45bn from 2015–2019.

'To the extent network providers reduce or delay capital investments,' he wrote, 'it would slow the rate of innovation, dampen consumer benefits and diminish US international leadership – and the impacts would compound over time.'

Roxana Kahale, partner at Kahale Abogados in Buenos Aires and Senior Vice-Chair of the IBA Media Law Committee, says that the obvious rationale for a slow down in investment is that broadband companies may never be able to recover the amount they invest if they cannot make money from fast-stream deals with OTT businesses. She believes that could deter companies from making the currently high levels of investment into their networks. But there could also be unintended consequences.

'If these companies do not invest, communications could slow down, and, if that happens, it could tip the scale against the FCC,' she says. 'Network companies may be able to successfully lobby to have the law changed in their favour.'

Yet at present, investment seems to be accelerating rather than slowing. In April, Comcast announced Gigabit Pro, a new residential internet service that offers download/upload speeds of 2 gigabits per second – much faster than most customers would need. The service launched in May, with a US-wide rollout following over 2015. AT&T and Centurylink are also offering superfast packages.

Two sides of Google

Jeff Kagan, an independent technology analyst, believes that the launch of these faster offerings has been prompted, or at least accelerated, by potential competition from an OTT business – Google. While Google is a supporter of net neutrality for its products, such as YouTube, it has also entered the network market with its fast Google Fiber service, making it a player in both markets. The fact that other network providers have launched rival products suggests they are taking the threat from Google seriously. 'Would these speeds have come along without Google? Probably. But would they have happened as quickly? Probably not,' Kagan says.

Google Fiber was launched in Kansas City metropolitan area in 2012, providing customers with internet and cable services. As of March 2015, Google Fiber had 27,000 television subscribers and the company plans to roll out the network to several other locations, including Atlanta and Nashville. While the network is not extensive, the company believes that the Title II regulations could boost its growth and investment into network technologies. Under Title II, Google Fiber would be able to gain free access to utility poles and other infrastructure owned by existing networks because they will be classified as public utilities. Far from being an impediment to investment for Google Fiber, the FCC's rules will allow it to piggyback on the equipment already in place to extend its network.

Kahale says such free access to cable lines

SEPTEMBER 2014

The FCC's public consultation ends with almost four million Americans commenting on net neutrality – more than the FCC has received on any previous issue

NOVEMBER 2014

President Obama calls on the FCC to protect net neutrality by adopting a principle that says internet service providers should treat all internet traffic equally

FEBRUARY 2015

The FCC votes in favour of such new net neutrality rules, which also involve reclassifying broadband providers as common carriers to bring them under its jurisdiction

and equipment could boost the success of the smaller internet service providers and introduce extra competition and investment into the industry – a point not missed by the FCC's chairman Tim Wheeler. 'Some internet service providers say investment will suffer if an open internet is mandated,' Wheeler said in a speech in Ohio in March. 'Google Fiber and hundreds of rural companies... say they can build their businesses within the sort of light-touch rules we have adopted. Even Comcast, AT&T and Verizon, who oppose what we did, continue to invest in their networks.'

The argument over net neutrality is not confined to the US, even if tough regulation there is closer to becoming reality than it is in Europe. Only a year ago, for example, the European Parliament voted to enshrine net neutrality in law, including proposing a ban on service providers blocking or slowing internet traffic on their networks. In March 2015, the majority of the 28 members of the European Council voted in favour of changing the rules to bar discrimination in internet access, but to allow the prioritisation of some specialised services that require high quality internet access to function. The nature of these specialised services is unspecified, but may include cars that are connected to networks in the future.

Most eyes, however, are fixed on the US, where the outcome of legal challenges to the FCC's net neutrality rules could have ramifications around the globe. 'Regulation is still very diverse among different countries, which makes it very difficult for international companies to comply with the wide range of systems in place,' Lefèvre says. 'The US is certainly leading as far as net neutrality is concerned.' As governments seek to strike a balance between consumers and service providers in the struggle over who should make money out of the internet, policy makers will be looking closely at how the legal challenges against the FCC play out, and how net neutrality can be defined in a practical way.

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Rules for an open internet

An open internet is one that allows customers to access the legal content and applications that they choose online without interference from their broadband network provider, according to the Federal Communications Commission.

In a fact sheet posted on its site, entitled *Chairman Wheeler Proposes New Rules for Protecting the Open Internet*, the FCC says that an open internet fosters innovation and competition by ensuring new products are not 'blocked or throttled' by internet service providers, which put their own services and profits before the public interest.

The legal foundation for the FCC's proposals strongly rests on Title II of the Communications Act and Section 706 of the Telecommunications Act of 1996. The provisions in that legislation have applied to mobile voice networks for over 20 years and, if the FCC is successful, will in future apply to broadband services providers – albeit with a number of important provisions 'subject to forbearance'. In other words, only those provisions that the FCC deems appropriate to the broadband industry will apply.

The rules effectively say that broadband internet access services – the retail broadband that customers in the US buy from cable, phone and wireless providers – would be regulated under Title II.

The main practices that are banned by the FCC and that it says harm the open internet are described its Bright Line Rules:

- *No blocking*: broadband providers may not block access to legal content, applications, services or non-harmful devices.
- *No throttling*: broadband providers may not impair or degrade lawful internet traffic on the basis of content, applications, services or non-harmful devices.
- *No paid prioritisation*: broadband providers may not favour some lawful internet traffic over other lawful traffic in exchange for consideration – in other words, no 'fast lanes.' This rule also bans ISPs from prioritising content and services of their affiliates.

Read the fact sheet at **http://tinyurl.com/open-internet-factsheet**.

GLOBAL LEADERS

James Palmer

James Palmer is Senior Partner at Herbert Smith Freehills and chairs the firm's Global LLP Council. In a recent IBA webcast interview with Todd Benjamin he spoke about embracing modern working practices, the firm's approach to international expansion, the role of the law in society and his views on the financial crisis.

Todd Benjamin: What do you think are the big challenges for law firms?

James Palmer: The big challenge for law firms is to think about the sort of service their clients want, rather than just offering the service they've always provided. We're seeing alternative structures for delivery, all sorts of different arrangements for partnering of service delivery, disaggregation of service and also internationalisation of service.

There's a challenge generally in the supply of lawyers, compared to the demand for lawyers. We've seen a huge shift towards the build-up of major in-house functions. They do a fantastic job, and they are changing the nature of the role of private practice firms. Another issue… is that law firms are smart commercial organisations, but we are also part of a profession. Being a profession means that maintaining values such as integrity and service to clients are all part of the discipline. As organisations become more commercial there is an important challenge for them not to lose sight of what gives them their justification to exist as a profession. The badge of a profession is very important and valuable, both to [lawyers'] satisfaction in what they do, but also to their role as a service business. I think corporatisation and going with scale can cause people to lose sight of those [values], if they're not very focused on sustaining them.

TB: You took the role of Senior Partner in February, and you have responsibility for the firm's strategy. What are your immediate priorities?

JP: Our Council is responsible for strategy. I chair the Council, which is our equivalent of a board. [Responsibility is] firmly with our CEOs as well, but it's my responsibility to guide the board's consideration of [strategy]. The immediate priority is to focus on client service. Most people talk about strategy as international expansion: new offices, new markets. For us, the overriding focus is on [defining] the services our clients want and [deciding] how we deliver those more effectively.

As part of our strategic focus, we are also thinking about which markets we have to be in. We are also thinking about service delivery models. It's well-known that we opened an office in Belfast – a lower cost model – to do a lot of process work around document review. We think about different business models for delivering better service.

TB: One issue is an increase in client demand for quick solutions to difficult problems, which is not necessarily consistent with the billable hour approach. How do you find common ground?

JP: You're absolutely right. When I started out, London law firm fees were controlled by the Solicitors' Remuneration Order. You took account of the hours [worked], the value to the client, the complexity of the issue and a series of other factors. This [necessitated] a billing approach based on those factors. We are far more flexible in our approach than probably the perception is, as are most of our competitors. The billable hour was not created by law firms: it was created a number of years ago by clients looking [for] a measurable. Everybody looks for metrics and measurables to judge performance by, an output that exists, so there was a focus built on [billable hours] for charging.

I completely agree with the implication in your question, which is that it's absurd that you [can] give some incredibly valuable advice very succinctly using 30 years of experience, whereas [you do] some rather mundane straightforward process [work], which takes 100 hours, and you make more money out of it. I think the billable hours model works, to the extent clients want to use it… provided there is a relationship and you understand that it's a package. Clients can't just come to you for five minutes twice a year to save some staggering amount of money. You expect to have a relationship, where you will work with them in other areas. The relationship doesn't work if you're only doing five minutes work and I think most clients understand that.

> "Law firms are smart commercial organisations, but we are also part of a profession

We have always been open to alternative billing models; it's not a new thing, but we've always [used billable hours] because that was the UK regulatory model. We have clients who want fixed fees; we have clients who want different weightings on different issues, and that's fine. My view is: I don't really care how we make a return from a client, as long as it's a fair return for the work we do, and that's the conversation I expect to have with the general counsel of our clients.

TB: You were a very strong advocate of the merger with Freehills. What did you learn from that merger?

JP: I think we got the merger between Herbert Smith and Freehills right. We didn't rush into it; we spent a lot of time between the two firms, [which] had worked together for nearly a decade.What we learned… was that many of the assumptions we'd made were right. The best thing we learned [was] about client response to the merger relative to the risks of the merger. Those who were driving [the merger], particularly led by Gavin Bell, the then-CEO at Freehills, and David Willis, the then-CEO at Herbert Smith, had identified the right characteristics for merger, which were [to ask if it] would help our clients, as the first driver. Secondly, [considering whether, in] putting groups of people together, if those people would align, build a shared vision and a unified firm, rather than operating as distinct organisations.

We tailored how we implemented the merger… to build an integrated firm for the long term: irreversible, aligned around common goals, not fragmented. We weren't interested in having two different regions with a badge of integration. The best thing was the client reaction, which was even better than we expected. The client revenue reaction was far beyond what we'd projected. We'd set some stretch illustrative targets for revenue increase in the first year: we went through that in something like seven months, which we hadn't expected.

TB: Do you anticipate any future mergers to expand the firm's international reach?

JP: I think that in the long term that is a real possibility. But [you should] be very careful about committing to merger strategies, as opposed to controlling your own development. I think there is a pressure in the medium to long term for consolidation in the legal profession, but consolidation brings risks. You need to be very careful that you don't do it to be seen to do a merger, but to serve your clients on a basis that will work.

TB: What's the biggest risk when undergoing a merger?

JP: Trying to tie together two groups of people that don't have a shared vision [or] a shared set of goals. [They] will not collaborate [or] provide a better service to clients in the aggregate than they did separately, and that's a real risk.

TB: Are young people entering your firm now different from the trainees of 1986?

JP: Yes it is different for young lawyers, but not completely different. I'm determined it shouldn't be. One of the differences is we're bigger, as are our competitors, so we have more processes around recruitment. I think students work harder now then they did 30 years ago. I am concerned that we're screening out people who don't conform to some checklists. I'm very interested in potential as against built CV [whether] we have enough people who are a little bit more left field coming through.

TB: You have a modified lockstep approach to remuneration, how does it work?

JP: Having grown up in a lockstep law firm, the mantra always was 'lockstep is the only structure that drives collegiality and collaboration because it drives alignment'. Our structure is still a modified lockstep: most of [it] is around sharing returns amongst the partners, so we're all aligned to work together. Globally we have a single profit pool. The modification turns on what you value in [it]. What we value is contribution to our clients and to the firm.

TB: Technology enables more flexible working patterns. Can this help women returning to work after having children?

JP: The heart of this issue… is talking about it much more openly and setting goals, which we've tried to do. We've made commitments to achieving diversity goals [relating to the] proportion of women partners. We were the first international law firm to do that. We just announced that 43 per cent of our new partners are women.

I think the biggest issue is a returner issue. How do you sustain patterns of career change through bringing up a family, or whatever else the dynamic might be? When I started, I was always the only lawyer on the deal. If I suddenly said I'm disappearing for two days that would have been much more problematic. I am absolutely clear that the advantage of the large law firms now compared to when I started is that we have much bigger teams, and I believe that teams are part of the answer.

Most of my clients know that if I am working with them on a transaction intensely, that I'm available most of the day to them. My other clients… probably guess I'm working with other clients. They expect to be able to speak to me that day, but they don't expect to be able to grab me at one day's notice and get me for the next three weeks exclusively. They accept that they'll only get part of my time. If I can work effectively part-time for each of those clients, why can't other people? I think it is all in the teaming. The moment you move to more of a team mindset, you can have tag teams, not people working through the night. You can provide the structures and organisations [that allow] collaboration and [improve] team communication.

We're piloting agile working: people working from home, people working part-time. I'm absolutely convinced that those pilots will be successful. We have not yet got a returners programme at Herbert Smith Freehills. I think we will have to think about it, because I completely agree that talent is not being harnessed. I think we need to look at ways of capturing that… because we're in the talent provision business.

TB: So, implicit in what you're saying is you do see commercial advantages in having a more diverse workforce and partnership.

JP: Totally – I think we're absolutely passionate about it. There was only one reason I joined the firm when I was interviewed in 1984, which was the environment. The interview I had at Herbert Smith was completely different from what I had everywhere else. It was the only firm that didn't ask me where I'd been at high school, where I'd been at university, whether I had a family connection with the law; there were women waiting to be interviewed as well as men. I didn't see that elsewhere in those days, and that was why I chose the firm.

TB: We are in the age of the global law firm now. Does the 'Magic Circle' tag still carry some gravitas or relevance, and is it a label that your firm aspires to?

JP: It's certainly not a label we aspire to. I think it's a tag that does have some market standing and perception, particularly in recruitment. I don't think it's a tag that clients relate to. I think law is a much more fragmented profession than law firms would like to convey. The reality is the most sophisticated clients in the world are using dozens of top law firms, not just three, five, seven, nine, 12: it is intensely fragmented. We have never had any doubt that we are one of the top law firms in the world in the markets that we serve. Whether it's disputes, where we're well known as the leading firm, or in my own background of M&A,

where we've always been one of the preeminent firms. Our market goal is always to be at the top of the markets we're in.

TB: You were involved in the UK's Kay review of the equity markets. How can companies avoid the kind of short-termism the report criticised, and which many believe caused the financial crisis?

JP: I think this is all about… the structures that drive human behaviour. If you give people a structure and goals and tell them to achieve financial rewards within those goals, they'll pursue them. The cause of the financial crisis was short-termism: short-term financial goals, lack of control, inherent conflicts in structures and disintermediation.

If those who exercise control are too removed from the underlying decisions that people take, then [there is a] build-up of fundamental poor business practices, as we saw in the crisis. Not all short-termism is a bad thing. If you've got an issue you have to address in the short term, you need to address it in the short term. What you've got to do is make sure you also address the long term, and [think] about longer-term challenges as well, including [the] changes in behaviours that you drive.

TB: Do you think the right structures are in place now to mitigate the possibility of another financial crisis?

JP: I'm glad you asked have they been mitigated, as opposed to whether we've avoided the risks. I think that they have been mitigated – I don't think we've avoided the structures that could create another financial crisis. Increased capital and increased focus on the effectiveness of governance structures and the regulation of behaviours have all been very good things, but I think we still have risk in the system.

The public doesn't tend to understand what banks are: banks are society's vehicles for leverage and risk. A bank is a risky thing. It has a very small amount of capital, it takes money in and it then lends almost all of it out again. If it doesn't get some of that repaid when it's expected, it goes bust. Everybody now requires more capital and on most analysis banks are heading towards overcapitalisation. But it all turns on the volatility of the economic performances, and if you have really volatile performances that capital could get stretched again.

If you insist [the banks are] fully capitalised, then [there's] no economic incentive to be a bank, so there's a trade-off there. I think you have to accept a level of risk. I don't completely believe you can ever avoid 'too big to fail', because I think that by definition banks have to accept a degree of risk, ultimately of insolvency. If [banks are] socially systemically fundamental to an economy, you need to create structures to sustain their social role. I don't want to sound totally pessimistic; I do think there have been some very fundamental changes. I think there is a lot of work still to be done on the culture of organisations to make them more long-term.

TB: You've stated before that 'disclosure does not equate to governance'. Is there too much emphasis on disclosure?

> "The cause of the financial crisis was short-termism; short-term financial goals, lack of control, inherent conflicts in structures

JP: I think transparency is now seen as a good: all transparency is good. Well, all transparency brings cost. If you look at the costs of the regulation that was introduced up to 2007, compared to the costs of regulation 20 years earlier, you would think regulation in 2007 was wonderful, because a lot of money was being spent on it, whereas very little was being spent on it 20 years earlier. Yet when we had a [global] crisis in the early 1990s, the banks were properly capitalised: they weren't selling inappropriate products to people, they weren't just making short-term profits.

Twenty years later with a massive investment in compliance infrastructures and detailed regulation, we had a financial crisis and terrible behaviours. I think that tells you a lot. That doesn't mean we don't need rules, but I think the idea that disclosing everything [solves the problem] doesn't work, when there's so much disclosure that people don't know what to do with it. I am a fan of transparency; I'm certainly a fan of regulators having full transparency. But that's different from requiring everything to be publicly disclosed, because it just creates huge infrastructure costs, which are then borne by consumers, and some of it is not justified relative to the benefits it brings.

I think governance is about truly thoughtful focus on risk and on what your social role is. I know that's sort of a cliché, but actually I think it's absolutely fundamental: everybody provides a service, whether it's acting as a financing principal, whether it's acting as a lawyer [or] an IT person. We have to be doing something socially useful and then we can get a return that is fair. Purely arbitrary principal trading by organisations set up for other purposes I think is questionable.

This is an abridged version of a longer interview, which you can view in full on the IBA website at **tinyurl.com/jpalmerIBA**

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