

IBA GLOBAL

April/May 2014

INSIGHT

IBA interview: Michael Kirby,
Chair of UN Commission
of Inquiry on North Korea

The noble pursuit of litigation
in the public interest

Banking on trust

With evidence of pervasive wrongdoing still emerging,
can faith in the world of finance be restored?



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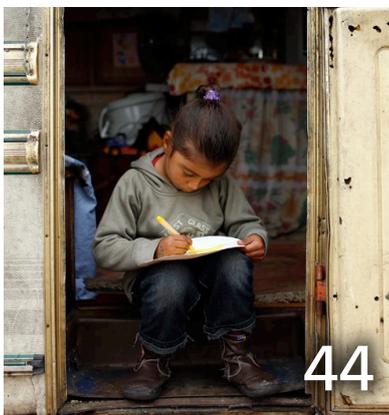
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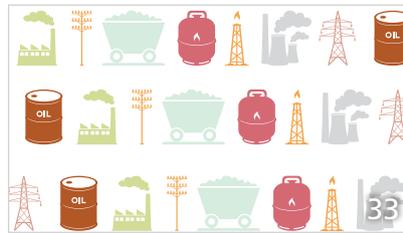
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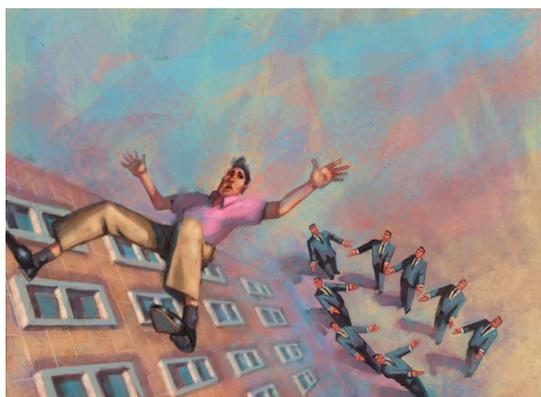
Editorial

This edition of *Global Insight* went to press as ongoing developments in Ukraine dominated the international agenda. Our initial coverage of the major issues — such as condemnation of Russian incursions, the legitimacy of the referendum in Crimea (or lack of it) under international law, the importance of building fundamental aspects of the rule of law from the ground up in Ukraine, and the need to address the lack of transparency and corruption that precipitated the unrest — is on page eight (**Ukraine: breaches of international law as crisis continues**).

Another significant concern is the extent to which Russia has been able to set the terms of subsequent negotiations, with a danger that America and the European Union become somewhat side-lined. President Obama was quick to condemn the Russian actions in Ukraine. But, he has been equally quick to emphasise that he wouldn't be advocating the pursuit of military options. Reassuring on one level, this is also very telling. The cover feature of our October 2011 edition spoke of the 'New World Disorder'. The article made the point that financial paralysis — debt in excess of \$14 trillion at the time — has a direct impact on America's ability and willingness to continue its leading role in the world. A key point was 'a reduced ability to serve as a buffer among nations not actually hostile to each other, but that harbour fears hostility might bubble up. For example, reassuring Western Europe that Russia can't intimidate.'

This is more pertinent than ever, particularly as Europe itself wrestles with the crippling aftermath of the bank bailouts and subsequent sovereign debt crises. That matters financial and economic impact on states' ability to influence international affairs highlights the need for the finance world to put its house in order, sooner rather than later, ensuring that they don't hamstring states in this way again. The cover feature of this edition (**Banking on trust**, page 22) tackles this issue head on, investigating whether anything significant has changed since the lowest point of the financial crisis five years ago, and assessing whether trust in the banks is on the way to being restored.

James Lewis



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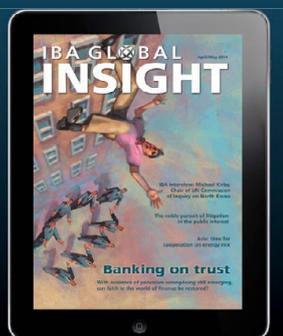


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Banks urged to demonstrate value to society and to restore trust

REBECCA LOWE

The financial services industry must undergo a fundamental culture shift and focus on reviving its links with society, legal experts have told *Global Insight*.

Following the worst financial crisis since the Great Depression, it is vital that banks concentrate on restoring trust with the general public. This involves more than abiding by new regulations aimed at reining in excessive risk-taking, and requires a fresh new perspective on the function of the sector, emphasising its social purpose.

'Banks shouldn't be there just to make money for their investors, because they have such a critical role in the functioning of society,' says Margaret Cole, PwC General Counsel and former Director of Enforcement at the Financial Services Authority (FSA), now two separate regulatory authorities – the Financial Conduct Authority and Prudential Regulation Authority. 'What we need to ask is: should people purely motivated by profit be having this level of influence on organisations at the heart of our economy? Or should we be looking for people who accept banking may be there for other reasons too?'

Banks need to challenge 'the suspicion they are getting rewarded for things the world doesn't need', according to former FSA Chair Adair Turner. That means a move away from highly leveraged products to more equity-based financing, he says: a back-to-basics form of banking with a clear social purpose.

In the UK, a new banking standards body, due to be operational by the end of 2014, aims to help effect this transformation. The body is currently being developed by Richard Lambert, former Director General of the Confederation of British Industry, at the request of the UK Parliamentary Commission on Banking Standards (a group of lawmakers tasked with making proposals for reform of the industry) and the chairmen of HSBC, Barclays, Lloyds, RBS Standard Chartered and Nationwide.

Lambert has stressed his independence from the banking sector, and has been clear that the new standards body will be run by people from outside the sector, with the aim of overhauling the way bankers are trained and accredited, setting codes of conduct and addressing the problem of short-term incentives.

However, the effectiveness of such a

deep-rooted remodelling of the sector relies on a strong message from the management of each entity, and will not take place overnight, stresses Herbert Smith Freehills' Head of Banking Litigation, Damien Byrne Hill. 'There is a new cultural agenda, which will gently and gradually have an effect. But it's really only as powerful as the people at the top of the institutions. It takes a lot of time to enact lasting reform.'

Stuart Popham, Vice-Chairman of EMEA Banking at Citigroup and former

hundreds of senior bankers were locked up for the role they played; since then, however, banks have grown far larger and arguably more powerful.

'The idea you are going to introduce a whole series of regulations and immediately bring about a huge seismic shift in corporate behaviour is fallacious,' says Keith Oliver, Senior Partner at Peters & Peters. 'It's only when people who have broken the rules are prosecuted and hung up to dry publicly, and potentially deprived of their liberty, that other people



'It is a new era for the world. It is a new era for extractive industries, for infrastructure companies, and for banks as well. It takes time for people to change their attitudes, but the willingness is there'

Stephane Brabant

Partner, Herbert Smith Freehills;

Co-Chair, IBA Corporate Social Responsibility Committee

Global Senior Partner of Clifford Chance, concedes the industry needs to do better at proving its value to the man in the street. The problem is one of perception, he suggests, rather than reality. Despite appearances, the sector is 'not apart from society', but responsible for the employment of two million people, he points out – 6.6 per cent of the British working population.

'We need to show the financial sector occupies a different position in society than is popularly seen, and is not a distinct entity,' he says. 'It needs to be seen as helping new businesses be created, as being involved in social purposes, as a key employer.'

Many believe talk of reform from the banks is lip-service. Banks won't change, they say, until executives lose their sense of immunity and a few go to jail. After the savings and loans crisis of the 1980s–1990s,

faced with similar choices are going to change their behaviour.'

Others are less pessimistic: the world is becoming more transparent, ethical and accountable. The 2011 UN Guiding Principles for Business and Human Rights, which put a duty on corporations to respect human rights, are both a symptom of and catalyst for this change. Banks are 'very anxious to implement them', according to Herbert Smith Freehills partner Stephane Brabant, Co-Chair of the IBA Corporate Social Responsibility Committee.

'It is a new era for the world,' he says. 'It is a new era for extractive industries, for infrastructure companies, and for banks as well. It takes time for people to change their attitudes, but the willingness is there.'

See feature, *Banking on Trust*, p 22.

UN Guiding Principles on Business and Human Rights three years on

In February, the IBA's North America office partnered with the Human Rights in Business Program at American University's Washington College of Law to hold a panel discussion entitled 'Business and Human Rights: How is the Global Business Community Responding to the UN Guiding Principles on Business and Human Rights Three Years after its Adoption?'

An audience of 100 lawyers and members of the business and academic communities heard speakers from diverse backgrounds discuss how businesses are transforming their practices in response to the landmark passage of the 'Ruggie Principles', as the UN Guiding Principles are often known, referring to the chief architect of the Principles, Harvard Professor John Ruggie.

Among the issues addressed by Sarah Altschuller, Counsel in Foley Hoag's CSR practice, was the gulf between companies in Europe and the US with regard to business and human rights issues. Despite US pride in the Bill of Rights and the Constitution, human rights are often quickly dismissed as an 'international issue' and certainly not something that should concern US companies on their own soil. Altschuller observed that some American clothing manufacturers, despite considerable efforts to monitor conditions in complex supply chains, are inconsistent when it comes to insisting that their suppliers adhere to stricter human rights standards. Further, in contrast with the US, the European Union has mandated that member states develop action plans for the implementation of the Principles. Altschuller has seen a growing number of European-based companies taking action to integrate



Image: Gabriella Herzog, Senior CSR Manager at Hess Corporation provides advice on best practices in the field of business and human rights, and (L-R) moderator John Richardson and panellists Mark Wielga and Sarah Altschuller

human rights into company business plans as a result of efforts by their home government to clearly set forth human rights expectations for the private sector.

Commenting on the event, the Director of the IBA's North America office, Michael Maya, said: 'As the business and human rights movement continues to gain momentum, it will be harder and harder for businesses and their legal advisors to ignore the impact that weak adherence to the Ruggie Principles and other human rights standards will have on their reputations and bottom line. In this respect, this movement is not dissimilar to the environmental movement that

has fundamentally altered business practices around the world, especially in the last decade. Many businesses and lawyers, particularly in North America, are wandering the desert a bit when it comes to the evolving field of business and human rights. There are many exceptions, however – Coca Cola and General Electric come to mind. The robust attendance at this event suggests there is a real need for more frequent dialogue and opportunities to share best practices among the business community and the lawyers who counsel them.'

To read a full account of the event, see tinyurl.com/UN-Guiding-Principles

Student Mentoring Programme kicks off with pilot scheme

The IBA Law Students' Committee and Young Lawyers' Committee are jointly developing a mentoring programme aimed at connecting law students with young practitioners to smooth the transition from law school to practice.

The programme offers a unique angle for law students who intend to work overseas at some stage in their careers, as all participants will be given

the option of being partnered with a mentor abroad, which is crucial in an era where legal matters frequently transcend borders. Law students who wish to be partnered with a mentor in their own country will also benefit immensely from the vast global network of lawyers this programme will fashion.

In the coming months, a pilot programme with six mentor/mentee

pairs will be run to allow the Committees to fine-tune all aspects of the programme before its official launch in September 2014. Given the absolutely overwhelming response to the call for applications for the pilot programme, the committees look forward to opening applications to all later this year to meet this pressing need.

UK competition regime changes enable regulator to be more aggressive

CHRIS CROWE

The overhaul of the UK's competition regime on 1 April will see the new regulator – the Competition and Markets Authority (CMA) – take on extended powers in relation to criminal cartels and dawn raids.

The CMA will come into being as a result of the merging of the Office of Fair Trading (OFT) and the Competition Commission (CC). Under the Enterprise and Regulatory Reform Act 2013, which also created the CMA, the criminal cartel offence will have a broader interpretation. As a result the competition authority will no longer have to prove dishonesty, meaning even secret and complex commercial arrangements may come under its microscope. On dawn raids, the CMA will be allowed to carry out compulsory interviews with a business' employees.

Under the new regime, the CMA will also seek greater cooperation with other industry regulators, such as the Financial Conduct Authority (FCA), Ofgem, Ofwat and the Office of Rail Regulation. There will be a greater onus on these authorities to be more active in the enforcement arena. In a consultation paper published on 1 October 2013, the Department for Business, Innovation and Skills (BIS) asked the CMA to consider certain industries that may benefit from closer competition analysis, such as 'knowledge intensive sectors, financial services and infrastructure sectors, including energy'.

Despite this apparent change in tone, Douglas Lahnborg, a London partner in the antitrust and competition group at Orrick, expects only moderate change in the competition arena. 'The substantive legislation is not changing and there are cases that they will be taking over [from the OFT and CC]', he argues. 'However, it will be very interesting to see which new cases the CMA takes on. It will give an indication of where their priorities will be. There will also be great focus on how quickly they will be able to manage their cases.'

The merger of the two bodies is intended to streamline the competition regime in the UK, which should in turn make it more efficient. With one single authority, there is expected to be less



'Confidence in the CMA will be based on its decision-making process, which needs to be transparent, independent and evidence-based'

Andrea Appella

Deputy General Counsel for Europe and Asia, 21st Century Fox; Co-Chair of the IBA's Antitrust Committee

duplication of information requests as had previously been seen. However, one major badge of honour for the UK competition regime had been its ability to provide 'fresh eyes' on a case through a referral by the OFT to the CC. In light of this, the CMA has stated that it intends to preserve the independence of second phase review. As Suyong Kim, co-head of Hogan Lovells' antitrust, competition and economic regulations practice, observes: 'They are striving very hard at the CMA to reassure people that the real virtues of the second phase investigations at the Competition Commission will be retained.' Further independent scrutiny of decisions will still be available through the Competition Appeal Tribunal (CAT) and the courts.

When it comes into being, the CMA's credibility will depend on its ability to

pick the right cases and win them. As Kim says, 'The CMA should be bold and ambitious, but at the same time it will be a challenge to get the standard of investigations as high as they need to be to withstand the appeals that are inevitable.' Kim believes that the biggest challenge facing the CMA is finding enough skilled staff to handle the cases it takes on. 'All the regulators are looking for staff. Ten years ago there was a move towards deregulation and self-regulation, but now the pendulum has swung back to regulation,' she explains.

Andrea Appella, 21st Century Fox's deputy general counsel for Europe and Asia, hopes that the CMA will continue to cooperate with other international antitrust agencies, achieving 'consistency of approach with the EU and other foreign competition agencies'. Appella continues: 'this is particularly important to promote consistency in best practices and reduce unnecessary burdens and costs for international companies that are involved in multi-jurisdictional inquiries and mergers.'

Appella, who is also Co-Chair of the IBA's Antitrust Committee, is concerned that the UK government's proposals to move towards a judicial review style appeal system in the competition sector will create problems. 'Confidence in the CMA will be based on its decision-making process, which needs to be transparent, independent and evidence-based', he argues. 'Therefore it is essential that the ongoing government consultation on the competition appeals system does not undermine the incentives of the CMA to produce good decisions, which need to continue to withstand scrutiny on their full merits and not just under the judicial review standard of fairness and reasonableness.'

Chris Crowe is a freelance journalist and can be contacted at chris@crowemedia.co.uk

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UAE business lawyers attend inaugural event in Dubai



From left to right: Event co-chairs Sadiq Jafar, Hoda Barakat and Richard Briggs.

On 4–5 March 2014, the IBA Legal Practice Division (LPD) Initiative for Women Business Lawyers in the Middle East successfully hosted its inaugural programme aimed at lawyers in commercial legal practice. The event which took place in Dubai, was a direct response to research undertaken by the IBA in the UAE, Kuwait and Jordan in 2013, and was held in collaboration with the International Chamber of Commerce United Arab Emirates (ICC-UAE).

The two-day programme entitled ‘Working in government, private sector or private practice – challenges and opportunities for legal professionals’, was developed with the support of the IBA’s Law Firm Management Committee, Anti-Corruption Committee and Arab Regional Forum.

Over 100 UAE practitioners gathered at the Dusit Thani Dubai to debate and share knowledge on the development and maintenance of an international commercial legal practice. A series of high-level speakers touched on vital topics, such as how to shape your legal career, while looking at the different possible career routes, practice areas, specialisations and how to transition into a different route.

Speakers also discussed methods of knowledge management, approaches to client interaction, allocation of compensation, degrees of responsibility and autonomy, strategies for business development and anti-corruption compliance. The IBA Law Firm Management Committee presented a much acclaimed session on effective law firm management. Delegates were very engaged and lively audience participation ensured discussions were always relevant and touched on important issues.

The IBA looks forward to develop this Initiative further and organise similar events in other jurisdictions.

Scholarships available for the 2014 Annual Conference in Tokyo

This year various sections and committees of the IBA Legal Practice Division are once again offering scholarships to young lawyers who wish to participate in the IBA Annual Conference, but who may have financial difficulties in doing so. Scholarships include free registration to the 2014 IBA Annual Conference in Tokyo, a contribution towards travel costs to the conference, and much more.

Details of how to apply can be found at tinyurl.com/Scholarships-Tokyo-2014.

‘Beatrice Mtetwa and the Rule of Law’ film to be distributed across Africa

The recently released documentary ‘Beatrice Mtetwa and the Rule of Law’ is to be sent free of charge to bar associations, law societies, law firms, non-governmental organisations, schools and other constituencies across Africa, with the aim of furthering discussion about the rule of law. Through a collaborative project with independent filmmaker Lorie Conway, the IBA expects thousands of copies of the DVD to reach the continent in March. The IBA presented the first UK screening of the film in 2013, and also previewed it at its Annual Conference last year.



IN MEMORIAM

Richard E Carter, 1935–2014

Former executive director of the American Law Institute-American Bar Association, Richard E Carter, died at his home in Philadelphia on 27 January. Before his retirement in 2005 he was head of the ABA’s CLE program.

Dick Carter served the IBA as Chair of the Legal Education and Professional Development Committee and as member of the former Council of SGP.

Ukraine: breaches of international law as crisis continues

SCOTT APPLETON AND VICTORIA IVANOVA

The referendum held by the people of Crimea on March 16 may have seen the local population vote to join Russia, but it provides no justification for the annexation of the province under international law, according to leading experts.

‘Under Article 2 of the UN Charter the forceful acquisition of territory is illegal. This is clearly what happened in relation to Crimea. It doesn’t matter what the result of the so-called referendum was, or what the will of the Crimean people may have been. Russia used force against the territorial integrity of Ukraine. That cannot be retrospectively legitimised,’ says Robert Volterra, an expert in public international law at London-based Volterra Fietta.

Crimea had been part of the Soviet Union, first as part of the RSFSR (Russian Soviet Federative Socialist Republic), until it was ceded to the then Ukrainian Soviet Socialist Republic in 1954. With the collapse of the Soviet Union, the 1991 Alma Ata Declaration affirmed Crimea as part of independent Ukraine.

‘All of this was an internal matter and apparently done according to the prevailing Soviet law, so there is no question of illegality at an international level. On multiple levels, Russia has now transgressed international law and its only pretext for annexing Crimea is based on the recognition of a referendum which has no legitimacy in international law,’ adds Volterra.

Following the collapse of the Soviet Union, Ukraine’s borders were further guaranteed by the 1994 Budapest Memorandum, signed by Russia, in exchange for giving up its nuclear arsenal. In 2010, Russia also negotiated with the Ukraine government a renewal of a 1997 agreement enabling Russia to retain a military presence and its Black Sea Fleet base in Crimea.

‘The moment Russian troops began moving in force out of their bases contrary to their 1997 Treaty with Ukraine they were committing an act of aggression under international law and under the UN definition of aggression,’ agrees Malcolm Shaw QC, Senior Fellow at the Lauterpacht Centre for International Law, Cambridge University.

The IBA has condemned Russia’s incursion into Ukraine as a violation of the UN Charter and called for an independent international investigation

into the matter. IBA Executive Director Mark Ellis said, ‘Ukraine is a sovereign state; Russia, as a UN Member State, is bound by the UN Charter’s prohibition on the use of force against it. The prohibition against force has only three exceptions: when authorised by the UN Security Council under Chapter VII; when there is consent from the territorial state; and when it is in self-defence. The first two exceptions do not apply in this case, as the Security Council has not issued a Chapter VII resolution authorising Russia to use force, and Ukraine has not consented to Russia’s military intervention. The third exception of self-defence applies only in

‘On multiple levels, Russia has now transgressed international law’

Robert Volterra

Public international law expert at
London-based Volterra Fietta.

response to an armed attack. Ukraine has not perpetrated an armed attack upon Russia and accordingly Russia cannot employ the self-defence exception.’

Shaw adds: ‘Crimea was part of Ukraine when Russian troops took to the streets, under international law it remains a part of Ukraine. It is not credible for President Putin to claim that the region’s ethnic Russians were facing an imminent and overwhelming danger, or that the former Ukraine President Viktor Yanukovich requested Russian intervention at the appropriate time – by the time of his appeal, it appears, he [Yanukovich] had deserted his office, left the country and the Ukrainian Parliament had already sworn in a new interim Government and President.’

In addition, experts argue, the Crimean Parliament simply did not have the authority to unilaterally decide its own destiny. Under the Ukraine Constitution it is possible for a region to seek self-determination, but only through a national referendum.

Ukraine may have clear rights under international law, but asserting them is another matter. Its Government has filed a claim at the European Court of Human Rights in Strasbourg, but the options beyond this are limited. Russia does not recognise the jurisdiction of the

International Court of Justice, while its veto, as a Permanent Member of the UN Security Council, means little chance of formal UN sanctions.

Serious civil unrest in Ukraine was sparked by the government’s decision to halt negotiations with the EU and to not sign an Association Agreement during the Third Eastern Partnership Summit in Vilnius in November, but quickly adopted a much wider agenda. An attempt to introduce legislation to curb civil liberties served to illustrate the extent of breakdown in the rule of law in Ukraine, which is central to the current crisis.

In January Ukraine’s parliament passed a series of laws significantly curtailing civil liberties – criminalising peaceful protests – as well as creating highly oppressive procedures for media and NGOs receiving foreign funding.

Mark Ellis says: ‘Ukraine is a party to all core human rights treaties, including the International Covenant on Civil and Political Rights, which enshrines fundamental freedoms such as freedom of expression and assembly. It is also a member of the European Convention on Human Rights, which provides additional robust protection of these rights and is directly applicable in domestic legislation by virtue of the Ukrainian Constitution. The introduction of anti-protest laws was clearly designed to chill the protest movement in Ukraine. Ultimately, the right to protest is a fundamental freedom that must be protected in a democratic society which adheres to the rule of law.’

At the end of January, Ukraine’s Parliament repealed most of the laws passed earlier in January, but then effectively voted four of them back in.

IBA President Michael Reynolds said: ‘The IBA welcomes the government’s decision to repeal some of the recently-adopted legislation... However, we urge the Ukrainian Government to abolish these laws in their entirety, as they represent a regressive step for a state committed to democracy and the rule of law.’

Lawyer and human rights activist, Oleksandra Dvoretzka says the wider crisis in Ukraine that triggered the unrest is fundamentally ‘about a major split in the population’s commitments, between those who don’t want to come to terms with the lack of accountability on all levels of power, and those who have conveniently adapted themselves to the current power constellation and its corrupt, feudalistic logic’

Human Rights Award 2014 – who would you nominate?



Nominations are open for the IBA's Human Rights Award 2014, which will be presented at the Annual Conference in Tokyo 19–24 October 2014.

Each year, the IBA presents an award to a legal practitioner who has made an outstanding contribution to the promotion, protection and advancement of the human rights, particularly with respect to the right to live in a fair and just society under the rule of law.

Previous winners of the esteemed award include: Somalian Constitutional Law Professor Abukar Hassan Ahmed (2013), presented with the Award for his dedication to the fight for human rights and the rule of law in Somalia; Iranian lawyer Abdolfattah Soltani (2012), presented with the Award for his courage and commitment to the rule of law and human rights in Iran, enduring long-term prison sentences, harassment, and intimidation for providing pro-bono legal counsel to those in need; Colombian lawyer, Ivan Velasquez Gomez (2011), presented with the Award for his commitment to human rights and justice and his work on parliamentary transparency and organised crime; and UK lawyer Clive Stafford Smith (2010), presented with the Award for his commitment to bringing legal rights to the most vulnerable and to those who cannot afford representation, and for his work defending individuals on death row, ensuring due process and justice for those wrongly convicted.

The closing date for nominations is 1 May 2014. More information on how to apply is available on the IBA website: tinyurl.com/IBAHumanRightsAward2014.

Myanmar's legal profession moves to establish national bar association

Myanmar's legal profession has taken a significant step towards establishing an independent, representative national bar association by forming an inclusive interim committee to steer its creation. This measure follows a legal seminar recently held in Nay Pyi Taw, Myanmar, organised by the IBAHRI and hosted by the Parliamentary Committee on Rule of Law and Tranquillity. Lawyers from across 12 of Myanmar's 15 administrative divisions attended the three-day event.

The seminar took place on 13–15 February at the Royal Kumudra Hotel, Nay Pyi Taw, Myanmar, and included representatives from international organisations and civil society. Daw Aung San Suu Kyi delivered a keynote address on the first day of the event, followed by IBA President Michael Reynolds. He said 'The IBAHRI seminar is the first time that so many lawyers in Myanmar have assembled to learn about the role of a bar association and to discuss the development of the country's legal profession. One delegate remarked "we have been waiting 30 years for this"'. The IBA President concludes that 'while many challenges lie ahead, Myanmar's lawyers have taken the first important steps to establish an independent representative bar association and we will fully support their endeavours.'

On the second day of the event, international and regional speakers addressed a plenary session entitled 'Bar Association's Best Practices: An International and Regional Approach'. Speakers included: Mark Ellis, IBA Executive Director; Lucy Scott-Moncrieff, Immediate Past-President of the Law Society of England and Wales; Lim Chee Wee, Immediate Past-President of the Malaysian Bar Association; Margery Nicoll, Deputy Secretary-General and Director of the Law Council of Australia International Division; Colin Wright, Council Member of the Hong Kong Bar Association; and Shirley Pouget, IBAHRI Senior Programme Lawyer.

The third and final day of the event comprised breakout sessions led by national and international facilitators, and summarised by Robert Pé, a partner at law firm Orrick. Eight groups of 16–20 delegates formed to discuss issues around independence, governance, objectives, ethics, and bar associations' codes of conduct.

Commenting on the next steps for the establishment of a national bar association, Mark Ellis said: 'The success and legitimacy of the process to establish an independent national bar for Myanmar depends on the endorsement of Myanmar's legal profession as a whole. The inclusiveness of all legal practitioners, networks and groups in Myanmar is of paramount importance and we urge those present at the seminar to engage in consultation with colleagues at their respective bar associations, lawyer networks, groups and communities on this important issue.' He concluded: 'To assist the Myanmar legal profession, the IBA will seek engagement with all relevant stakeholders, including the Myanmar Government and Parliament, and notably the Parliamentary Committee on Rule of Law and Tranquillity. We place our expertise in developing bar associations at Myanmar's legal profession's disposal.'



IBA President Michael Reynolds; leader of Burma's National League for Democracy Aung San Suu Kyi; and IBA Executive Director Mark Ellis at the IBAHRI-hosted legal seminar in Myanmar, February 2014

Darfur: international community must not ignore 'terrible' atrocities

REBECCA LOWE

Violence and lawlessness are worsening by the day in Darfur, Sudan, and the international community must do more to help bring peace to the region, the Secretary-General of the Darfur Bar Association (DBA) has told *Global Insight*. Atrocities in Darfur continue to escalate. The Janjaweed militia and army are committing human rights abuses with impunity, according to El-Sadig Ali Hassan, including murder, kidnapping and rape. On 10 March, UN Secretary-General Ban Ki-moon said he was deeply concerned about the increase in violence, which has displaced up to 100,000 people since the end of February.

'The situation is getting worse and worse,' Hassan says. 'People are dying at the hands of the militia and the economic situation is deteriorating. The government talks about the peace process, but the Janjaweed continues to work with the government, committing terrible crimes against innocent civilians.'

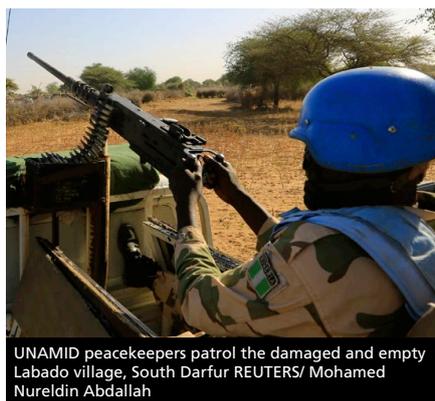
The Sudanese Government publicly denies it supports the Janjaweed, but there is substantial evidence it has armed the group and coordinated joint attacks. The conflict – which began in 2003 as an insurgency against the government for perceived discrimination against non-Arab groups – has been further complicated since the 2011 secession of South Sudan by a surge of hostility between tribes due to competition over land and resources.

President Omar al-Bashir is wanted by the International Criminal Court (ICC) for crimes against humanity, war crimes and genocide, but remains at large. Arrest warrants are also outstanding for Sudanese ministers Ahmad Harun and Abdel Raheem Muhammad Hussein, and Janjaweed militia leader Ali Kushayb.

Rebel leader Abdallah Banda Abakaer Nourain, who faces war crimes charges, voluntarily surrendered to the ICC in 2010 and is due to go on trial in May. Despite this, Hassan is sceptical the Court can make a difference in the region. 'Nourain is not a significant case,' he says. 'This process has been ongoing for three years, but nothing has

happened. Many people believe it's just propaganda. The people need justice, but justice is not being implemented.'

Sternford Moyo, Senior Partner and Chairman of Scanlen & Holderness law firm, based in Zimbabwe, and IBAHRI Co-Chair, agrees the international community must do more. However, the lack of action is not the fault of the ICC, he says, but those who prevent it from doing its job. 'The accountability process started by the bold action of the Prosecutor generated irrelevant controversy started by members of the African Union (AU) regarding whether or not the Court was targeting Africans,' he tells *Global Insight*. 'Urgent action is required both by the UN and the AU to stop all forms of conflict and restore normalcy in Darfur.'



UNAMID peacekeepers patrol the damaged and empty Labado village, South Darfur REUTERS/ Mohamed Nureldin Abdallah

All eight cases on the ICC's docket involve African states, four of which were referred by the states themselves, two by the UN Security Council and two by the Prosecutor. The AU – 34 members of which are signed up to the Court – has accused the ICC of discrimination against the continent and urged the Security Council to stop issuing proceedings against incumbent presidents. The trial against Kenyan President Uhuru Kenyatta and Deputy President William Ruto is currently underway.

While voicing frustration with the ICC, Hassan is dismissive of the AU's criticism. Many governments oppose the Court, he says, because they are concerned it may one day turn on them. 'Many African rulers are not democratic and have come to power

through force. If they accept the charges against Bashir and Kenyatta, they are worried the process will come back to them.'

Over the past year, Hassan's office has provided legal aid for more than 1,000 people, many of whom have been placed indefinitely in pre-trial detention. Nearly half were arrested in the September 2013 demonstrations, when thousands took to the streets to protest against soaring petrol prices. Human rights groups claim around 200 people were killed, while the government puts the figure closer to 70.

With the ICC at an impasse, Hassan urges the international community to act. Bashir is 'not afraid' of Sudanese citizens, he says, but pays attention to international NGOs. 'If he hears that these NGOs know about the detainees

'Urgent action is required both by the UN and the AU to stop all forms of conflict and restore normalcy in Darfur'

Sternford Moyo
Senior Partner and Chairman of
Scanlen & Holderness, Zimbabwe;
IBAHRI Co-Chair

in prison, they will treat them better, because they suspect delegates will come to Sudan to see them.'

Sudan must urgently undergo numerous legal reforms, according to the DBA leader. Laws restricting the rights of women, non-Arabs and freedom of speech must be revised, while displaced people, who currently enjoy no protection in court, must be afforded legal rights.

Ultimately, however, such laws will mean nothing without implementation, he says – which would involve fundamental judicial and legislative reform. 'Bashir says we need freedom and to let people have their rights, but that is just talk. If people start talking about their rights, the security forces and police arrest them.'

Egypt: Separating Law and Politics



The IBAHRI has published an investigative report, calling on the future Egyptian government to take action to promote the independence of the judiciary and prosecution services in Egypt. The 85-page report, *Separating Law and Politics: Challenges to the Independence of Judges and Prosecutors in Egypt*, found that although judicial independence is constitutionally protected, in practice, the executive is given wide powers over judges, providing scope for abuse. The report also highlights the country's selective prosecutions and calls for meaningful and peaceful transitional justice process that guarantees independence and impartiality.

Nonetheless, the report recognises that new opportunities lie ahead. 'The 2014 Constitution is a significant improvement on its 2012 predecessor and represents a fresh start for Egypt' says Baroness Helena Kennedy QC, IBAHRI Co-Chair. 'The IBAHRI strongly encourages the new Egyptian government to entrench standards protecting the independence of the judiciary and the prosecution, in order to protect the rule of law today and for generations to come.'

Separating Law and Politics is based on the findings of an IBAHRI fact-finding mission to Cairo in June 2013, and subsequent remote investigations held between August and November 2013. In order to strengthen the rule of law,

specific recommendations to the future government are made in the report, which, according to IBAHRI Co-Chair Sternford Moyo, come at a critical time: 'Egypt finds itself at another political crossroads, and the upcoming parliamentary and presidential elections present a valuable opportunity for the future government to promote and protect the independence of the judicial and prosecutorial services in Egypt.'

On 10 February 2014, the IBAHRI launched the report at a high-level panel discussion, held at The Law Society of England and Wales. At a time when Egypt's two last presidents are on trial, and amid calls for intervention by the ICC, the discussion addressed the key challenges for independent trials in Egypt. Moderated by Jonathan Rugman, Foreign Affairs Correspondent for *Channel 4 News*, speakers included Amal Alamuddin, a UK barrister specialising in international law and human rights, and the mission's rapporteur; and Nasser Amin, Executive Director of the Arab Center for the Independence of the Judiciary and the Legal Profession, an NGO based in Cairo, Egypt.

[Download *Separating Law and Politics* at tinyurl.com/IBAHRI-NR-Egypt.](http://tinyurl.com/IBAHRI-NR-Egypt)

[A short film highlighting some of the report's findings and selected recommendations can be viewed at tinyurl.com/IBAHRI-Film-Egypt2014.](http://tinyurl.com/IBAHRI-Film-Egypt2014)

IBAHRI backs call for UN inquiry relating to Sri Lanka

The IBAHRI has urged the UN Human Rights Council (UNHRC) to establish an independent and international inquiry into alleged war crimes and past violations of human rights law in Sri Lanka, as called for by the UN High Commissioner for Human Rights, Navi Pillay, in a recently published report.

'Since the end of the conflict between the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam, there has been a systematic dismantling of checks and balances on executive power' says IBAHRI Co-Chair Baroness Helena Kennedy QC. 'In the absence of an independent judiciary, the IBAHRI has noted on multiple occasions the inability of the Sri Lankan legal system to provide redress for alleged human rights violations and war crimes'.

The UNHRC Report includes recommendations to the Sri Lankan Government and to the UNHRC, ahead of its 25th Session, 3-28 March 2014, in Geneva, where it is due to consider a resolution on Sri Lanka. Baroness Kennedy adds '[The IBAHRI] strongly urges the UN Human Rights Council, to adopt these recommendations in the forthcoming resolution.'

The IBAHRI, in collaboration with the International Commission of Jurists (ICJ), produced a briefing note on key points regarding the incapacity of Sri Lanka's domestic justice system to provide redress for war crimes and human rights violations, and the need to establish international accountability. IBA Executive Director Mark Ellis comments 'It is noted with immense regret that

there has not been a single successful prosecution for the numerous attacks against minorities, journalists and human rights defenders in Sri Lanka in relation to the country's civil war.' He adds 'For there to be sustainable peace in Sri Lanka, it is essential to hold proper investigations and prosecutions into the alleged war crimes and human rights violations of the past committed by both sides, as well as to establish an independent and effective justice system that properly protects against, and provides reparation for any future violations. We are hopeful that the UNHRC debate will take the first step in establishing accountability.'

[Download the IBAHRI/ICJ briefing note in Arabic, English, French and Spanish at tinyurl.com/IBAHRI-ICJ-SriLanka-2014.](http://tinyurl.com/IBAHRI-ICJ-SriLanka-2014)

Venezuela: protests heighten concern over rule of law

RUTH GREEN

As the situation in Ukraine grows increasingly complex by the day, drawing the world's attention, thousands of miles away on the other side of the Atlantic, Venezuela endures its worst protests in more than a decade.

What started as a mere isolated, student-led protest in February has evolved into a widespread discontent, highlighting the government's failure to provide adequate security measures, basic food supplies and its mishandling of the country's finances. The protests have drawn comparisons with the unrest that ravaged the country in 2002 and are the most serious challenge yet to the government of Nicolás Maduro, who was elected president in April last year following the death of Hugo Chávez, after 14 years in office.

Although similar to earlier demonstrations, former IBA President Fernando Peláez-Pier, a partner at Hoet Peláez Castillo & Duque in Caracas, says the scale of unrest has taken the country and the government by surprise. 'We have not seen governmental repression quite like this in recent years: based on different reports, in 17 days of protests there have been 18 deaths and 1,044 arrests,' he says.

Dozens of demonstrators and activists have been arrested, including Leopoldo López, leader of opposition party Popular Will (*Voluntad Popular*). After the government issued a warrant for his arrest, López handed himself over to the National Guard on 18 February. Rather than being seen as an admission of guilt, López's move appears to have galvanised the protest movement.

'The judicial decree against Leopoldo López and his decision to turn himself in has provoked a reaction amongst students and society that in my opinion the government never anticipated and what's more surprising still is that the brutal repression has still not been brought to a halt,' adds Peláez-Pier.

Following increasingly strict controls over the country's media and criticism that the government is withholding much-needed foreign currency to buy paper, a large number of newspapers have had no choice but to go out of business. Instead, many journalists have taken to social media to vent their grievances and the popular Twitter hashtag #sinpapelnohayperiodico ('without paper there are no newspapers') has gone viral.

However, although social networking sites have given the media a voice, some warn that it has had a detrimental effect on the protest movement.

'Social media has filled the vacuum of the private sector media in Venezuela, which played a major role in the 2002 coup against Chávez,' notes Dr Julia Buxton, a Venezuelan expert at the School of Public Policy at the Central European University.

'The use of social media in Venezuela may have had the converse effect of

without executive interference and is perhaps one of the least independent in the world.'

Wilks highlights the trial of Judge María Afiuni as a case in point. 'It took almost three years for her trial to begin... it was annulled because the prosecution "interrupted" the process by failing to show up at the evidentiary hearing,' he says.

Peláez-Pier agrees that one of the few certainties is that López is unlikely to



Anti-government protesters clash with riot police during a protest against Nicolás Maduro's government in Caracas, 20 March 2014

'In Venezuela today there is no such thing as rule of law and in turn there is no separation of powers, nor independence of the judiciary'

Fernando Peláez-Pier

Partner, Hoet Peláez Castillo & Duque, Caracas; former IBA President

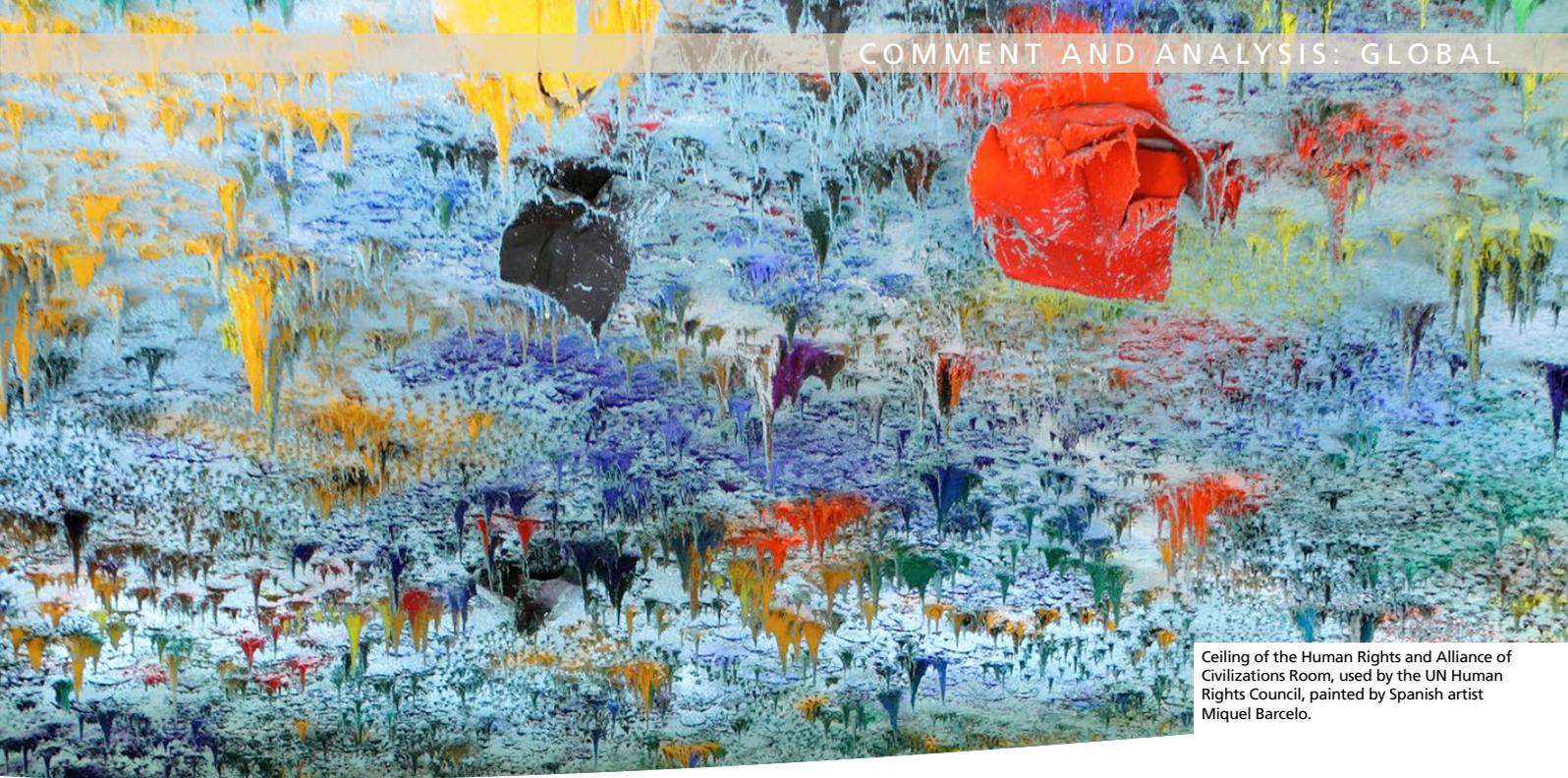
mitigating against coverage in the international media as many journalists have been stung by reproducing false images circulated by the opposition. When the protests were at their height in the run-up to and including the 12 February demonstration in Caracas, it became apparent that fabricated images were being tweeted,' she adds.

As for López's forthcoming trial, the track record of the country's judicial system does not bode well for the opposition leader, says Alex Wilks, Senior Programme Lawyer at the IBAHRI. 'Venezuelan criminal procedure is notoriously unpredictable and particularly in high-profile political cases is incapable of providing due process according to national and international standards,' he says. 'Furthermore, the judiciary is structurally unable to act

receive a fair trial. 'In Venezuela today there is no such thing as rule of law and in turn there is no separation of powers, nor independence of the judiciary. As a result, the trial of Leopoldo Lopez will conform to what the executive decrees independently from what is established by the legal proceedings.

Wilks says the IBAHRI will be calling on the Venezuelan government to respect its international obligations to guarantee judicial independence and the rule of law. 'As a current member of the UN Human Rights Council, it needs to show that it is serious about respecting the UN system and the treaties that it has signed.'

For full details of the IBAHRI's Venezuela coverage, see tinyurl.com/IBAHRI/Venezuela.



Ceiling of the Human Rights and Alliance of Civilizations Room, used by the UN Human Rights Council, painted by Spanish artist Miquel Barcelo.

The United Nations' human rights problem

The UN Human Rights Council is responsible for promoting human rights globally. Yet, recent appointees include countries with much work to do themselves to address poor human rights records.

JOEL BRINKLEY

The United Nations Human Rights Council (the 'Council') is 'responsible for the promotion and protection of all human rights around the globe'. Why then are China, Russia and Cuba among the council's most recent appointees? Currently Russia and China are protecting Bashar al-Assad, Syria's President, whose genocidal behaviour toward his own people has been responsible for more than 100,000 deaths – while actively working to ensure that more than 200,000 of his people are unable to receive humanitarian assistance.

And consider the treatment of those such as Mikhail Khodorkovsky and the protest punk-rock group Pussy Riot. The courts have imposed

harsh punishments on those bold enough to criticise the ruling regime in Russia, while China routinely jails human-rights advocates. Cuba, meanwhile, is a longtime dictatorship that does not allow freedom of the press or assembly. And, not long ago, the Castro government defended Assad, saying 'terrorists', not Assad forces, were responsible for the Syrian violence.

How can a human-rights body function with these and several other malefactors among its members? Among the other members are Venezuela, whose police shot and killed three anti-government protestors in February; and Pakistan, which has come under pressure for its inability to control its border with Afghanistan

and for failing to restrict the activities of Taliban leaders declared by the UN as terrorists. Add to those Vietnam, Congo and Algeria.

As UN Watch, a Geneva-based human rights group put it: 'By electing massive abusers of human rights to the very body charged with protecting them, the UN is about to drop more rotten ingredients into the soup. We should not be surprised with the results,' adding that the new members 'should be in the dock of the accused, not sitting on high as prosecutor and judge'.

Hans Corell, who was the UN Under Secretary-General for Legal Affairs, as well as Legal Counsel, from 1994 to 2004, says he believes a solution is possible – but a long way off. 'This is a dilemma that can be achieved in only one way,' he says. 'The principles of the rule of law, of which human rights is a fundamental component, must be applied both nationally and internationally. It will take time to achieve this goal. But there is no other way ahead if [...the goal is to...] create a world where people can live in dignity with their human rights protected.'

Some may view that as a rather panglossian solution. But Corell also offers a more down-to-earth idea: 'What the General Assembly can do is, of course, see to it that among the Council's 47 members are only states with a reasonable human rights record. But then we are again facing the core problem.' Major human rights offenders, like those already on the Council, will strive to protect their brethren.

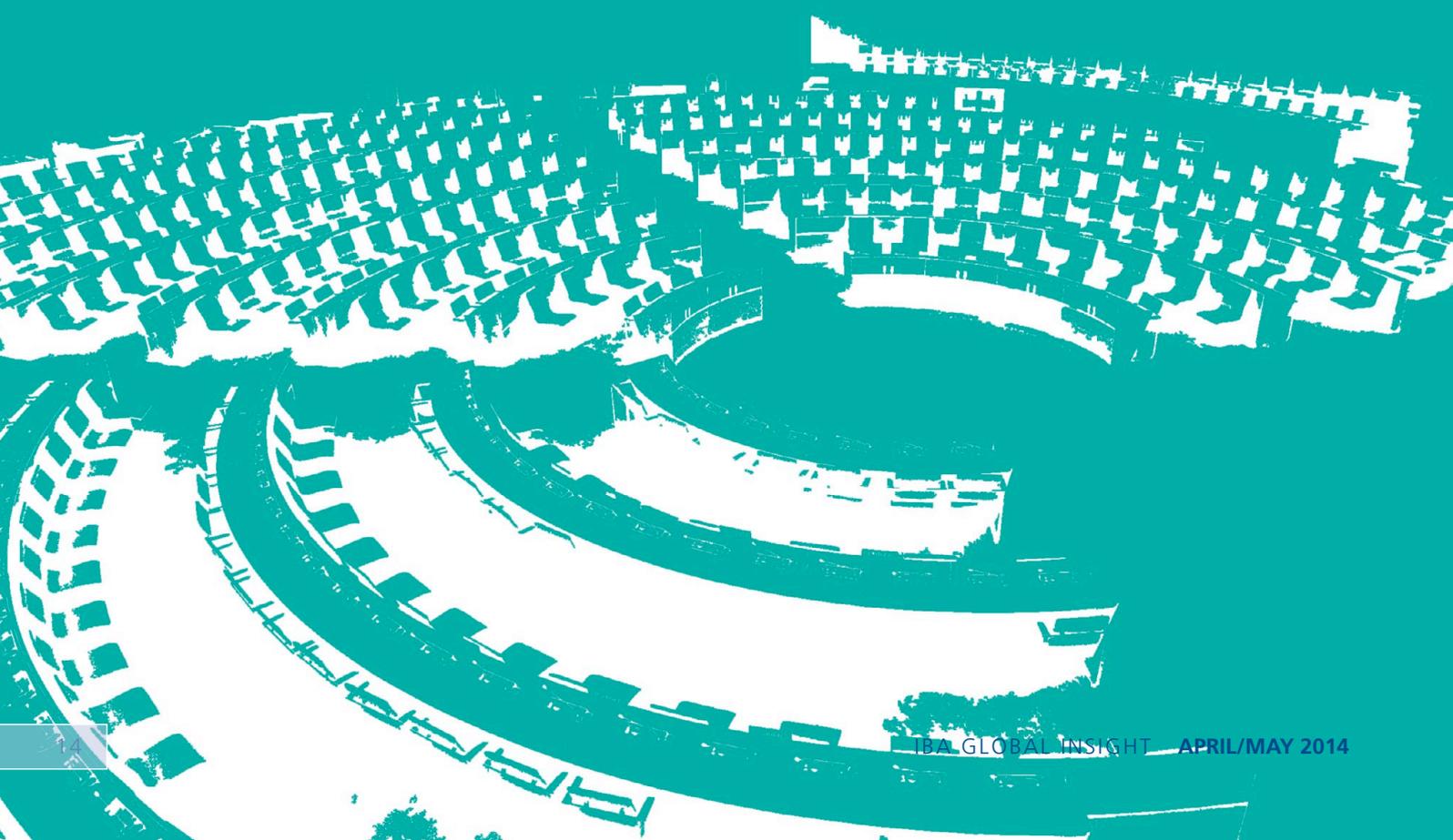
One option might be to appoint a General

Assembly subcommittee whose members must have strong human rights records. This committee would review and approve new appointees to the Human Rights Committee. After all, Corell says, 'in order for a state to criticise others with legitimacy, that state must pay attention to its own observance of human rights.'

Fundamental flaw

The Human Rights Council stands as a stark illustration of a fundamental flaw in the United Nations. Every state is an equal member, from states that cherish democracy and human rights, to threatening, murderous and kleptocratic states that see their citizens as chattel.

What better proof could there be than Iran's membership on the United Nations Conference on Disarmament – Iran, the nation believed to be working secretly to create nuclear weapons. Last spring, Iran served as the disarmament conference's president, causing Erin Pelton, spokesman for US mission to the UN, to complain that 'Iran's upcoming rotation as president of the Conference on Disarmament is unfortunate and highly inappropriate. The United States continues to believe that countries that are under Chapter VII sanctions for weapons proliferation or massive human-rights abuses should be barred from any formal or ceremonial positions in UN bodies.' (The UN describes Chapter VII sanctions as: 'Action with respect to threats to the peace, breaches of the peace, and acts of aggression.')



And Canada's ministry of foreign affairs said simply: 'This makes a mockery of disarmament issues and the world's sincere desire to make progress.' But Iran continued to serve anyway.

'What the General Assembly can do is, of course, see to it that among the Council's 47 members are only states with a reasonable human rights record'

Hans Corell

Former UN Under Secretary-General for Legal Affairs and Vice-Chair, IBA Human Rights Institute

The Human Rights Council problem extends beyond the nations appointed to be members. The Council also hires representatives who play to the prejudices of some of its members – like Richard Falk, an American who is the Council's Special Rapporteur on Palestinian human rights. Falk has been associated with the controversial 9/11 Truth movement, which calls for an investigation into what caused the attacks and the role they suggest the US administration itself might have played to provide an excuse to attack Middle Eastern nations.

And last year Falk caused a storm of criticism when he wrote on his personal blog following the Boston Marathon bombing that the United States had provoked the attack as it is 'a menace to the world and to itself'. He added: 'Should we not all be meditating on W.H. Auden's haunting line: "Those to whom evil is done/do evil in return"?' After all, 'how many canaries will have to die before we awaken from our geopolitical fantasy of global domination?'

The UN Secretary-General, Ban Ki-moon, expressed his outrage, issuing a statement that said: 'The Secretary-General rejects Mr Falk's comments. The Secretary-General immediately condemned the Boston Marathon bombing, and he strongly believes that nothing can justify such an attack.'

Ban was also careful to point out that Falk 'is appointed by the member states of the Human Rights Council in Geneva, not by the Secretary-General.'

Falk is still on the job. And while he serves as the Council's Special Rapporteur on Palestinian human rights, there isn't one for Israel. The Council is seen as heavily biased against Israel. The February 2011 report of the UN's intergovernmental working group on the review

of the work and functioning of the Human Rights Council quoted the US in stating: 'Israel remained the only country singled out on the Council agenda and [the US] considered that as the Council's most egregious flaw.'

Revisiting past problems

The United Nations formed the Human Rights Council in early 2006. As the UN leadership chartered the new body, it scheduled its review for five years later.

Summarizing the review, the Chair-Rapporteur, Sihasak Phuangketkeow, wrote that 'the US recalled that it undertook this process with a view to improving the Council, with a number of proposals, and with an open mind to hear those of others. Yet, it was met with a process designed to be a race to the bottom' particularly 'with regard to the Council membership, the need to ensure greater scrutiny of the human rights record of countries that offer themselves for election to the Council.'

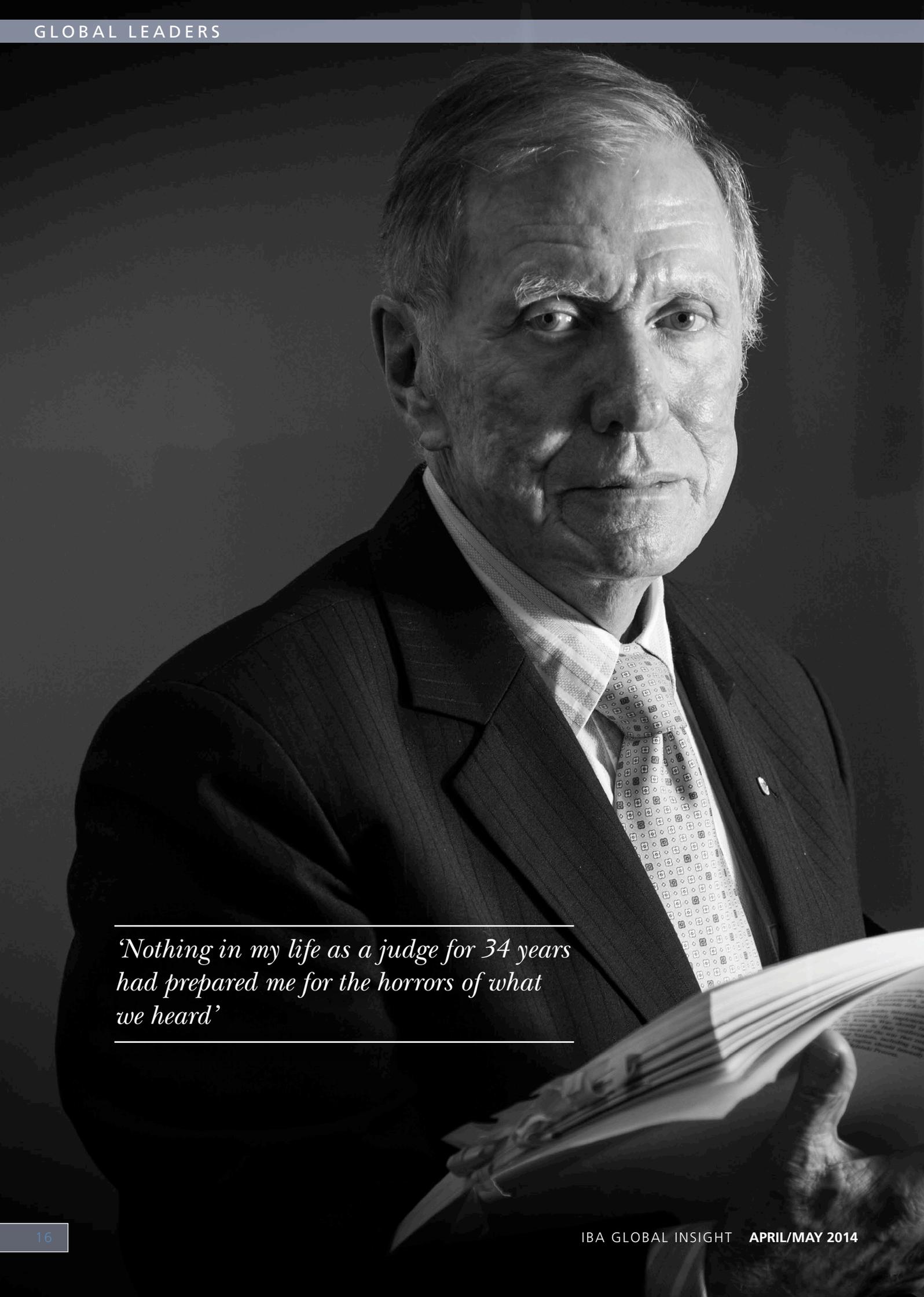
The review of the Council suffered from the same problem that afflicts everything the UN does. The Cuban delegation, for example, said it considered the Council to be 'in a better situation than in 2007, and the Council is a very energetic body with ability to act'. Views such as America's were in the minority.

The Human Rights Council came into being because the United Nations leadership and many member states deplored its predecessor, the Human Rights Commission. The UN disbanded it in 2005 after years of angry criticism – primarily over the composition of its membership. Too many human-rights offenders were elected to the Commission, among them China, Russia and Pakistan. The crowning blow came with the election of Sudan during the height of the Darfur ethnic-cleansing massacre ten years ago.

As Corell puts it, 'I was not very impressed when the idea about transforming the Commission into a Council came up. I foresaw that the Council would immediately be facing the same problem as the Commission for the simple reason that the dilemma rooted in the election of the members would be the same.'

Today, we see that you can dress up the Council with a new name, but the fundamental problems remain. ☒

Joel Brinkley is a Pulitzer Prize-winning former foreign correspondent for the New York Times. He can be contacted at joelgbrinkley@yahoo.com

A black and white portrait of an elderly man with short, light-colored hair, wearing a dark pinstriped suit jacket, a light-colored shirt, and a patterned tie. He is looking directly at the camera with a serious expression. He is holding a large stack of papers or a book in front of him, which is slightly out of focus. The background is dark and indistinct.

*'Nothing in my life as a judge for 34 years
had prepared me for the horrors of what
we heard'*

 GLOBAL LEADERS:

Michael Kirby

The IBA's first live webcast of 2014 featured the Hon. Michael Kirby, Chair of the UN Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea. In conversation with the BBC's Kirsty Lang, the former Australian High Court judge and IBAHRI Council member discusses the findings of the report and what steps can be taken to bring accountability for the 'unspeakable atrocities' allegedly perpetrated by the Pyongyang regime. He also gives his views on UNAIDs, the global 'war on drugs' and his long-term efforts for gay rights across the world.

Kirsty Lang: Let me start with the process of the inquiry. How do you investigate abuses of human rights in a country that won't let you in?

Michael Kirby: It wasn't all that difficult, actually. I'm often asked that by the media, as though North Korea can completely immunise itself from being investigated simply by not cooperating. That isn't the case in our own domestic jurisdictions and it can't be the case in respect of international human rights breaches. What we did was to go to the peripheries around North Korea. We had public hearings in Seoul, Tokyo, London and Washington DC, and we

had consultations elsewhere. It wasn't difficult to get evidence, it wasn't difficult to get experts. There are people who've spent their whole lives studying North Korea.

KL: And that form that you did it in, where people give evidence before a court, it's not always the way that it's done, is it?

MK: Correct. Commissions of inquiry in the past have followed more closely the civil law tradition, and things have been done on paper and by a less formal process. I suppose that my own background in the common law world, the

English-speaking legal system, led me to think that really wasn't suitable; particularly in the case of North Korea, because North Korea was not allowing us access [...].

North Korea has said that we were gullible, that we believed people who are mere propaganda agents for South Korea and the hostile forces, meaning mainly Japan and the US. We didn't believe that. We accept that the testimony was accurate, was honest; it was given by brave people who exposed themselves and their families in North Korea to some risks. They had the feeling that people did after the Holocaust; they wanted to explain what they'd been through, they felt an obligation to do this.

KL: But there must be a problem with this kind of inquiry in ensuring the credibility of those witnesses, because by the mere fact that they're outside of North Korea, they're critics of the regime, they're dissidents.

MK: That's a problem in any inquiry. I was a judge in Australia for 34 years and so I know the problems of credibility. In the old days, we used to say judges have a magical capacity of telling truth from falsehood. Well, science shows that that is not true; human beings can be duped. But we had some corroboration from science, because satellite images were made available to us of the prison camps. North Korea says there are



no political prison camps in their country and that human rights are just perfect, but we had the satellite images that corroborated the testimony.

Also, witnesses who came from different parts of Korea gave evidence about the same issue. Take, for example, the famine issue. Twenty-eight per cent of Korean newborn babies are stunted. That means their mothers have been malnourished whilst carrying them and they will suffer lifelong burdens

in their development. There was remarkable similarity in the type of evidence that was given.

KL: And to what extent did you check whether those witnesses were indeed from North Korea and were what they said they were?

MK: We had a wonderful secretariat. The UN comes in for a lot of bashing, but this was really good value for money. There were ten highly expert investigators. They had a protocol and they would go through a series of questions. The mandate from the Human Rights Council

'If you look at the Korean Peninsula at night, it's a shining, dazzling space in the south, and it's a shining, dazzling space in China, but then between them is this dark abyss of North Korea'

to us had a provision, saying: first, do no harm, so we had to be very careful that we were not needlessly exposing them or their families [...]. But our secretariat would check and check again with groups in South Korea. So we had a lot of information [...].

And there was an interesting phenomenon, actually, woven through the testimony. Every now and again a witness would say something that indicated they rather liked Kim Il-sung, the first of the Kim family. For me, it was a bit like South Africa under apartheid; I was always surprised that you would get black South Africans who would reject the notion that the whites were not South African. They would accept that they were part of one community, and they had to get it right and they had to correct things.

KL: Now, your Commission found that there was a complete denial of the right of freedom of thought, consciousness and religion. How does a state achieve that?

MK: They achieve it by total control. There are many countries that are autocratic and don't respect human rights, don't have the rule of law and so on, but this is a real, old-fashioned totalitarian type of regime. It's not content with controlling the body, the movements of people; it wants to get into their brains [...]. It's a control exerted by not permitting any access to the internet, to international news media, even to South Korean soap operas. People love those South Korean soap operas and there's a big market among young people for them, but it has to be very clandestine because it's a very

serious offence. People are not permitted to leave their village without a permit [...]. It's a very suspicious society.

KL: People are encouraged to denounce their neighbours, children to denounce their parents, the sort of thing we would have seen in East Germany, for instance, under communism.

MK: Yes. There's a very well-known young Korean who escaped from one of the political prison camps; he actually denounced his mother, and his mother was subsequently hanged in his presence in prison. He was born in prison, but he had no real close relationship with anyone, and it's only now on escape that he's claimed that he's learnt to show ordinary human emotions [...]. He escaped through the electrified wires, walking on the body, as an earth, of a co-prisoner – and he escaped into China and then to South Korea.

KL: You must have heard so many appalling pieces of evidence, but was there anything that really shocked you?

MK: Many ask us this, and I feel always a little guilty in picking something out because of the fact that nothing in my life as a judge for 34 years had prepared me for the horrors of what we heard. But one case was a case of parents, Mr and Mrs Yokota [...]. They had a daughter, Megumi, in Japan, and Megumi was sent to badminton practice. She was due to come home at 7:30pm; 7:30pm passed, 8pm, 9pm... They were ringing around, trying to find what had happened. Well, Megumi had been abducted. It was a state practice on the part of North Korea of abducting

MK: One of the ideas that Kim Il-sung introduced into North Korea was songbun: a matter of dividing society up into classifications. The notion was that, essentially, there were three classes. There were the members of the party, the people who had connections with the anti-colonial movement and so on; they were the 'reliables'. That was about 20–25 per cent of the population. Then there were the 'waivering' classes; they were people you couldn't quite trust. And then there were the 'hostile' classes, which were about 40 per cent. So you were born with a songbun, it



went onto your card, your identity records. It was very hard if you were in the waivering class, and almost impossible if you were in the hostile class, to get yourself up into the core class, which was extremely important for membership of the party, and for education and health rights, and, most importantly, for access to food.

KL: You've been quoted as saying: 'At the end of the Second World War so many people said, if only we had known the wrongs that were done in the countries of the hostile forces. Well, now the international community does know. This is time for action.' Now, NGOs have been writing about abuses in North Korea for many years. How do you feel that this report can achieve something that others have failed to do?

MK: A very interesting thing happened this week in Geneva when we formally presented to the Human Rights Council. Thirty-seven members expressed the view that the recommendation of the Commission should be followed and North Korea should be referred to the International Criminal Court (ICC). And that can only be done in one of two ways: if the country subscribes to the Rome Treaty which sets up the ICC, or if the Security Council refers the matter to the ICC. And so we recommended this should be done.

KL: But isn't it likely that China will veto any referral?

MK: That is certainly a possibility [...]. China said that they really do not agree with country-specific mandates. Well, I can understand

This is a real, old-fashioned totalitarian type of regime. It's not content with controlling the body, the movements of people; it wants to get into their brains'

people so they could be put to use. In Megumi's case, seemingly the use was that she would be able to teach modern Japanese idiom. Subsequently, she died in North Korea – but just last weekend arrangements were made for Mr and Mrs Yokota to meet Megumi's child in Mongolia. So if one good thing has come out of the inquiry, I believe it is that the Yokotas met Megumi's daughter.

KL: One of the things your report also found was discrimination rooted in the so-called 'songbun' system. Can you explain to us what that is and how it works?

that point of view, but once you've had the Human Rights Council setting up a commission and getting all this testimony, to then take a completely formalistic position...

KL: So you think China might be too embarrassed to block that?

MK: I don't know about embarrassment; I don't want to do psychoanalysis. I think what is important is that China is a great country, a most populous country. China is one of the greatest economies of the world. If you look at the Korean Peninsula at night, it's a shining, dazzling space in the south, and it's a shining, dazzling space in China, but then between them is this dark abyss of North Korea. And it really behoves China, such an important permanent member of the international community, to consider what should be done.



KL: Ok, let's suppose China does agree to refer your report to the ICC. North Korea is not going to give itself up to the Court, so what real impact can this indictment have?

MK: That hasn't really been played out. There are lots of steps in this jigsaw puzzle and I would think the first step is going to be some consultation by members of the Security Council. There is a procedure called the 'Arria' procedure, which involves not having a formal meeting of the Security Council, but having a meeting outside the chamber with those members that are willing and interested. And I would hope such a meeting should take place [...].

The Security Council has got quite a lot on their plate at the moment, but they've got to consider not just matters that are of great concern to the European-North American part of the world, but they've got to consider that there's a whole big world out there [...]. And what we have to do as an international community, if we're serious about international human rights, is face up to the necessity, when you get hard cases like this, that something has to be done.

KL: I know the IBA is working with the Korean Bar Association to address human rights concerns in the region and will be holding a showcase session

on the UN report at its Annual Conference in Tokyo in October, where you're going to be speaking. What more do you think the IBA and its members can do to highlight this issue, to bring about action and change?

MK: Well, I applaud the decision of the IBA to make this a major issue. I would think the IBA would already have made contact with the Japan Bar Association and lawyers throughout Japan. This is a very big issue in Japan. Japan is affronted, and rightly so, by what is actually a piratical act of seizing citizens of Japan, like Megumi, as an act of State.

So what can individuals do? Well, individuals can write to their bar associations. Members can write to their members of parliament. There are also the non-permanent members of the Security Council, including at the moment Australia, and I hope Australia will be taking this report very seriously. And in China, interestingly, following the publication of our report, there was a very large outbreak of blogging and tweeting on social networks.

My professor of international law when I was at law school taught that Talmud scholars said: it's not given to people in their lifetime to fix up every problem in the world, but neither are we released from the obligation to try. And I think that should be the IBA's message: that we can't fix up every problem in the world, but we can try.

KL: Thank you. I would like now to move on to some other issues. The issue of gay rights is very close to your heart, and I believe you were the first openly gay judge on the Australian Supreme Court. This is another issue that has been in the papers recently: a 2013 Russian law banning

'Sometimes so-called conservative, non-activist judges can become extremely activist when matters of corporate entitlements... come before them. It's all a matter of... how you'll label people'

the spreading of propaganda of non-traditional sexual relations amongst minors. What do you make of the outcry about this law, and is it right to pick on Russia given that so many other countries have laws discriminating against homosexuality?

MK: First of all, I think Britain has a particular responsibility here. The French abolished the laws against homosexuals in the middle of the French Revolution, in 1793. And therefore all

the legal systems that followed from the French system – the Netherlands, Indonesia, the French colonies in Africa, the Spanish and German systems – they didn't follow the criminalisation of homosexuality. It just was a lovely little gift

'It's not given to people in their lifetime to fix up every problem in the world, but neither are we released from the obligation to try. And I think that should be the IBA's message: that we can't fix up every problem in the world, but we can try'

from the UK to its colonies, and unfortunately it's still in place in 41 of the 54 countries of the Commonwealth of Nations [...].

It was good that this was sort of semi-suspended in Russia during the Winter Olympics, but now there are other fish to fry and it's still in place in the law. And I hope that worldwide we will see science and rationality prevail. A small proportion of people, probably about six per cent, are homosexual. Get over it. It's like having a big hatred against people who are left-handed.

KL: I've got a question from a member of the audience: Nicholas Smythe, in London. To what extent do you feel that the war on drugs has had any positive or useful effect on those most negatively affected by it, particularly those with substance abuse issues?

MK: There may be particular drugs and circumstances where you need particular legal responses, but we really need to get away from a punitive response and in the direction of a public health response to the issues of drugs – and particularly because injecting-drug use is a major vector for HIV. In Russia and parts of South Asia, the most prevalent way that HIV is spread is not by sexual activity, it's by injecting-drug use. If you criminalise it, you make it impossible to reach out.

In Australia and New Zealand, at the very beginning of the epidemic, we did a very brave thing: we introduced needle exchange. And the result is that the level of HIV in New Zealand is one per cent of the drug-using population; in Australia it's two per cent. In the US, I think it's about 33 per cent, and in Russia it's about 50 per cent.

KL: Now, I mentioned at the beginning that you're often described as a judicial activist. Are you proud of that description or do you dislike it? Is it accurate?

MK: I dislike it because it's an expression used by particular branches of the media to try to disempower and disrespect a particular person. It's true that during my service in the High Court I disagreed with my colleagues in a significant number of cases, but we agreed in most cases. And I think when you get to a highest court, you shouldn't be ashamed of disagreement; you should be ashamed if there were Tammany Hall type deals between the judges: you agree with me on this case and I'll agree with you on the next [...].

Also, I've found that sometimes so-called conservative, non-activist judges can become extremely activist when matters of corporate entitlements and other issues come before them. It's all a matter of horses for courses and deciding how you'll label people.

KL: Since your retirement from judicial service, you've been involved in a huge amount of work involving the UNAIDS Commission and so on. Of all the things that you have taken on, what would you say were the issues closest to your heart?

MK: Objectively, the North Korea Commission of Inquiry would be the most important. But at the moment I'm serving on a body set up by UNAIDS, which is the joint UN programme on the HIV epidemic. And it is addressing itself to a very interesting question, and that is: what lessons can we learn from the exceptional way in which the international community responded to the AIDS epidemic for public health more generally – for problems like obesity, malaria, tuberculosis?

KL: But wasn't that because of activism by the gay community who lobbied intensely to get politicians all over the world to wake up and notice how serious the issue of AIDS was?

MK: I agree, in the early days the gay communities were important, but HIV is overwhelmingly a non-gay issue. It affects heterosexual people in Africa, in the Caribbean, in Latin America, and therefore they were, in a sense, a beneficiary of people who thought: we're going to make a bit of trouble. And a bit of trouble sometimes is a good thing [...]. Everybody should speak up for human rights, not just for the familiar, but for the people of the world, in all their diversity. We should all speak up. ☒



This is an edited version of Michael Kirby's interview. Watch the full interview or read the full transcript at tinyurl.com/iba-kirby. App edition is available on iTunes and Windows 8.

Banking



on trust

More than five years on from the nadir of the financial crisis, evidence of pervasive wrongdoing across the banking industry continues to emerge. Billion-dollar fines and regulatory reform should usher in a new era of ethical conduct, but bankers are yet to revive trust in the sector. *Global Insight* assesses the huge challenges facing the world of finance.

REBECCA LOWE

This is the tip of the iceberg,' a leading white-collar crime lawyer, based in London, tells *Global Insight* when asked if all the banking abuses have now been flushed to the surface. 'A huge amount goes on that will never be the subject of criminal or regulatory enforcement. As a relatively informed taxpaying British citizen, I wonder how they have missed this. It's absolutely amazing.'

Consider what the tip of the iceberg has encompassed since the lowest point of the financial crisis in the autumn of 2008: Libor rigging; foreign exchange (FX) and

commodities manipulation; money laundering; mis-selling; foreclosure abuses; bribery; securities fraud; sanctions busting; Ponzi schemes; and more. It's safe to assume the body of the iceberg would be enough to sink even the most 'unsinkable' of ocean liners.

'Should people purely motivated by profit be having this level of influence on organisations at the heart of our economy? Or should we be looking for people who accept banking may be there for other reasons too?'

Margaret Cole
*General Counsel of PwC and former
 Director of Enforcement at the FSA*

It is exactly this suspicion of endemic wrongdoing, much still undiscovered, that continues to dog the financial services industry. Just as a new era of atonement is declared, the public airing of another scandal rocks the sector and bankers return shamefaced to the pillory once more. With average wages dropping and inequality rising, the public is looking to apportion blame and hold those responsible to account.

The public anger has ample justification. Bankers brought the global economy to its knees, after all, and survived relatively unscathed while the poorer members of society bore the costs. Yet the problem with such collective fury is that it masks the need for constructive debate. Demands for justice and revenge get conflated, and 'banker' becomes an obfuscating catch-all term for villain, gangster and rogue, the source of all society's ills.

Nevertheless, regaining trust is paramount for the proper functioning of the financial system. Surprisingly, however, given the time elapsed since the autumn of 2008, there remains a lack of agreement on the best way to do this. The vast fines hitting the industry are deserved, but are they a deterrent and who ultimately pays? Are regulators taking the right steps to prevent such widespread abuse recurring? And why have no

senior bankers been arrested and jailed?

Most importantly: is the industry prepared for a radical change of culture? 'Banks shouldn't be there just to make money for their investors because they have such a critical role in the functioning of society,' says Margaret Cole, PwC General Counsel and former Director of Enforcement at the Financial Services Authority (FSA: now split into the Financial Conduct Authority and Prudential Regulatory Authority). 'What we need to ask is: should people purely motivated by profit be having this level of influence on organisations at the heart of our economy? Or should we be looking for people who accept banking may be there for other reasons too?'

The power of money

Over the past six years, banks' legal costs have gone from minor irritation to a major stain on company accounts. Ten of the biggest banks paid nearly \$250bn in fines and litigation costs between 2008 and 2012, according to research by the London School of Economics; a sum equal to the GDP of Pakistan. Between 2010 and 2013, JPMorgan Chase & Co's litigation fund increased eight-fold, from \$3bn to \$23bn.

'The fines are having a huge impact,' says one City banking analyst, who declined to be named. 'Lloyds so far have reserved £10bn for PPI alone. That's a proportion of GDP; it's vast. We're seeing the same for mortgage suits, and people are very worried about potential FX suits. There are some whopper issues affecting banks' capital positions.'

The hope is that such punishments will deter further misconduct. Yet the people bearing the brunt are not those who misbehaved, but the shareholders and customers. 'Are these colossal regulatory fines the most effective way to deal with this?' asks Linklaters partner James Gardner, who represents Lehman Brothers in litigation arising out of the bank's collapse, as well as banks in relation to Libor, FX and commodities regulatory investigations. 'What they do is simply effect a fiscal confiscation of cash from shareholders to regulators and governments. And in the case of the UK state-owned banks, all we're doing is exporting UK taxpayer cash across the Atlantic.'

While Gardner may be accused of having a vested interest in reducing fines, those on the other side of the regulatory and enforcement divide tend to agree. 'The people who suffer are the investors, who are completely blameless, and the public, who are completely blameless,' says Ros Wright, former Director of the Serious Fraud Office (SFO). 'So it's not really a penalty.'

The UK's six-year statute of limitation is swiftly

approaching for claims resulting from the crisis and is likely to prompt a flurry of activity in the courts. Some sizeable cases are already lurking on the horizon. The Libyan Investment Authority's \$1bn claim against Goldman Sachs is pending at London's High Court [see box], while shareholders wishing to sue Lloyds TSB for its takeover of HBOS must spur into action before September. The collapse of Lehman Brothers in August 2008 is also likely to prove a popular trigger for lawsuits. Banks' litigation costs are unlikely to diminish any time soon.

Some cases are making banks particularly nervous. Guardian Care Homes' \$100m claim against Barclays, which goes to trial this April,

looks set to become a test-case for Libor-related claims [see box]. Should it prove successful, the result would be 'financial Armageddon', according to one financial advisor, potentially opening the floodgates to millions of buyers of Libor-based products.

Herbert Smith Freehills head of banking litigation, Damien Byrne Hill, who represents major banks, agrees that those genuinely damaged during the crisis deserve redress, but voices frustration at the 'waves of hangers on' jumping on the bandwagon of some of the mass litigation claims. 'I've seen it first-hand: people saying, well there are some swaps claims out there, so I must claim,' he says. 'Swap therefore claim. But there's a lot of stuff that is completely flaky.'

'Bad behaviour will always be a danger because of the types of people we are talking about. There's an element that they are the untouchables. They are the lords of the dance'

Brian Spiro

*White-collar crime partner,
BCL Burton Copeland; Co-Chair of the
IBA Business Crime Committee*

Untouchables no more

Yet if fines are ineffective then what? The majority of lawyers approached for this article agree with the iceberg analysis; the level of undetected abuse in the industry is immense, they admit; perhaps as much as 90 per cent. And something needs to be done. 'When I compare the conduct of client X, whose account has been closed by a bank, to client Y, who works for the bank, the conduct of the banker is often far worse,' one white-collar crime specialist comments. 'The criminality is widespread.'

The problem, many believe, is a deeply ingrained sense of immunity. 'Considering what I know is happening on trading floors, the idea that the wrongdoing stops at Libor and FX is very naïve,' says Brian Spiro, BCL Burton Copeland white-collar crime partner and Co-Chair of the IBA Business Crime Committee. He adds: 'Bad behaviour will always be a danger because of the types of people we are talking about. There's an element that they are the untouchables. They are the lords of the dance.'

A new book, *Young Money*, seems to prove this point. Written by journalist Kevin Roose, the book relates the astonishing antics of Wall Street fraternity Kappa Beta Phi: an exclusive club of financial tycoons kept secret for eight decades, until Roose managed to infiltrate it. What he found was a roomful of swaggering billionaires gorging on foie gras, chanting Latin – '*dum vivamus edimus et biberimus*' (while we live, we eat and drink) – and joking about the financial crisis. In the meantime, the new recruits, or 'neophytes', were forced to dress in drag and sing songs such as 'Bailout King', a parody of ABBA's 'Dancing Queen'.

The story beggars belief, and seems to verify the public's deepest suspicions: that those most blameworthy for the crisis feel neither responsibility nor remorse. The only way to get





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the attention of such people, some suggest, is by putting them in the dock. ‘There’s a lot of evidence suggesting that heavy penalties do not in themselves act as an effective deterrent,’ Spiro says. ‘What acts as an effective deterrent is a concern you are going to be caught.’

‘Just like tax competition, it’s been a race to the bottom in respect to bank prosecutions. There hasn’t been effective international coordination’

James S Henry
Former chief economist, McKinsey & Co

So why have no senior bankers been locked up? After the savings and loans crisis in the 1980s–90s and Enron-related scandals in the 2000s, hundreds of CEOs were jailed. According to James S Henry, former McKinsey & Co chief economist, two things have changed: banks have become far more powerful, and far more global. ‘Just like tax competition, it’s been a race to the bottom in respect to bank prosecutions,’ he says. ‘There hasn’t been effective international coordination.’

In the UK, six traders have now been arrested by the SFO for Libor-related offences. Yet those at executive level remain elusive. With an annual budget of only £36.5m, boosted on an ad-hoc basis by government subsidies, there is admittedly only so much the Office can do. The result: an iceberg of misbehaviour.

According to SFO Director David Green, it is ‘absolutely right there have been no prosecutions’ for those at the helm during the financial crisis, because a case requires ‘evidence of dishonesty, not recklessness or negligence’. Yet there are those who believe such evidence should not be hard to find. New York District Judge Jed Rakoff points out that the US Financial Crisis Inquiry Commission uses the word ‘fraud’ 157 times when describing what led to the crisis. Writing in a January 2014 *New York Review of Books* article, he puts it simply: ‘How could the transformation of a sow’s ear into a silk purse be accomplished unless someone dissembled along the way?’

Green’s task is admittedly a tough one, however. In Britain, it is almost impossible to hold the head of a bank to account for the

wanton activities of their underlings. Unlike the UK Bribery Act, which states that a company can be prosecuted – and senior management imprisoned for up to ten years – if it fails to ensure effective measures are in place to prevent bribery, other criminal laws do not have the same test. Corporations can only be held to account if direct intent is proved by the ‘controlling mind’, or board of directors.

Frustrated by this, Green has proposed adjusting the Act to include all acts of economic crime – a creative move certain to make even the most complacent of bailout kings stop dancing and take notice.

Proving dishonesty may not prove such a stumbling block in the future either: under the 2012 Financial Services Act, a new criminal sanction for reckless misconduct was created. This could prove an effective deterrent, experts believe, just as the Sarbanes-Oxley Act – which threatens jail-time for execs who knowingly certify inaccurate financial reports – forced US companies to clean up their accounts post-Enron. ‘Plainly the softening of the threshold between what is criminal and what is civil has led to a change in behaviour,’ one City litigator comments. ‘The same could well be applied in the context of actions by banks. But to make it bite, you’ve got to be specific, targeted and measurable.’

Cosy complicity

For Michael O’Kane, head of business crime at Peters & Peters, the lack of prosecutorial teeth in the UK is not solely an austerity issue. White-collar crime ‘should be a government priority, but will not be’, he believes, due to entrenched cosiness between the financial and political worlds. ‘No UK government will take any steps viewed as potentially undermining confidence in the City of London as the world’s leading financial centre,’ he says. ‘We have seen this most recently with the leaked memo ruling out sanctions against Russia for fear of damaging Russian investment in London.’

In recent years, the police and Crown Prosecution Service have got ‘very close’ to politicians when investigating scandals such as cash for honours and expenses fraud, O’Kane points out. ‘In such a climate, one could be forgiven for thinking that politicians do not want strong independent prosecuting agencies.’

The desire to protect the City may be one reason why the SFO and FSA dodged Libor when they first became aware of it. In 2012, an email written by former Barclays CEO Bob Diamond reporting a conversation with Bank of England Deputy Governor Paul Tucker suggested Tucker had encouraged the bank to

Financial crisis litigation: big City cases

Since the 2008 financial crisis, banks' legal costs have soared. Ten of the biggest banks paid nearly \$250bn in fines and litigation costs between 2008 and 2012, while the growing burden of compliance is pushing figures even higher. As claimants rush to hit the six-year deadline for civil claims resulting from the crisis, pressure on budgets is unlikely to ease any time soon. Here are three key cases at London's High Court that give a flavour of what the sector has in store.



Goldman Sachs v Libyan Investment Authority – ongoing

In a suit filed at London's High Court in January, the Libyan Investment Authority (LIA) alleges that Goldman Sachs made around \$350m in profits on \$1bn in trades. The LIA claims Goldman took advantage of its relationship with the fund to gain managers' 'trust and confidence', and states it did not understand the trades Goldman was making, resulting in large, 'inadequately documented' trades, which ultimately proved worthless. The lawsuit refers to each trade as an 'oppressive bargain' that earned Goldman a premium, and requests repayment of losses and interest. Goldman says the claims are 'without merit' and will be defended 'vigorously'. Libya's sovereign wealth fund built up assets of around \$60bn under deposed leader Muammar Gaddafi, who was killed in the 2011 uprising. It currently has the second-largest sovereign wealth fund in Africa, according to the Sovereign Wealth Fund Institute, and the 21st largest in the world.

For Goldman Sachs:
Herbert Smith Freehills

For Libyan Investment Authority:
Enyo Law; Roger Masefield QC;
Andrew George; Edward Cumming



Graiseley Properties (Guardian Care Homes) v Barclays Bank – ongoing

Graiseley Properties, part of Guardian Care Homes, launched a claim against Barclays in April 2012 over its alleged mis-selling of interest rate swaps. After Barclays was fined by regulators for manipulating Libor in 2012, Mr Justice Flaux ruled in London's High Court that Graiseley could amend its claim to include an allegation that Barclays had misrepresented Libor. The bank appealed, claiming that 'doing nothing' (ie not alluding to the integrity of Libor during the sales process) could not be conduct amounting to an 'implied representation'. However, in November last year, the UK Court of Appeal dismissed Barclays' appeal, ruling that proposing a product linked to Libor was arguably enough to amount to an implied representation that the bank's involvement in the setting of the rate was honest. The case, scheduled to go to full trial at the High Court in April 2014, is a highly significant test-case for Libor – and its implications may be even more far-reaching given the emerging FX scandal. If successful, it could open the floodgates for other claims.

For Graiseley:
Cooke, Young & Keidan, replaced in December 2013 by the Wilkes Partnership; Stephen Auld QC of One Essex Court

For Barclays:
Clifford Chance; Robin Dicker QC;
Jeremy Goldring QC of South Square



Deutsche Bank v Sebastian Holdings – concluded

Norwegian company Sebastian Holdings was ordered to pay \$240m to Deutsche Bank after London's High Court threw out its \$8bn compensation claim against the bank. The case was one of the largest ever to be heard at the court, involving massive legal costs. Deutsche Bank originally pursued Sebastian for compensation for losses incurred by trades that lost value during the recession. The investment fund, owned by Norwegian billionaire Andrew Vik, countered that trades the bank made on its behalf were unauthorised and refused to pay more money to cover the losses. The ruling, by Mr Justice Cooke, was handed down following a four-month trial involving 36 factual and expert witnesses from across the world. The judge criticised the excessive number of written submissions involved in the trial, saying: 'It would be highly regrettable, in my view, if in future substantial litigation the oral tradition was subverted and replaced by lengthy submissions of the kind with which the Court was faced here.'

For Deutsche Bank:
Freshfields Bruckhaus Deringer; David Foxtton QC of Essex Court Chambers;
Sonia Tolaney QC of 3 Verulam Buildings

For Sebastian Holdings:
Travers Smith; David Railton QC of Fountain Court

reduce Libor to improve its market position. According to his note, the Deputy-Governor said ‘it did not always need to be the case that we [Libor] appeared as high as we have recently’ – a phrase understood by Barclays’ former Chief Operating Officer Jerry del Missier as an instruction to manipulate the rate. Del Missier later resigned, while Tucker and Diamond deny the note had such a meaning.

‘The embarrassment of central banks in relation to what happened is a very interesting story that may start to play out in more detail,’ says a leading fraud City litigator. ‘It’s likely that several central banks will have said something similar, because nobody wants to see their own banks being punished by the markets. That’s of course very difficult to deal with when those same central banks and related regulators are doing investigations into Libor.’

In an internal report, published in March 2013, the FSA concedes it was ‘acutely aware’ of Libor ‘dislocation’ in 2007–8. Interestingly, the report distinguishes between manipulating the Libor submissions to benefit traders (‘trader manipulation’) and reducing submissions to avoid negative market or media impact (‘lowballing’). In the FSA’s June 2012 final notice declaring action against Barclays, it dedicates four paragraphs to outlining the risks of trader manipulation, and just three sentences to addressing the issue of lowballing.

‘To my mind what you see here is the FSA being significantly less critical of the second type of Libor manipulation than the first,’ the litigator comments. ‘But if you look at the reports of the US authorities, they don’t make that distinction: they are both deemed as bad as each other.’

Central bank embarrassment has been heightened recently by the emerging foreign exchange (FX) scandal, which, according to Bank of England Governor Mark Carney, has the potential to be ‘as serious as Libor, if not more so’. Anthony Grabiner QC, the £3,000-an-hour barrister hired by News Corporation to chair its post-phone hacking standards body, has been appointed by the Bank of England’s oversight committee to investigate allegations that staff knew about FX rigging. The formal inquiry was launched following an internal Bank review, which found no evidence to substantiate the claims, but resulted in the suspension of an employee.

Allegations of government complicity are not confined to the UK, however. Part of the reason for the failure to indict senior bankers in the US, Rakoff believes, is the government’s involvement in the crisis: the 1999 repealing of the Glass-Steagall Act (mainly at the behest of Citibank); the deregulation; the low interest

rates; the pressure on banks to make loans to low-income households. He writes: ‘The government was deeply involved [...] in helping create the conditions that could lead to such fraud.’

The cost of compliance

Banks may have been let off the hook where prosecutions are concerned, but new regulations are proving harder to ignore. A wealth of hastily drafted rules in the US, EU and UK have attempted to atone for past permissiveness, increasing debt-to-capital ratio requirements, capping bonuses, curbing proprietary trading and ring-fencing investment activity from retail banking.

To cope with the changes, HSBC added 1,750 compliance employees last year, while JPMorgan Chase added 4,000. According to Thomson Reuters, the size of regulatory fines can ‘pale into insignificance’ next to the costs

‘The populist received wisdom that everyone in the City is a crook and it needs to be cleansed from the bottom up, like something from the Chicago prohibition era, is really dangerous. London is probably the financial capital of the world and the UK benefits from that’

Paul Lomas

Former head of Freshfields general industries group and global commercial disputes team

incurred from internal restructuring. John Fordham, head of commercial litigation at Stephenson Harwood, who is acting in relation to Madoff feeder fund Kingate Management, believes banks’ regulation costs now comprise as much as three times their spend on litigation. ‘In the 1990s, it was the other way around,’ he says. ‘Banks’ legal departments are concentrating a massive amount of their budget on regulation.’

For some, regulation has now become overburdensome. Paul Lomas, former head of Freshfields general industries group and the global commercial disputes team, concedes there is a 'need to punish wrongdoing', but believes the penalties often bear little relation to the harm. 'The populist received wisdom that everyone in the City is a crook and it needs to be cleansed from the bottom up, like something from the Chicago prohibition

'We need to show the financial sector occupies a different position in society than is popularly seen, and is not a distinct entity. It needs to be seen as helping new businesses be created, as being involved in social purposes, as a key employer'

Stuart Popham

*Vice-Chairman of EMEA Banking, Citigroup;
former Global Senior Partner, Clifford Chance*

era, is really dangerous,' he says. 'London is probably the financial capital of the world and the UK benefits from that.'

Institutions are frequently compelled to strike deals with regulators on flimsy evidence due to the expense and potential reputational damage of battling the case out, Lomas adds. 'The current obsession with ever larger fines on ever slimmer evidence takes no account of the impact on behaviour or the economy. If people overcompensate for risk, we chill legitimate behaviour – and we want the City to be successful.'

Whether one believes corporates are more sinned against than sinning, the 'chill' factor is clearly a concern. Western lenders have ceased doing business with some Middle Eastern and African banks because they do not have the funds or resources to meet compliance standards. In June 2013 Barclays stopped dealing with remittances to Somalia, the country's biggest foreign currency stream, while RBS announced in February it was closing thousands of customer accounts due to money-laundering concerns.

O'Kane says over the past six months his firm has taken on more clients whose bank accounts have been closed than over the past decade. 'Largely as a result of US enforcement action, many banks have had a huge cold shower, which is no doubt often a good thing. However, this may be an over-reaction. There are knock-on effects, with many aid agencies now unable to operate bank accounts to get goods into Syria or Somalia, and this is causing real problems.'

Considering previous levels of money laundering and sanctions busting activity among banks – five UK banks (Barclays; HSBC; Lloyds; RBS; Standard Chartered); Swiss bank Credit Suisse; Netherlands bank ING; Intesa SanPaolo of Italy; and US bank JP Morgan have faced fines from the US Treasury's Office of Foreign Asset Control for breaching US sanctions ranging from \$3m to over \$500m – this 'chill effect' may seem like an acceptable price to pay. But achieving the right balance between risk and restraint is clearly an evolving challenge.

Another key challenge, says Gardner, is achieving the right balance between looking backwards and forward. He asks whether Western regulators spend too much time and resources mopping up the previous mess rather than preparing for the crisis to come, pointing out that in Japan, Singapore and Hong Kong the regulators take a different approach. Rather than imposing huge fines and conducting extensive investigations, the authorities will ban banks from certain types of activity or issue 'humiliating' public improvement notices. 'It's a really interesting philosophical issue,' he says. 'What is the balance between quick justice and thorough justice? The virtue of the Japanese system is a swift delivery of certainty and finality. As a result, the Japanese regulators and their banks will be at less risk of fighting the last war and missing the new wrongdoing right under their noses.'

Man-made monster

The reason banks engage in illegal and unethical practices is simple, says Washington lawyer Jack Blum, who specialises in financial crime. It's because conventional banking is 'essentially a terribly boring, profitless business'. The big money comes from extreme recklessness and unlawful activities such as money laundering, he explains. 'But without this they could still make money; it just won't be ten million a year. They'll make average salaries like the rest of us.'

A popular thought, no doubt. However, banks clearly need to do more than stop

breaking the law; they need to challenge ‘the suspicion they are getting rewarded for things the world doesn’t need’, according to former FSA Chair Adair Turner. That means a move away from highly leveraged products to more equity-based financing, he believes: a back-to-basics form of banking with a clear social purpose.

Stuart Popham, Vice-Chairman of EMEA Banking at Citigroup and former Global Senior Partner of Clifford Chance, concedes the industry needs a new vision. ‘We need to show the financial sector occupies a different position in society than is popularly seen, and is not a distinct entity,’ he says. ‘It needs to be seen as helping new businesses be created, as being involved in social purposes, as a key employer.’

A new banking standards body, due to be operational by the end of 2014, aims to help effect this transformation. The body, due to be run by non-bankers, is designed to radically overhaul the way bankers are trained and accredited, set codes of conduct, address the problem of short-term incentives, and revive lost links between banks and society.

Some question, however, whether the vision of a bygone era of honest community banking is little more than a chimera. John Steinbeck was writing about the all-consuming man-made ‘monster’ of banking in *The Grapes of Wrath*, after all – published 75 years ago. ‘Look back at the 1920s and Charles Ponzi,’ says Keith Oliver, Senior Partner at Peters & Peters.

‘The basic wrongness of man has existed since time immemorial.’

Thankfully, others are less pessimistic about the human condition. For some, like Herbert Smith Freehills partner Stephane Brabant, Co-Chair of the IBA Corporate Social Responsibility Committee, the world is getting more transparent, ethical and accountable. The non-legally binding UN Guiding Principles for Business and Human Rights, which put a duty on corporations to respect human rights, are both a symptom of and catalyst for this change, he believes – and banks are ‘very anxious to implement them’.

‘It is a new era for the world,’ Brabant says. ‘It is a new era for extractive industries, for infrastructure companies, and for banks as well. It takes time for people to change their attitudes, but the willingness is there.’

An historic symbol of profit and greed, banks may always be perceived as ‘monsters’ reflecting the worst aspects of the human condition. However, they are not detached from their environment but reliant upon it for survival and success. New regulations can bolster transparency and accountability, but only through tenacious public pressure and a will to effect the change necessary to regain lost trust can the iceberg gradually be brought to the surface and thawed. ☒

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





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Time for Asia to cooperate on energy mix

It's time for individual Asian nations to stop using their natural energy reserves as a bargaining chip and begin working together to ensure future energy supply across the entire continent.

STEPHEN MULRENAN

Typhoon Haiyan – or Yolanda, as it is called by Filipinos – clearly demonstrated the need to keep issues relating to resource security high on the international agenda. The immediate international relief effort has ensured that few Filipinos are going hungry today. However, now that the devastating effects of November's typhoon are no longer front-page news, many aid organisations are leaving the Philippines, as the nation's needs evolve from emergency aid to long-term rehabilitation.

Yet, four months on from the 20-foot storm surge that killed approximately 10,000 people and had a force stronger than Katrina or Sandy, many Filipinos still do not have access to clean water or communications, while more than 60 per cent remain without power. Haiyan highlighted

weaknesses in existing Asian infrastructure, and the need for improvement when it comes to resource security.

Population surge

Many Asian countries have been concerned for some time over their ability to meet projected demand for food and energy at a reasonable cost and with tolerable levels of risk taking.

Exacerbating the problem is the speed at which the global population – and Asia's in particular – is growing. Using historical population data, birth rates and mortality rates, the world population in 2013 stood at 7,118,279,573. Just over 40 years ago, in 1970, there were approximately half as many people. Of the seven-plus billion people



in the world, some 4.3 billion reside in Asia, the largest and most populous continent: a figure that itself has quadrupled over the last century.

This growth trend is set to continue. Between 2000 and 2050, populations are projected to double or nearly double in Afghanistan, Bangladesh, Cambodia, Laos, Nepal and Pakistan. Meanwhile, growth rates are expected to remain high in India, Indonesia, Iran, Malaysia, Mongolia, Myanmar, the Philippines and Vietnam. Only Japan and Kazakhstan will buck the trend (see 'Population crisis: can Japan lead the way in finding a solution?' *Global Insight*, Feb/Mar 2014).

'Resource security is a particular issue if you don't have access to sufficient supply, whether through equity or contractual rights, to meet demand'

Daniel Reinbott
Partner at Ashurst

Such growth will lead to increased pressure on the region's natural resources, with an expected increase in energy demand of 40 per cent in this decade alone. The countries which are least able to cope with additional environmental stress, and where often income levels are also at their lowest, will be hit the hardest.

Many Asian nations are responding by actively encouraging energy and food self-sufficiency – through improving agricultural productivity and water storage and developing cleaner energy supplies.

There is also growing recognition that regional security will not be achieved until Asian countries discontinue their current unilateral approach to the problem and, instead, pursue greater regional cooperation.

Retaining control

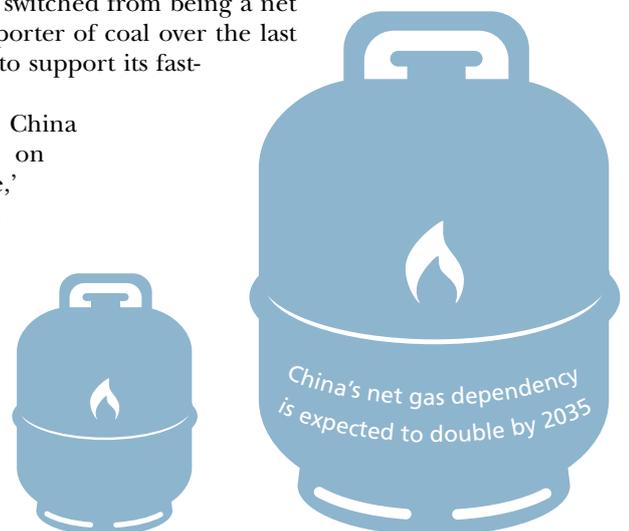
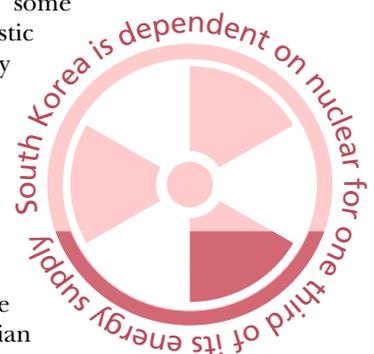
The issue of resource security is governed by a nation's unique set of circumstances, and the resources it may or may not have access to by accident of nature.

'Resource security is a particular issue if you don't have access to sufficient supply, whether through equity or contractual rights, to meet demand,' says Singapore-based Ashurst partner Daniel Reinbott. For example, some countries with sufficient domestic supply to meet demand in theory, may struggle in practice, if they signed a long-term export contract to a foreign supplier when domestic demand was not so high. This could lead to a situation where imports are required to meet the demand of domestic consumers, often at a premium. Consequently, despite the desire for self-sufficiency, many Asian nations will need to import more energy sources in the future to meet demand.

Coal is likely to remain the fuel of choice in 2014, despite its links with climate change and the expense of importing it. This is largely due to its availability, its low price and the recent increase in US coal exports to Asia.

Although by far the largest coal producer in the world, China has switched from being a net exporter to a net importer of coal over the last five years, as it seeks to support its fast-growing economy.

'Circumstances in China have a big impact on the market price,' says Allen & Overy's Hong Kong-based partner Paul Griffin, who also sits as Vice-Chair of the IBA's Oil and Gas Law Committee. 'What the current market price is will dictate how much coal they produce.'





Energy demand in

Asia is expected to

increase by 40 per

cent this decade

China also houses the world's largest unconventional gas resources, but is unsure that even this will be sufficient to support its growth. It is therefore again acquiring more from overseas – via pipelines, but also in the form of liquefied natural gas (LNG) – and learning as much as it can from its foreign partners in the process.

The vast majority of gas extracted is now exported to China and, according to the International Energy Agency (IEA), the country's net gas dependency is expected to double by 2035, while its oil dependency will surge from 50 per cent to over 80 per cent.

It is unclear how long China's intensive growth can rely solely on fossil fuels: recent alarmingly high levels of pollution in its cities have caused unrest among the population, which may force the government to consider more environmentally-friendly sources of energy in future.

Import dependence

Asian countries are set to become the world's dominant energy importers. One extreme example of dependence on imports is Japan, which has few resources of its own – no gas pipeline supplies – and which has long been dependent on a strategy of importing energy, such as LNG, to meet its long-term demand.

This strategy is expensive: resource-rich cities such as Newcastle in Australia can charge a high price for those resources, which importers such as Japan are compelled to pay.

A recent hike in the price of imported crude oil and natural gas from the US vindicates Japan's pursuit of an alternative approach, made even more pressing by the currently fragile state of its economy.

'Market price is very influential so long as Japan and South Korea are perceived to be higher priced markets,' says Griffin.

This explains the Japanese government's enthusiasm for investing in joint ventures in resource exploration. To this end, it is betting big on Myanmar – despite the lack of solid geological information in the country. An example is the Thilawa Special Economic Zone just south of Myanmar's former capital, Yangon, which is currently being built by the cash-rich trading companies of Mitsubishi, Marubeni and Sumitomo. The Japan International Co-operation Agency (JICA) is financing much of the infrastructure development, which will

house a power plant and a deep-water port.

Japan imported even more fossil fuels following the March 2011 Fukushima Daiichi nuclear disaster, but as it used less nuclear power its carbon emissions went up. In light of this, it is revisiting its nuclear power projects.

'The question of how to begin again is very much a live question in Japan,' says Griffin. 'The nuclear focus has the potential to dampen LNG prices, which will affect supply.'

South Korea, dependent on nuclear power for almost one-third of its power generation, is currently wrestling with the same issues. A revised nuclear policy is expected from the government in 2014.

Like Japan, Singapore has few natural resources of its own. In an effort to support its growing population, it imports pipeline gas from Indonesia and Malaysia. But over-reliance on its neighbours has left it feeling vulnerable.

In a move to diversify, government-owned investment company Temasek Holdings established state gas company Pavilion Energy in April 2013 to invest in clean energy, especially around the LNG supply chain. Singapore's first LNG mining terminal on Jurong Island came into operation last year. While this enhances Singapore's security of supply, it also presents trading opportunities within LNG markets

Vietnam is also reacting to an increase in energy demand. Construction of its first nuclear power plant is anticipated before 2017, and the country recently started to import coal. It will need more foreign coal in future, as well as improved access to its large offshore natural gas reserves, which has recently been restricted due a territorial dispute with China.

'You often have a number of competing interests in the South China Sea,' says Griffin, 'where a number of states can and do exert claims.'

Such disputes make the normal work of exploration very difficult, although the underlying principle – embodied in a United Nations Law of Sea treaty, which has a very wide application – is that a territory's natural resources extend beyond land to the sea, and typically up to a distance of 200 miles.

Controlling supply

An increase in demand for energy has led to a strong focus on meeting domestic market obligations (DMO) across Southeast Asia. DMO is a requirement, under a host government concession, that a certain amount of a resource be allocated for domestic demand and not be sold abroad, in an effort to promote economic growth. There may also be a requirement for processing or refining to take place in the same country prior to export, or 'as part of the concession or production licence, producers



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may be required to support the development of downstream industries, or agree to undertake the production of value-added downstream products within the country,' says Daniel Reinbott.

For example, although rich in resources, Indonesia has little over-supply due to its increasing domestic demand. 'Now that demand is increasing,' says a Singapore-based lawyer at a mining and petroleum company, 'the Indonesian government has banned the export of most commodity materials.'

'You often have a number of competing interests in the South China Sea... where a number of states can and do exert claims'

Paul Griffin

Allen & Overy partner and Vice-Chair of the IBA Oil and Gas Law Committee

The Malaysian government controls its supply of resources by insisting that a foreign party – such as a BP or Shell – forms a joint venture with state oil and gas company Petronas for the exploration of resources.

There is also a big push in Myanmar for the domestic allocation of resources before exporting. However, as its government requires foreign assistance in order to access any domestic resources, it has to strike a delicate balance between satisfying projected domestic demand and fostering foreign direct investment to boost economic development.

Resource rich

Australia enjoys an over-supply of natural resources such as coal, gas and uranium, meaning it need not worry about DMO, or restricting exports. As such it has enjoyed a resources boom and is well placed to continue boosting its energy exports to Asia: it is already the world's largest exporter of coal.

'Oil and commodity price fluctuations are very important to Australia as a seller,' says Brisbane-based Clayton Utz partner and IBA Advisory Board Representative for Oceania Andrew Smith, 'as well as buyer nations because of the impact on their respective economies.'

The need to limit carbon emissions might change this, potentially lowering demand for coal, which could in turn impact on the country's so-called 'two-speed economy' – where the gains from the boom have accrued largely to mining-related sectors and states.

Australia is already the leading producer of coalbed methane, and it plans to expand its extraction of this 'unconventional' gas resource to provide feedstock for a series of LNG plants, developed for export: the country is on course to become the world's largest LNG exporter by 2020.

Conscious that it faces increased competition as an energy supplier to the region, Australia is also being touted as the next big market for shale gas extraction, although this is not without controversy.

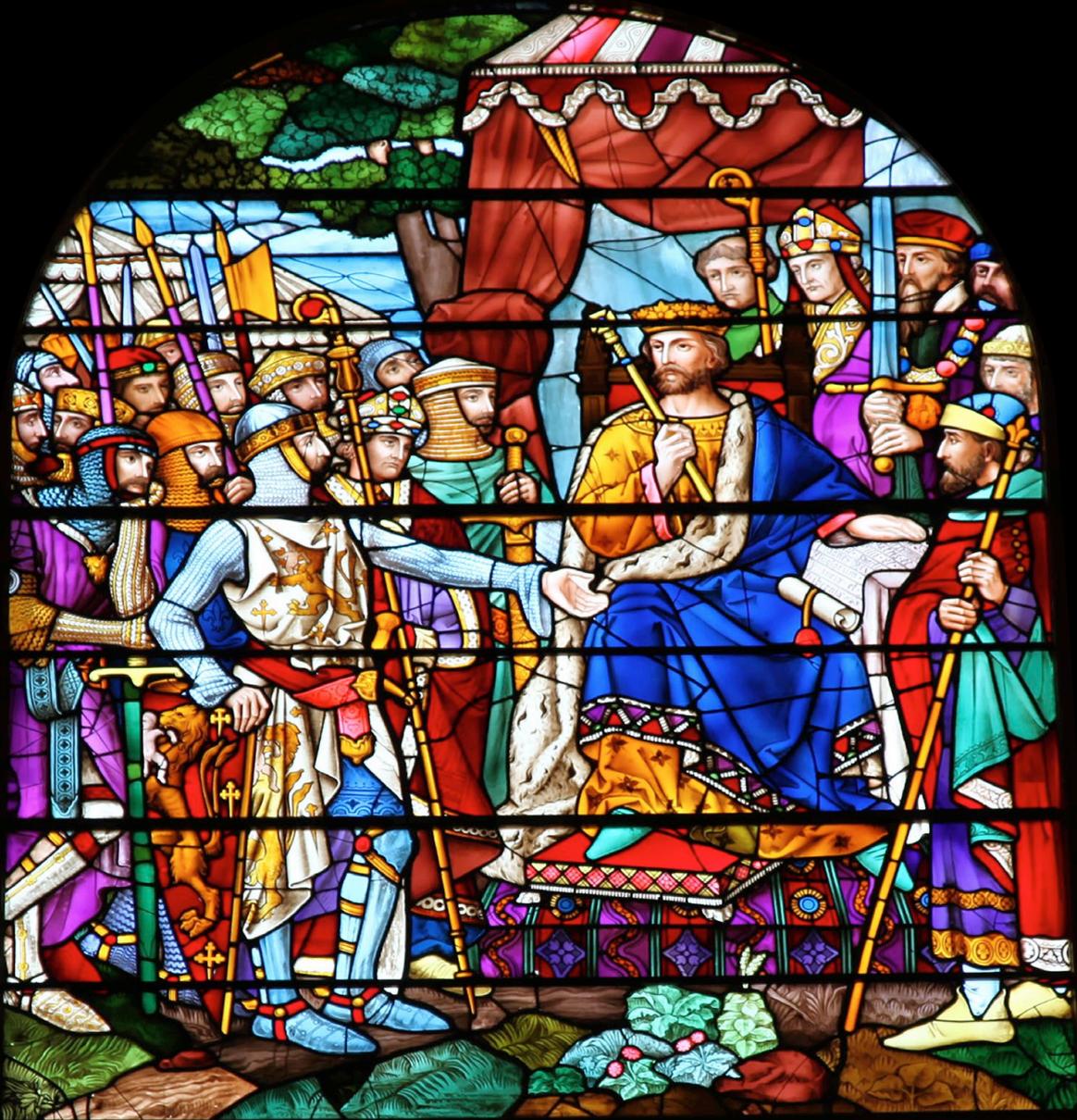
Energy security

Australia could be an important player in promoting energy security across Asia. Currently, it is no different to any other country across Asia in the sense that it is playing the hand it has been dealt when it comes to resource security.

While the pursuit of national security goals is to be expected, Typhoon Haiyan showed that some Asian countries need the support of others when it comes to addressing food, energy and water shortages. Frameworks and agreements are therefore needed that promote competitive markets, investment and trade, and the transfer of knowledge. While a number of treaties do exist, such as the ASEAN agreements among the states of Southeast Asia, there is nothing that compares with Europe's common market approach.

Ultimately, the extent to which Asian countries are able to cooperate rather than compete for access to resources may influence how well any one country can respond to a future natural disaster. ☒

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The signing by royal seal of the Magna Carta in stained glass, Mansion House, London

Magna Carta and the Global Community

This extract from the upcoming book *Magna Carta: The Foundation of Freedom 1215-2015* analyses the application of rule of law in two fundamentally important and evolving areas – relations between citizens and states, and relations between states – also assessing the overlap between both, which has become so significant in recent years.

RICHARD GOLDSTONE

Until the middle of the 20th century, international law regulated only the relationship between sovereign states. The rights of individuals in their own states were not within the domain of international law. That changed radically in reaction to the scourge of Nazism and its egregious violations of the human rights of millions of people. It was reflected in the preamble of the Charter of the United Nations that was unanimously adopted by the nations assembled on 26 June 1945 in San Francisco. They resolved ‘to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.’

They determined that one purpose of the UN was the promotion and encouragement of the ‘respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.’

In this way the protection of individuals against the power of the sovereign that lay at the heart of Magna Carta was adopted by the global community as the means to ensure respect for the fundamental human rights of all people.

UN Declaration: ‘a Magna Carta for all men everywhere’

What was absent from that first formulation was the recognition that those fundamental human rights required enforcement. In other words, they were dependent on the application of the rule of law. The United Nations General Assembly took this next step in Paris on 10 December 1948, when it adopted the Universal Declaration of Human Rights. It was drafted by the Human Rights Commission of the United Nations. Its chair and indefatigable champion was Eleanor Roosevelt. In her speech to the General Assembly on 10 December 1948 she said: ‘We stand today at the threshold of a great event both in the life of the United Nations and in the life of mankind. This declaration may well become the international Magna Carta for all men everywhere. We hope its proclamation by the General Assembly will be an event comparable to the proclamation in 1789 [the French Declaration of the Rights of Man and of the Citizen], the adoption of the Bill of Rights by the people of the US, and the adoption of comparable declarations at different times in other countries.’

Whilst not a legally binding document, it was the first expression of the rights to which all human beings were entitled for no reason other than being members of humankind. The Universal Declaration recalls in its preamble that: ‘Whereas disregard and contempt for human rights have resulted in barbarous acts which have

outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.’

However, in 1948, members of the international community were not ready to oblige themselves to protect those human rights. Hence, the Universal Declaration was adopted as an aspirational document that did not require any Member State to translate it into binding domestic law. They nonetheless accepted the obligation ‘to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.’

Enforcing social and economic rights

It was only in the 1960s that nations began to accept legally enforceable obligations to respect and enforce fundamental human rights. In 1966, the United Nations General Assembly adopted the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). They entered into force ten years later. These covenants made many of the provisions of the Universal Declaration of Human Rights effectively binding on governments. As of October 2013, the ICESCR had been ratified by 161 states and the ICCPR by 167 states. The Universal Declaration and the two covenants have become known as ‘the International Bill of Rights.’

According to Article 2 of the ICCPR, States Parties commit to respecting all rights enumerated in the convention and ensuring that persons whose rights are violated have an ‘effective remedy’. Competent authorities are obliged to ‘enforce such remedies when granted.’ In contrast, Article 2 of the ICESCR only requires States Parties to ‘...take steps, individually and through international assistance and cooperation . . . to the maximum of [their] available resources . . . to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means...’

In other words, the rights recognised in both covenants are in principle judicially enforceable,

but the rights protected by the ICCPR are directly enforceable whilst the rights protected by the ICESCR were to be progressively implemented. It should come as no surprise that in very few countries are the social and economic rights justiciable. Increasingly, civil society is pressuring governments to recognise and enforce those social and economic rights.

Eliminating racial discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination 1969 defines 'racial discrimination' as 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.'

Article 2 requires States Parties to take wide and far-reaching steps to implement the provisions of this Convention. They include taking:

'Effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists.'

In addition, each State Party:

'Shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.'

Only 45 nations have ratified this Convention.

The International Convention on the Eradication of Discrimination against Women 1979 defines discrimination against women as: '...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.'

States that join this Convention oblige themselves to make its provisions enforceable. It has been ratified by 187 nations.

Prohibiting torture and protecting children

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 commits its parties to prohibit any form of torture or cruel, inhuman or degrading treatment in their jurisdictions. Torture is defined as 'any act by which severe

pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person, information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'

On the UN General Assembly's adoption of the Universal Declaration of Human Rights:

'We stand today at the threshold of a great event both in the life of the United Nations and in the life of mankind. This declaration may well become the international Magna Carta for all men everywhere'

(Paris, December 1948)

Eleanor Roosevelt
Chair, Human Rights Commission
of the United Nations

One hundred and fifty-four nations have ratified this Convention. Apart from those nations that have ratified this Convention, the prohibition of torture has become accepted in customary international law and is binding on all nations. So, too, is the prohibition on genocide.

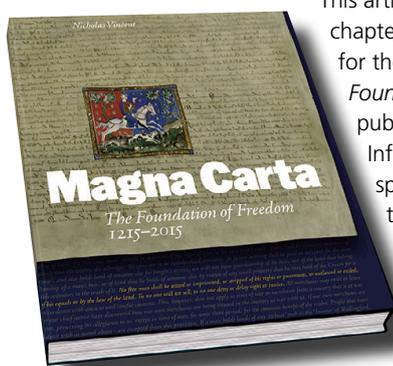
The Convention on the Rights of the Child 1989 incorporates the full range of rights applying to children, defined as people under the age of eighteen years. These include civil, cultural, economic, political and social rights. As described by the United Nations: 'The Convention sets out these rights in 54 articles and two Optional Protocols. It spells out the basic human rights that children everywhere have: the right to survival; to develop to the fullest; to protection from harmful influences, abuse and exploitation; and to participate fully in family, cultural and social life. The four core principles of the Convention are non-discrimination; devotion to the best interests of the child; the right to life, survival and development; and respect for the views of the child. Every right spelled out in the Convention is inherent to the human dignity and harmonious development of every child. The Convention protects children's rights by setting standards in health care; education; and legal, civil and social services.

By agreeing to undertake the obligations of the Convention (by ratifying or acceding to it), national governments have committed themselves to protecting and ensuring children's rights and they have agreed to hold themselves accountable for this commitment before the international community. States Parties to the Convention are obliged to develop and undertake all actions and policies in the light of the best interests of the child.'

This Convention has been ratified by every member of the United Nations with the exception of Somalia and the United States.

There are now also a number of regional human rights treaties that, with varying strength of provisions for enforcement, guarantee individuals the right to hold their own governments accountable for human rights violations. They are the European Convention on Human Rights 1950, the American Convention on Human Rights 1969, the African Convention on Human and Peoples' Rights 1981 and the Arab Convention on Human Rights 1994. By far the most advanced system is that under the European Convention, with thousands of individual complaints coming to the European Court of Human Rights each year. Indeed, that Court has recently been over-burdened with an unmanageable caseload.

In his Report of 23 August 2004 to the Security Council, then Secretary-General Kofi Annan referred to the rule of law as being at



This article is an extract from Justice Goldstone's chapter, 'Magna Carta in the 21st Century', for the forthcoming book *Magna Carta: The Foundation of Freedom 1215-2015*, to be published in August by Third Millennium Information. You can order your IBA special edition - with an introduction by the Master of the Rolls, Lord Dyson, and a list of IBA Members who supported the project - by subscribing in advance. **Purchase your copy by April 30th to ensure you are listed as a subscriber: tinyurl.com/IBAMagna**



the very heart of the UN's mission. He stated: '[The rule of law] refers to a principle of governance in which all persons, institutions and entities, public and private, *including the State itself*, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.' [Emphasis added.]

The Secretary-General was conflating the rule of law as a protection of the rights of individual citizens and the relationship of states between themselves. However, the application of the rule of law between states is increasingly gaining traction.

King John could not remotely have conceived of citizens having rights arising from international commerce. Even less could he have imagined states requiring protection from the conquest of space. Yet, the principles that were included in Magna Carta translate without conceptual difficulty to these modern incarnations of international law. There are conventions relating to commerce between citizens of different states. The Convention on the Limitation Period in the International Sale of Goods 1974 establishes uniform rules governing the period of time within which a party under a contract for the international sale of goods must commence legal proceedings against another party to assert a claim arising from the contract or relating to its breach, termination

or validity. The United Nations Convention on the Carriage of Goods by Sea 1978 establishes a uniform legal regime that governs the rights and obligations of shippers, carriers under contracts of carriage of goods by sea. There are complex international laws relating to the carriage of goods and persons by air. In the preceding half-century, space exploration has made significant

'King John could not remotely have conceived of citizens having rights arising from international commerce [...] Yet, the principles that were included in Magna Carta translate without conceptual difficulty to [...] modern incarnations of international law'

Richard Goldstone
Co-Chair, IBA Rule of Law Action Group

advances. The potential for competition and even violent contest with regard to the benefits of such scientific endeavours has resulted in far-reaching international treaties.

The need for international lawmaking is well illustrated by the failure thus far to reach agreement on the provisions of a global telecoms treaty that would impose controls over the use of the internet. Negotiations recently broke



down because of disagreement over whether the internet should be within the scope of regulation at all and whether the treaty should include language recognising a right to access telecommunication services.

There are today in excess of 150,000 international treaties registered with the United Nations. The interpretation and procedures with regard to such international treaties are governed by the provisions of the Vienna Convention on the Law of Treaties, 1961. This treaty has been ratified by 113 nations. A number of nations that have not ratified the treaty, such as the United States, accept that its provisions now represent customary international law and are thus binding on them.

A more difficult situation obtains with regard to enforcement of orders of international criminal courts. One need look no further than the conduct of Sudan and Libya in failing and indeed refusing to comply with orders issued by the International Criminal Court. The referrals of those two situations to the Court were made by the Security Council under peremptory resolutions issued pursuant to the provisions of Chapter VII of the Charter of the United Nations. Sudan and Libya are thus also in violation of their Charter obligations. The Security Council has not taken any action in response.

On the other hand, during the second half of the 1990s, political and economic pressure exerted by the United States against Serbia and Croatia resulted in those nations sending senior members of their governments and militaries for trial before the United Nations International Criminal Tribunal for the former Yugoslavia. Indeed, as that tribunal comes to the end of its mission, every single one of those indicted has faced trial in The Hague. International

criminal law and the tribunals that enforce it have effectively limited the previous regime of impunity for war criminals.

In a recent law journal article, Professors Oona Hathaway and Scott Shapiro describe the ways in which international legal norms are enforced – not usually by the use of force but by denying violators the benefits that a myriad of international treaties provide for States Parties. It is this process that the authors describe as ‘outcasting.’ For example, violations of the rules of the World Trade Organization and its compulsory dispute resolution system will result in specific retaliatory trade measures and might also deprive the offending nation of the benefits of the General Agreement on Tariffs and Trade. A failure to comply with orders of the European Court of Human Rights could result in suspension of membership in the European Union. Then there are unofficial sanctions brought about by international organisations ‘naming and shaming’ violators and bringing often effective pressure on other governments to take retaliatory steps to encourage compliance.

The rule of law as applied in the global context has advanced in ways and to a degree that would have been unimaginable half a century ago. ☒

Richard Goldstone is a former South African Supreme Court judge. In the 1990s, he headed the influential Goldstone Commission investigations into violence in South Africa, and in 1994 was appointed the first Chief Prosecutor of the UN International Criminal Tribunals for the former Yugoslavia and Rwanda. He succeeded Nelson Mandela as Honorary President of the International Bar Association’s Human Rights Institute in 2012 and is currently Co-Chair of the IBA’s Rule of Law Action Group.



A girl draws at the door of a caravan at an encampment of Roma families. October 2013

The noble pursuit of litigation

Though strategic litigation and test cases make essential contributions to the rule of law, there's concern that they're being abused. And, as funding comes under attack, there's a greater need than ever for pro bono lawyers to take on test cases to ensure access to justice and accountability.

POLLY BOTSFORD

Following the fall of communism, the European Roma Rights Centre (ERRC) identified a significant problem with the educational segregation of Roma children in parts of Central and Eastern Europe. Roma children were ending up in what were termed 'special schools', supposedly set up for children with intellectual disabilities, and thus segregated from mainstream schooling. In 1998, the ERRC decided to investigate.

To try and bring about reform, it became apparent that the ERRC needed to identify a test case to put before the courts. In order to find the right applicant it interviewed hundreds of Roma families in the region and found 18 Roma children in the Czech Republic to be the test case.

The legal angle the ERRC adopted was indirect discrimination: entry tests to mainstream schools were set for all children but they were biased against Roma children because they focused on Czech customs and language. The Roma children often failed and so were subsequently put in the special schools. The centre found that Roma children were twenty-seven times more likely than non-Roma children to be sent to a special school.

With the backing of the centre, the children applied to the domestic courts and then to the European Court of Human Rights (ECtHR), challenging segregation on the grounds of indirect discrimination. After almost ten years of investigation and litigation, with interventions by

other non-governmental organisations (NGOs) such as Interights and Human Rights Watch along the way, in 2007 the case of *D.H. and Others v Czech Republic* 57325/00 [2007] ECHR 922, came before the ECtHR's grand chamber. It found in favour of the applicants.

The *D.H. and Others* case shows how test case litigation is pursued as a deliberate strategy to effect systemic change, hence the development of the term 'strategic litigation'. This use of public interest litigation as part of a wider campaigning agenda has increased over the past decade or so both in the UK and internationally in line with an increased interest in human rights.

A strategic case is pursued in order to achieve some degree of law reform beyond the specific case being brought. This may be by enforcing laws already in place, clarifying laws that are untested, challenging the way that laws are enforced (such as the *D.H. and Others v Czech Republic* case), or even ensuring a law is not enforced – in a case brought in the 1990s by adults who had been prosecuted for sado-masochistic activity, which concerned whether adults engaged in such activity could consent to it, although the law was not changed, no further criminal prosecutions were brought (*Laskey, Jaggard and Brown v UK* 1997 24 EHRR 39).

'It may be that the particular applicant loses on the facts but their case encourages another applicant who does have a strong case'

Andrea Coomber
Director, Justice

Austerity measures and accountability

In the UK, there are various public interest challenges based on the impact of austerity measures with cases being brought, for instance, against changes to the welfare benefits system. Ten families with disabled members affected by a reduction in housing benefit because they had a spare room (the so-called 'bedroom tax') brought a case in March of last year on the grounds that the reduction was discriminatory. They recently lost in the Court of Appeal.

The main mechanism for taking test cases in the UK is judicial review. According to statistics produced by Oxford University in 2012, there has been a steady increase in such cases since the 1970s: in 1975 there were a few hundred cases and by 2011 around 2,500 (these do not include immigration and asylum cases).

The same has happened internationally with an increased interest in international litigation by NGOs such as the Justice Initiative or the Centre for Justice and International Law. In Europe, after the collapse of communism in the 1990s, the various former communist countries joined the Council of Europe and so came within the ambit of the ECtHR. Since then, there has been a significant increase in cases: ECtHR applications in 1999 were just over 8,000 and in 2012 just over 65,000, according to ECtHR statistics (judgments were 177 in 1999 and 1,000 in 2012). Cases are brought before national courts as well as supra-national organisations such as the African Commission on Human and Peoples' Rights (the African Commission), the ECtHR and the Inter-American Court of Human Rights.

It also raises awareness of the issue in question as the court proceedings often bring press coverage. James Welch is Legal Director at civil liberties organisation Liberty, an organisation well-known for its sophisticated approach to the press. He says: 'Our cases bring a campaign to the attention of the public which can foster, hopefully rational, discussion'. It can provide important legal argument by airing difficult areas of law (and with the use of third party interventions, can bring in significant expertise in a specific area), and can bring pressure on governments to reform legislation.

Strategic litigation: a difficult game

But strategic litigation can also be a difficult game to engage in for any organisation. Because there is a wider cause to consider, this sets up a potential tension between the interests of the particular client in a case (and a lawyer must act in the client's interest) and the wider cause. Andrea Coomber, current Director of Justice, a human rights organisation, gives a vivid example: 'I recall representing a prisoner in Egypt who had been detained under the then national emergency law for expressing a religious view. We took a test case to the African Commission. Once the case had got to the admissibility stage, we were approached by the Egyptian Government and asked to drop the case in return for our client's release, which we did. But it does illustrate that we had to give up the wider cause of challenging the law before the African Commission.'

This tension between client and cause is eased in the US where there is a more common practice by NGOs of specifically recruiting applicants once a problem has been identified (as was done in the *DH and Others v Czech Republic* case) rather than having to rely on an applicant who may not appreciate or be interested in the broader issues.

The applicant may, of course, lose their case – and for any number of reasons; litigation carries this inherent risk. Coomber says, however, that: ‘there are losses you can accept and others you can’t’. In the first category, it may be that the particular applicant loses on the facts but their case encourages another applicant who does have a strong case. Or it could be that the case itself sufficiently highlights the issues that the cause is boosted in the round. John Wadham, current Executive Director of legal NGO Interights, says of the sado-masochism case, *Laskey and Others v UK*: ‘Although ultimately the applicants lost, the case helped with the narrative and educated the public’.

But even if an applicant wins there is no guarantee that this will result in changes to the law or policy changes that may be necessary to bring to life any judgment; implementation and compliance ‘success rates’ are low in many fora including the ECtHR. One researcher at the University of Pretoria in South Africa found that of the African Commission’s recommendations made at the time the research was conducted in the mid-2000s, only 14 per cent had been complied with by the relevant African states.

A particularly fraught issue at present is funding for strategic litigation cases. Though many NGOs are privately funded through foundations, trusts, grants and similar, and can support the legal costs of a case in that way, other types of funding such as legal aid in the UK or conditional fee arrangements are also used. But both of these sources are under review. Recent changes to civil litigation rules mean that conditional fee agreements are less useful. And, of course, legal aid is also under intense scrutiny with the UK Government bringing in measures that have a direct impact upon the funding of judicial review cases.

For example, there are proposed changes to the current provisions of the merits test on legal aid applications so that so-called ‘borderline’ cases, where the prospects of success are unpredictable, will not get funding. Yet test cases are often borderline cases because they are exploring a point of law which is untested. Lucy Scott-Moncrieff, Co-Chair of the IBA’s Access to Justice and Legal Aid Committee, says: ‘These are the very cases which are under attack from funding [cuts], cases where it is not possible to say either way what the prospects of success are because they raise a new point of law.’

It is not only the legal costs of the applicant that need to be considered but the potential costs if an

applicant loses and is subject to an adverse costs order. If an applicant is legally aided, then they are likely to have adverse cost protection –which makes legal aid even more important.

‘These are the very cases which are under attack from funding [cuts], cases where it is not possible to say either way what the prospects of success are because they raise a new point of law’

Lucy Scott-Moncrieff
Co-Chair, IBA Access to Justice
and Legal Aid Committee

Keeping the judiciary separate

In the UK, the success of strategic litigation and the growth of judicial review have led to concerns about the effect it is having on the government purse and, more fundamentally, whether it is undermining the proper separation of powers between the executive, the judiciary and the legislature.

The UK Government is critical of the way that judicial review is used and criticises NGOs which bring judicial review cases for strategic reasons and is proposing a series of reforms to limit this. The proposals originally aimed to change the rules on standing so that fewer organisations would be able to bring a case in the first place. Following consultation, however, this has since been dropped. Other proposals include giving the courts more power to dismiss cases which relate to purely procedural issues, and there are further proposals to change legal aid in judicial review cases such as requiring NGOs that intervene as third parties in judicial review cases to bear their own costs and the cost to other parties of their intervention, and giving the courts greater powers to identify non-parties who might be funding a case behind the scenes and ultimately to be able to make a cost order against them.

Reforms have come under attack from lawyers and organisations, not least from the parliamentary select committee, the Joint Committee on Human Rights. One of its members, IBA Human Rights Institute Co-Chair Baroness Helena Kennedy QC, during UK Secretary of State for Justice Chris Grayling’s evidence to the committee recently, warned that the reforms would render the system

Test cases from anti-slavery to benefits

Somerset v Stewart [1772]



A habeas corpus case in England brought by James Somerset, an escaped slave who was to be taken back to the US to be a slave again, against his former owner, Charles Stewart. Slavery was not lawful in England, but was in the US, so the case was about whether or not one could forcibly put someone on a ship in England knowing that he would become a slave at the ship's destination. James Somerset

was backed by Granville Sharp, an abolitionist, and was successful.

Brown v Board of Education of Topeka, Kansas [1954]



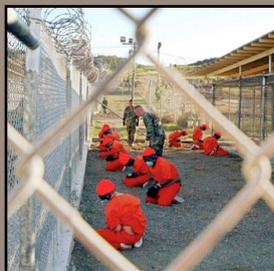
The most famous test case where the US Supreme Court ruled that racial segregation of public schools was unconstitutional as it breached the 14th Amendment. Five cases were brought in five

separate states by schoolchildren, and were supported by the National Association for the Advancement of Colored People. It was a trigger for the US civil rights movement.

A and Others v the Home Office [2004]

Fallout from the anti-terrorist legislation in the UK introduced in the wake of terrorist attacks on the US in September 2001. The case concerned the 'Belmarsh detainees' as they came to be known. They were foreign nationals detained (in Belmarsh) indefinitely under the Anti-Terrorism Crime and Security Act 2001 on the grounds that they had links to terrorist organisations.

The House of Lords found that the UK Government was in breach of articles 5 and 14 of the ECHR because there were different rules for foreign nationals compared with national terror suspects. The case is just one example of the many cases relating to anti-terrorist litigation, anti-terrorist detentions, rendition, and Guantánamo Bay.



D H and Others v Czech Republic [2007]



Part of a wave of cases to emerge after the collapse of communism, this ECtHR case concerned the educational segregation of Roma children in the Czech Republic, highlighting a problem across the Central and Eastern European region more generally.

The children claimed that unfair entrance tests into schools led to segregation and was indirect discrimination. The 18 applicants were supported by the European Roma Rights Centre and were successful.

'institutionally pro-executive, pro-Government'.

She tells *Global Insight*: 'Judicial review is the way in which issues of public interest can be ventilated, and considered carefully by an independent source, at arm's length from policy-makers, who can be too close to their policies and too distracted by political necessities. Judicial review is a litmus test for what might be wrong in our systems.'

Grayling denies that his reforms will undermine the use of judicial review. He tells the IBA: 'Judicial review is, and will remain, an important means to ensure the actions of the executive and other public bodies are lawful. But it should not be used simply to campaign against, frustrate, or delay proper decision-making. This is bad for the economy and the taxpayer, and not in the interests of justice.'

Grayling also says: 'judicial reviews should not be concerned with the merits of decisions, but rather the lawfulness of decisions. It is not the court's role to substitute its own judgment for that of the decision-maker.' He is not alone in having these concerns and there has been considerable discussion in the newspaper op-ed pages as to whether or not courts (or rather judges) are being asked to overstep the mark in relation to checking the executive in such judicial review cases.

Judicial review is the way in which issues of public interest can be ventilated, and considered carefully by an independent source, at arm's length from policy-makers, who can be too close to their policies'

Baroness Helena Kennedy QC
Co-Chair, IBA Human Rights Institute

In a lecture in 2011, Lord Sumption, a Justice of the Supreme Court, sounded alarm bells on the 'significance of the judiciary as a result of the increasingly vigorous exercise of its powers of judicial review'. In the lecture, he argued that the public increasingly found it necessary, in order to hold the executive to account, to apply to the courts and ask judges to do this by means of judicial review. He argued that this has led to judges being asked to resolve 'inherently political issues' and 'is difficult to defend'.

Sumption's arguments have been much debated, not least by Sir Stephen Sedley in a dissecting article in *The London Review of Books* a month or so after Sumption's lecture. He defended the judicial record with '...examples of judicial authority recognising the inadmissibility of adjudication on political issues' which he

Judicial review is, and will remain, an important means to ensure the actions of the executive and other public bodies are lawful'

Chris Grayling
UK Secretary of State for Justice

claimed were lacking from Lord Sumption's lecture. He reiterated the distinction between the legislature which has 'constitutional supremacy' because of its democratic credentials and so could not be called to account, and the executive which is 'subject to public law controls' (and thus the scrutiny of the courts).

Of course, these matters are not so easily distinguished in practice (a point Sedley himself makes): if a court must review the actions of the executive they may find themselves drawn into a discussion on specific policies in order to consider whether they have been unlawfully applied. It is during such an intricate exercise that the question of whether the courts are overstepping the mark arises. Scott-Moncrieff believes that the lines are clearly demarcated: 'Test cases often challenge not the letter of the law but the interpretation of the law. That is what a common law system does.'

Indeed, as Co-Chair of the IBA's Litigation Committee Mike Hales observes, an increased scrutiny of the executive was an inevitable consequence of new human rights legislation. He draws parallels with the US: 'The US Supreme Court has regularly reviewed the acts of the US executive and legislature, testing their actions against the US Constitution. In the absence of a written constitution in the UK, the developing sophistication of human rights law in the UK and the impact of decisions of the ECtHR was bound to result in an increase in cases that test the extent of those rights.'

US Supreme Court Associate Justice, Stephen Breyer, and Lord Phillips of Worth Matravers, former President of the UK's Supreme Court, discussed the principles behind this scrutinising role of the judiciary at the IBA's Annual Conference in Boston. 'Our Constitution separates powers into pockets,' says Breyer, 'both vertically into state and federal, and horizontally into three branches so that no one group of people in the government can become too powerful.'

Lord Phillips observed that in the UK, the situation was framed slightly differently: 'We have a parliament which is supreme, the rule of law requires us to apply the laws which it has enacted. There is a degree of latitude in interpreting the law because we proceed on the basis that parliament must have intended the laws to be compatible with our international obligations and in particular the European Convention on Human Rights.'

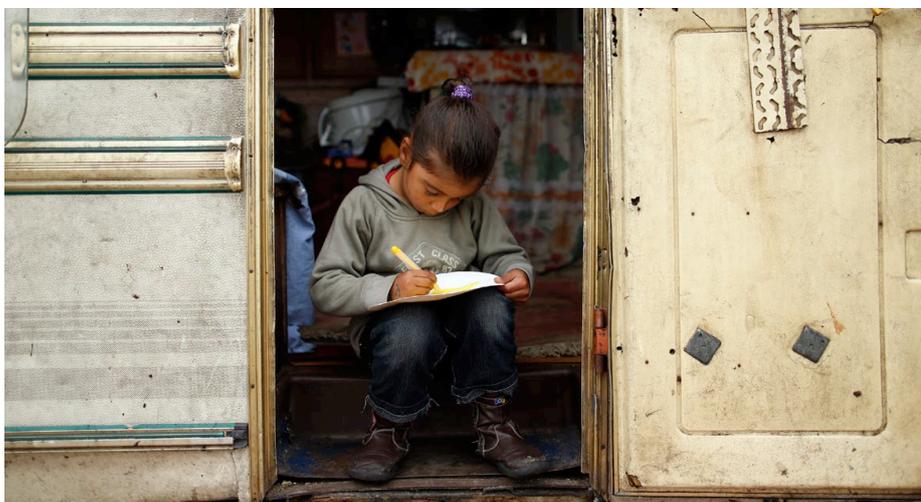
Perhaps it is best to look at public interest litigation and its strategic use as a sign of a robust rule of law where the decisions of the executive are scrutinised: a source of pride rather than of vexation. As access to justice becomes increasingly frayed by reductions in the scope of legal aid, ever more pro bono lawyers are needed to propel such cases forward. ☒

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Watch a filmed interview with former ECtHR President at tinyurl.com/IBAFilmBratza

Film of Stephen Breyer, Associate Justice of the US Supreme Court, addressing the Rule of Law Symposium at the IBA Annual Conference 2013, in anticipation of the 800th anniversary of Magna Carta, can be viewed at tinyurl.com/IBARuleofLawBreyer





Arbitration: what does the future hold?

The IBA's 17th Annual International Arbitration Day was the best attended yet, attracting 900 delegates. *Global Insight* discusses some of the key issues facing the practice of arbitration with the day's high profile speakers, focusing on whether or not there is a need for greater regulation or more soft law.

SAM CHADDERTON

This has become the landmark event that everybody wants to attend. In one day you have the entire arbitration world with all the superstar practitioners there.'

These are the words of the International Bar Association Arbitration Committee's Co-Chair Eduardo Zuleta, describing the record-breaking 17th International Arbitration Day at the Maison de la Mutualité in Paris on 14 February.

The quality of panels and key speakers have positioned the day as the high point of the arbitration calendar, says Zuleta.

'The IBA Arbitration Committee is leading the way in producing recommendations, papers and soft law which, one way or another, like it or not,

are used, respected, looked into and debated.'

Indeed, it was the IBA Guidelines on Party Representation in International Arbitration (the 'Guidelines') that proved the main topic of discussion at the recent conference.

Zuleta claimed in his welcome speech, addressing the largest arbitration conference ever, that the Guidelines, approved in May 2013, have been 'widely supported by the globalised arbitration community'.

The event was subtitled 'Advocates' duties in international arbitration: has the time come for a set of norms?' – and that theme was central to many of the debates both inside and outside the conference room.

On the agenda for attendees was whether or not counsel owe a duty of honesty in relation to their submissions – and if so, to whom? There was also the question of whether 'the playing field should be levelled' in the gathering and taking of evidence. Arbitrators without powers was another key theme, but the hot topic on everyone's lips was whether the IBA Guidelines were 'the right step or a step too far?'

IBA Guidelines

The IBA has only recently adopted its Guidelines on Party Representation, aimed at codifying a universal set of common rules to improve the fairness and efficiency of the arbitral procedure across jurisdictions and practitioners.

Zuleta claims it will take at least five years before anyone can judge if the Guidelines have been a success, but he stands firmly behind the move to create them, and explained why.

‘These Guidelines are attempting to give the parties certain basic rules of conduct,’ he said. ‘There are experienced practitioners versus counsel with no experience whatsoever who are coming into the field and it is helpful to have a guide on how to behave.’

Zuleta and his Committee Co-Chair Paul Friedland, of White & Case’s New York office, emphasised throughout the conference that the new Guidelines were ‘not intended to educate’ sophisticated arbitrators. Instead they are aimed at less-developed nations, said Zuleta, where the local rules of the bar are ‘not to the same standard’. An increasingly globalised world, argued Zuleta, shines a brighter light on the disparities between working cultures in the field.

‘For example,’ explains Zuleta, ‘in certain jurisdictions there is a common law duty of candour – which means the lawyer has to put before the arbitration tribunal not only those decisions and cases that are favourable to their own argument, but also those that are not.’

‘That is something which, in Latin America for example, is unthinkable. Similarly so is the extent to which you can prepare a witness. These Guidelines try to give the tribunal a reasonable instrument to say what we should expect from counsel. Under them, there is an agreed power to exclude counsel in certain situations.’

Regulation: help or hindrance?

Throughout the day, the main debate centred on the Guidelines and Zuleta acknowledged that by the final session there were two polarised points of view on show.

‘These positions have always traditionally been [held] in the arbitration arena,’ he said. ‘There are those that consider no more guidelines or rules are required and that arbitration should be allowed to function the way it is.’

‘In the final panel discussion of the day some delegates were questioning “do we really need more rules? Do we need more soft law?”.’

Zuleta believes it depends on whether counsel see ‘a globalised world where you need to consider everyone else’ or instead regard arbitration as something which is ‘used by a small group of practitioners’.

The day’s debate on whether the time has come for a set of ‘norms’ was crystallised in the final session. It culminated in examining whether the Guidelines are ‘the right step or a step too far’. Or even – as moderator Wendy Miles of Wilmer Hale, London, added – ‘a step not far enough’.

The panel – with more than a century of experience between them – were divided in

mulling over the question of whether too much regulation and soft law can act as a distraction to arbitrators, or be exploited to harass opponents.

Eric Schwartz, current Vice-President of the ICC International Court of Arbitration and Paris-based arbitration partner of King & Spalding, spoke in place of his absent colleague Doak Bishop. Emmanuel Gaillard, Paris partner at Shearman & Sterling also argued in favour of the Guidelines.

Taking the opposing position was London barrister and arbitrator, Essex Court Chambers silk Toby Landau QC, and LALIVE’s Geneva-based Michael Schneider.

‘The importance of the IBA and its Guidelines has played a central role in improving the process of arbitration as a whole’

David W Rivkin
IBA Vice-President

Respect our differences

Speaking exclusively to *Global Insight* after the event, Schneider said that he and Landau ‘shared a reservation against increasing regulation in arbitration’.

Schneider doubts there is a ‘general consensus of agreement on the need for guidelines’ and said he ‘questions the usefulness of guidelines on party representatives’.

He explained: ‘Since I have spoken up in criticism of the subject, I have received much comment supporting and encouraging a more reserved position.’

‘More generally, I think we should pay more attention to the differences in arbitration, listen to each other and respect our differences, rather than trying to force everything into uniform standards. This all the more as international arbitration is moving in a direction which receives heavy criticism from the users.’

At the start of the debate, Miles reminded the conference of Bishop’s 2010 rallying call. He had claimed that although international arbitrators may have different legal cultures, it didn’t mean they were ‘pirates not sailing under a national flag’.

Bishop called for those ‘navigating the high seas to have more than just a coastal chart’, saying: ‘There is a current compelling need for the

development of a code of ethics in international arbitration and for the adaptation of tribunals and institutions to the adoption of such a code.'

Four years on and the IBA has now come up with that code – but it is not to everyone's liking. Landau had previously called for a 'pause for thought' in 2012 and two years on he was asked if the arbitration community understood what it meant to prescribe ethical norms.

In a witty retort he issued a 'public health announcement' over the contagious condition 'legislitis' – an involuntary reaction where 'if something moves, codify it'. He said people were suffering from 'the urge to set down principles encapsulating otherwise self-evident propositions'.

Concern over future direction

Landau's serious point was that, although he didn't dispute a lot of the content of the new IBA Guidelines, he had concerns over the direction in which arbitration was heading.

'The core issue is not "is there a problem with conflicting ethical conceptions?", argued Landau. 'Do they get resolved firstly by the implementation and imposition of one all-purpose harmonised global single standard? Or do they get addressed and resolved by way of a more organic local variable solution, which is dependent upon the particular circumstances of the parties, of the case, of the tribunal and of the issue itself?

'What I suggest in fact we need... is a framework in order to provide assistance and support for that individual answer.'

According to the IBA Arbitration Committee Co-Chair Paul Friedland, there is 'no need for greater regulation' of the sector. The new Guidelines are 'soft law', which can benefit some practitioners, Friedland said.

'The key point is that these Guidelines may not be needed by experienced arbitrators,' claimed Friedland, 'but they may be highly appreciated and needed by those relatively less experienced or newcomers to the field.

'It may be a straitjacket for most, but for some, it evens up the playing field between them and the more experienced practitioners.'

High-level debate

David W Rivkin of Debevoise and Plimpton, New York and London and IBA Vice-President, shared his thoughts on counsel ethics at the conference, prompting attendees to consider whether arbitrators have a 'duty of honesty' in their submissions. Rivkin tells *Global Insight* that the 'seriousness of subjects discussed' is one of the reasons that the day has become such a global success.

'We hoped that the International Arbitration Day would add to the substance of discussions that take place in the world of international arbitration,' Rivkin states. 'And over the years it has served just that purpose.

'The importance of the IBA and its Guidelines has played a central role in improving the process of arbitration as a whole.'

Rivkin says that, as a result, the event has become an occasion 'where those that practice in the field feel they must be there to hear the debate and be with others in the community'.

He confesses to being 'extraordinarily pleased' at this year's attendance of around 900 people and says that the importance of the debate on whether there needs to be a set of standards governing arbitration was part of the main attraction.

Rivkin's personal opinion, he said following the event, is that the Guidelines on Party Representation are 'necessary and important to help focus counsel on appropriate standards of conduct, whichever legal system one may come from'.

He points out that in an increasingly global sphere, parties and counsel involved in a conflict come to the 'arbitration table' with different expectations.

A set of norms, argues Rivkin, helps create a level playing field and 'helps to educate those lawyers less familiar with international arbitration and more familiar with litigation'.

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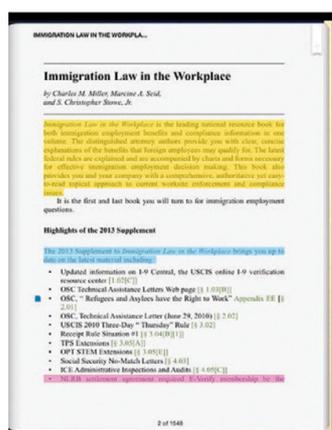
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He adds: 'There are certainly a lot more parts of the world now doing international arbitration; as international trade has grown then so have disputes in those parts of the world.'

Focusing the mind

Rivkin acknowledges the opposing views of speakers such as Landau and Schneider, saying that the discussion about ethical rules on how cases should be conducted could not be underestimated in its importance and that was why this particular event had attracted a record attendance.

'Landau refers to a "disease" in terms of the creation of guidelines,' counters Rivkin. 'But I think they are important in helping focus counsel

If the market views the Guidelines as useful they will be incorporated into procedural orders by tribunals, and then parties and counsel will adopt them. But if, over time, they are viewed as raising more problems than they solve – then they'll be avoided.

Rivkin and other speakers at the IBA International Arbitration Day claimed that from their own experience, several courts, including the UK, have already referenced the Guidelines in procedural orders. That would give an early hint that the market place views them as being useful. However, the true picture will take several years to emerge.

'[Guidelines] may be a straitjacket... but for some, it evens up the playing field between them and the more experienced practitioners'

Paul Friedland

IBA Arbitration Committee Co-Chair; White & Case, New York

and their clients on serious issues that have to be considered in order to provide a common basis for discussion.'

What the Guidelines do in real-life cases, Rivkin claims, is to force parties to consider what the necessary conduct is for potentially difficult situations and not just ignore or fail to respond to the issue.

'It isn't the Guidelines which create a conflict between a tribunal and a client's ethical rules, for example,' explained Rivkin, 'but they do bring it to the forefront and I say that is a good thing for the IBA to be doing.'

The success of the new IBA Guidelines will be judged over time, Rivkin explains. Like other IBA standards released, the pros and cons will be evaluated – as well as the specific provisions as they are used in real-life cases.

Friedland closed the event and he told *Global Insight*: 'It is one of the most important days on the crowded arbitration calendar. It has become one of the major events because the IBA itself is such an important institution.'

'People described the day as a huge success, partially because of the number of attendees and partially because of the excellence of many of the speakers.'

To coincide with the 50th anniversary of the International Centre for Settlement of Investment Disputes (ICSID) Convention, the 18th IBA Annual International Arbitration Day will be held in Washington DC, on 27 February 2015. ☒

Sam Chadderton is a freelance journalist and can be contacted on samchadderton@hotmail.com

Gay rights in Africa taking a great leap backwards

Despite international condemnation, influential African states such as Uganda and Nigeria have passed laws that criminalise homosexuality, undermining fundamental human rights and attacking basic freedoms.

KAREN MACGREGOR

Around the world, legal battles are being waged about gay rights, some progressive and others retrogressive in terms of human rights and the rule of law. In Uganda a giant step backwards was taken on 24 February when President Yoweri Museveni approved the Anti Homosexuality Act 2014, which carries a life sentence for 'aggravated homosexuality' and terms of up to seven years for 'aiding and abetting homosexuality'.

The anti-gay law had been before parliament for four years, and was passed on 20 December 2013. Earlier drafts had carried the death penalty for aggravated homosexuality – defined as repeat offending or homosexual acts with people who are disabled, under 18 or if one of the parties is HIV-positive. It is also illegal not to report any offence under the act. Museveni said: 'No study has shown you can be homosexual by nature. That's why I have agreed to sign the bill.' He dismissed international condemnation as 'an attempt at social imperialism'. Along with the anti-homosexuality law came an 'anti-pornography' bill that bans overtly sexual materials and criminalises women who wear mini-skirts, show breasts, thighs or backsides, or behave in ways that may cause sexual excitement.

In January this year Nigeria's President Goodluck Jonathan signed the Same Sex Marriage Prohibition Bill, which carries penalties of up to 14 years for gay marriage and up to ten years for supporting gay clubs, societies or organisations. Soon thereafter, police began arresting gay men, and in the capital Abuja a mob reportedly dragged more than a dozen men from their homes, marched them naked down streets and assaulted them.

In Uganda and Nigeria the new laws not only violate human rights under numerous international conventions signed by their governments, but also the countries' own constitutions. In both cases, however, it appears that they enjoy support among the public – Nigeria claims 92 per cent popular support – and both countries' leaders have dismissed external criticism.

Homosexuality in Africa

Homosexuality is criminalised in 38 African countries, while in 13 others homosexuality is legal or there are no laws regarding it, according to the International Gay and Lesbian Association. Only South Africa constitutionally guarantees gay rights and it is the only African country where same-sex marriage is legal – although that has not stopped the (sometimes violent) victimisation of gays.

'In Tanzania and Sierra Leone, offenders can receive life imprisonment for homosexual acts. In Mauritania, Sudan and northern Nigeria, homosexuality is punishable by death,' wrote Thebe Ikalafeng in South Africa's *Sunday*

Independent. Most of Africa struggled with the reality of homosexuality, ‘deeming it a Western behaviour that is against African cultural and religious value systems, inhuman, counter-procreation and an affront to the majority of anti-homosexual Africans.’

He cited numerous examples of homosexuality down the ages in Africa, drawing on a 1976 study by anthropologists Stephen Murray and Will Roscoe – from the Azande warriors of northern Congo and South Africa’s Rain Queen Modjadji of the Lobedu to Uganda’s King Mwanga II and Nilotic Langa tribes. ‘Without the social construction of homosexuality then, such practices were not frowned upon as un-African or inhuman as they are today.’

Ikafafeng concluded: ‘In the midst of religious, ethnic and power conflicts, incessant famine and poverty, and hard-won victory over a colonial history of discrimination and criminalisation based on having a different identity, this is one battle in which Africa should not be engaged.’

Education is the best way to counter negative public attitudes towards the lesbian, gay, bisexual and transgender – LGBT – community, which in turn encourage unacceptable policies, says

Judge Richard Goldstone, a South African and co-chair of the IBA’s Human Rights Institute: ‘In parts of Africa there is ignorance about the subject and especially what it means to marginalise and oppress that community.’

International condemnation

Western countries have been outspokenly critical of the African actions.

In March the European Parliament approved a non-binding resolution accusing Uganda and Nigeria of violating Article 9(2) of the Cotonou Agreement on human rights, democratic principles and the rule of law and called for urgent dialogue. Members also proposed targeted sanctions such as travel and visa bans against key individuals responsible for drafting and adopting the laws, and demanded a review of the European Union’s development aid strategy ‘with a view to redirecting aid to civil society and other organisations rather than suspending it’.

Uganda is a large recipient of international aid, and in the wake of Museveni’s signing, several countries and the World Bank announced the suspension of funding or its diversion from government to civil society.

The International Bar Association’s Human Rights Institute (IBAHRI) urged Museveni not

to sign the anti-homosexuality legislation, with IBA Executive Director Mark Ellis describing it as ‘an attack on human dignity and fundamental freedoms in Uganda’.

IBAHRI Co-Chair Sternford Moyo said the bill ‘violates multiple rights and freedoms guaranteed to Ugandan citizens under international human rights law and the Ugandan Constitution. Moyo pointed out that Uganda is party to the International Covenant on Civil and Political Rights and African Charter on Human and Peoples’ Rights, which guarantee freedom from discrimination.

In 2010 the IBAHRI Council resolved to oppose discrimination, violence and other breaches of human rights directed at people – or family members, friends or associates – on the basis of sexual orientation or gender identity.

Goldstone told *Global Insight* that the IBA should continue highlighting serious violations of fundamental human rights wherever they occur. ‘It is important to ensure that the spotlight remains on them and that these violations are not forgotten as the headlines move on to other areas of public interest. The IBA might also point to the fact that Uganda is less likely to attract tourists and less likely to host student and international human rights meetings for as long as its present unacceptable policies remain in place. Some law schools have already cancelled their plans to host summer schools and meetings in Uganda.’

Rather than take a softly-softly approach, said

‘[The bill] violates multiple rights and freedoms guaranteed to Ugandan citizens under international human rights law and the Ugandan Constitution’

Sternford Moyo
IBAHRI Co-Chair

Ross Ashcroft, Chair of the IBA’s Human Rights Law Working Group, the IBA needs to speak with force and condemn laws such as that passed in Uganda as thuggish behavior it is. ‘Plain and simple, these laws are legalising thuggery.’ To do otherwise ‘is to ignore our fundamental roles as lawyers – to speak up for the voiceless and protect the vulnerable’. The IBA should also ‘stand side-by-side with positive contributions to the legal advancement of minority peoples’. For example, the judge of the Jdeide Court in Lebanon, who



A Ugandan covers his face with a paper-bag in order to protect his identity

recently took the stance that homosexual conduct is not against nature, nor is it a mental illness. 'That was a brave, but fundamental decision.'

Africans speak out

Many Africans who support homophobic measures have volubly defended Uganda and Nigeria, with primary arguments based on African culture and religious beliefs. Interviewed on CNN Ngozi Okonjo-Iweala – Nigeria's finance minister and former managing director of the World Bank – referred to the decades it had taken America's gay community to achieve a protected position. It was a question of conversation, evolution, education and engagement. 'So I would say withhold judgment and let us work on this.'

But many other Africans have been outraged. UN High Commissioner for Human Rights Navi Pillay, a South African, said: 'Rarely have I seen a piece of legislation that in so few paragraphs directly violates so many basic, universal human rights.' Former Mozambique president Joaquim Chissano called on African leaders to take 'a strong stand for fundamental human rights, and advance the trajectory for basic freedoms' by allowing people to make informed decisions about basic aspects of life such as sexuality and health, without discrimination, coercion or violence.

Twenty African civil society groups called on the African Union to urgently respond to and condemn an increase in sexuality- and gender-related abuses, and to produce a 'roadmap' on how to tackle anti-gay laws in member states.' The levels of violence, threats, and abusive and hate speech have escalated dramatically as homophobic laws have been put in place.'

Writing in *The Observer* in the UK, Ugandan Patience Akumu accused Museveni of embracing a twisted 'African morality' and trading the anti-gay law for one more term in office.

Early in Museveni's leadership, wrote Akumu, he 'recognised that it was time for Africa to look

colonialism in the eye, count her losses and move on'. There was a sexual revolution. But like most revolutionaries, Museveni lost focus and the benefits of the revolution started to matter less. 'Women being undressed on the street for being 'indecent', homosexuals imprisoned and killed are a small price to pay for another chance to dupe Ugandans.'

Eight Ugandans – including MP Fox Odoi – and two civil society groups, have gone beyond words and filed a Constitutional Court petition, according to the freedom of expression non-profit, Index of

'Rarely have I seen a piece of legislation that in so few paragraphs directly violates so many basic, universal human rights'

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UN High Commissioner for Human Rights

Censorship. They are seeking to repeal sections one, two and three of the act, arguing that they contravene the constitution's right to privacy and equality before the law without discrimination, and also that the bill was unconstitutionally rushed through parliament without a quorum as a 'Christmas gift' to Ugandans.

After filing the petition, Odoi told the media: 'I would rather lose my seat in parliament than leave the rights of the minorities to be trampled upon. I don't fear losing an election, but I fear living in a society that has no room for minorities.' ☒

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