

IBA GLOBAL INSIGHT

Feb/Mar 2013

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on America, Israel, and
Palestine

Exclusive interview with
Luis Moreno Ocampo
on the International
Criminal Court's first
decade

Protect, respect, remedy:
are businesses and
law firms meeting
their human rights
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Judicious activism

Judge Jed Rakoff: putting rule of law back
at the heart of the financial system



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From the Editor



Goodness knows the financial crisis and its aftermath have brought to light enough villains. It's a nice change, then, to focus on emerging heroes. By all accounts, the man featured on our cover, Judge Jed Rakoff, is one such figure: indeed Matt Taibbi, contributing editor of *Rolling Stone*, described him recently as a 'sort of legal hero of our time'.

In our exclusive interview (**Judicious activism, page 19**) conducted with Rakoff at his chambers in New York in October, he discusses in detail his distaste for the lax approach that's been allowed to pervade the US enforcement and justice system, leaving widespread wrongdoing largely unchecked. He is keen to emphasise that he isn't on a moral crusade, just someone trying to do their job properly. He is also keen that those around him do theirs properly, too. Rakoff has attracted headlines for his criticism of the US Securities and Exchange Commission's policy of allowing defendants to neither admit nor deny guilt as a condition of settlement in civil cases.

He and the agency clashed in 2009, for example, when he overturned a \$33m settlement between the SEC and Bank of America relating to the bank's failure to disclose that it had paid bonuses to Merrill Lynch executives shortly before it acquired Merrill. In his ruling, Rakoff lambasted the proposed consent decree as 'a contrivance designed to provide the SEC with the façade of enforcement and the management of the Bank with a quick resolution of an embarrassing inquiry'. He has continued in this spirit, rejecting, in November 2011, Citigroup's \$285m settlement with the SEC relating to the sale of toxic mortgage assets.

Of course, Rakoff can't turn around a rotten system single-handed. But it appears that the tide might be turning. No doubt the news, emerging as *IBA Global Insight* went to press, that Mary Jo White would be the new head of the SEC, would be music to Rakoff's ears. White is the first prosecutor to take the role in the SEC's 80-year history. She's also the woman who prosecuted mafia boss John Gotti, so will take no prisoners. 'You don't want to mess with Mary Jo,' President Obama said on announcing her nomination.

James Lewis

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- Environment and real estate transactions: current and future challenges
- How to effectively solve real estate disputes: dispute resolution and real estate

Who should attend?

Lawyers in private practice, in-house counsels, bankers active in the real estate industry, fund managers, senior managers in real estate companies, accountants, brokers and other service providers to the industry.

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News

IBA President to focus on climate change

The IBA has announced Michael J Reynolds, partner at law firm Allen & Overy, as its new President. His two-year tenure succeeds that of Akira Kawamura of Anderson Mori & Tomotsune in Tokyo, Japan, who held the position from January 2011.

Prior to becoming President, Mr Reynolds held a number of senior positions at the IBA including Vice-President, Secretary-General, Chair of the Legal Practice Division and Chair of the Antitrust and Trade Law Committee. He is a Director and founding member of the IBA's Global Forum on Competition and is the European Union (EU) coordinator for the IBA.

Mr Reynolds opened Allen & Overy's Brussels office in 1979, where he has since been based, and has more than 30 years' experience in European antitrust law with the firm. He has represented major European, US, Japanese and other international clients in a number of important cases before the European Commission and European Court of Justice and has advised the governments of Poland, Romania, Russia and Spain on the application of EU law. He represented Sun Microsystems as complainant in the leading EU case against Microsoft.

In addition, Mr Reynolds is a Visiting Professor in European Law at the University of Durham and a member of the International Competition Network's Cartel and Merger Control working groups. He represents the IBA at ICN annual conferences as well as at the annual meetings of the Organisation for Economic Co-operation and Development.



In his welcome message, Mr Reynolds pointed out the developments which necessitate a change in perspective: 'The global goal of economic growth is turning toward that of sustainable growth, the goal of civil and political rights is broadening to encompass economic and social rights; and we can expect that the fulfilment of these will require that such growth is more evenly spread.'

These developments will lead to a focus on climate change, the strengthening of IBA engagement with legal professionals across the globe,

and the enhancement of standards in cross-border transactions.

Mr Reynolds points out that 'the work and discourse of the IBA and its global membership of gifted, internationally-minded lawyers, is immersed in these shifting concerns, and in understanding how they might affect individuals and organisations, across all fields of specialist law.' He sees the IBA's commercial emphasis as working in harmony with its wider mission on the rule of law, without which commerce cannot function.

Immediate past President honoured by Emperor of Japan

IBA past President and Anderson Mori & Tomotsune partner, Akira Kawamura, has been decorated with The Order of the Rising Sun – a significant honour from the Emperor of Japan – chiefly for his work in relation to the global legal profession.

The Order was established in 1875 by Emperor Meiji of Japan and was

the first national decoration awarded by the Japanese government. In general, it is awarded to those who have made distinguished achievements in international relations; promoting Japanese culture; advancements in their field; development in social or occupational welfare; or in the conservation of the environment.

A delighted Mr Kawamura commented, 'I am indeed, honoured by and proud of this decoration as it is awarded largely due to the recognition of my lengthy service to the betterment and welfare of global communities, work in which the International Bar Association has played an integral role.'

Wegelin closure signals sea change for Swiss banks

JONATHAN WATSON

Switzerland's oldest bank is to close after pleading guilty in a New York court to helping American citizens avoid taxes.

Wegelin, founded in 1741, said it would 'cease to operate as a bank' after admitting that it had helped about 100 American clients avoid paying taxes on assets worth at least \$1.2bn between 2002 and 2010. The bank has agreed to pay \$57.8m in fines and restitution to the United States authorities.

Wegelin's guilty plea and the resulting political storm raised the question of how commonplace these practices are in Swiss banking.

Alexander Troller, partner in banking and finance at Swiss law firm Lalive, says Wegelin's demise is a consequence of a 'fundamental turning of the tide' for the Swiss banking industry. It started in early 2009 when US prosecutors charged UBS with helping Americans to hide assets from the Internal Revenue Service (IRS). Rather than face court, UBS opted to admit it fostered tax evasion, pay a fine of \$780m and hand over data on 250 secret accounts. Details of another 4,450 accounts were disclosed later.

This led the Swiss government to decide it had to get rid of the much-criticised distinction between tax fraud and tax evasion that existed in Swiss law. 'Swiss banks can no longer operate as they did before,' says Troller. 'Many Swiss banks still have non-declared funds and clients who are not tax compliant with their domestic tax authorities, but they are being asked to show a clean bill of (tax) health or to leave.'

In the case of clients residing in Austria or the United Kingdom, they will now be subject to the relevant 'Rubik' agreement Switzerland has signed with those countries. This means their assets will be taxed and there will be a one-off payment for past transgressions.

Those agreements have encountered plenty of criticism, especially in the UK. 'The most glaring loophole in the UK deal is that it does not extend to trusts,' says John Christensen, director of pressure group the Tax Justice Network. 'Any sophisticated wealth holder using



offshore will normally build their tax planning around a trust, a foundation or another similar vehicle.'

Switzerland has signed a similar agreement with Germany, but this was blocked last November by the German upper house of parliament.

A few Wegelin partners may have landed their bank in trouble by being particularly 'loud' in portraying themselves as the last line of resistance against foreign tax pressure, Troller says. 'They had become a bit of a symbol of what foreign authorities didn't like about old-style Swiss private banking. When other Swiss banks had stopped actively assisting non-tax-compliant foreign clients, Wegelin maybe made too much noise in still welcoming them, particularly former UBS customers.'

The unfortunate thing is that no authority in Switzerland has had the courage to learn from the UBS experience and try to rein in the business of helping foreign taxpayers violate foreign tax laws, according to Geneva-based Francis Rojas, Of Counsel at international private client group Maitland.

'Surely high-profile investigations by the Swiss authorities of Swiss bankers doing this sort of thing would have sent the right signal not only to old school Swiss bankers but also to foreign authorities, such as the Department of Justice or the Securities and Exchange Commission, that the Swiss are taking ownership of this issue and dealing with it,' he says.

Troller thinks it is unlikely that the Wegelin case is making banks in other tax havens look over their shoulders.

As long as financial centres continue to compete with each other, and as long as major economies will need the 'oxygen' of the occasional injection of offshore capital, the offshore model will survive, he says.

However, tax campaigners believe the Wegelin case could set a useful precedent. 'This shows there really is scope to push back on the influence tax havens like Switzerland have on tax evasion around the world,' says Murray Worthy, Tax Justice Campaigner at the charity War on Want.

Worthy adds that the US Foreign Account Tax Compliance Act (FATCA) is helping to drive greater international tax transparency. The Act requires banks, wealth managers and other account-running firms to report on any of their clients whom they believe to be US citizens with over \$50,000 in their accounts. If they fail to do so, they will have to pay a withholding tax of 30 per cent on income from US financial assets they hold.

However, needless to say, FATCA is proving unpopular with those banks outside the US who are being forced to implement it. They dislike its extraterritorial nature and see it as saddling them with huge extra costs and responsibilities – for little or no gain. Implementing the legislation outside the US is likely to be a major challenge.

Whether bilateral European agreements or the American approach will make a real difference in Swiss banking remains to be seen.

Read the full story at tinyurl.com/IBANews-Wegelin.

Structural changes to the IBA's Public and Professional Interest Division (PPID)

In 2011 the IBA's Management Board established a Review Committee to reassess the IBA's structure. Its report recommended some alterations to the management structure of the PPID. The recommendations were that the IBA create a lateral management structure for the PPID, consisting of the Bar Issues Commission (BIC), Human Rights Institute (IBAHRI) and a new Section on Public and Professional Interest (SPPI), to which the majority of the remaining PPID entities will belong. The recommendations were approved in June 2012 and came into effect at the start of the new membership year, January 2013.

For full details tinyurl.com/IBA-PPID.

IBA conferences in 2013



Preliminary details of IBA events for 2013 with links for registration are now available on the IBA website. By registering your interest you will be sent full programme and registration details as soon as they become available. The IBA stages around 40 specialist conferences each year focusing on specific practice areas; as well as the IBA Annual Conference, and these events are open to both IBA members and non-members.

See tinyurl.com/IBA-Conferences-2013.

Lack of women at the top is an 'uncomfortable truth' for legal profession, says Law Society President

HANNAH CADDICK

Following a recent survey of leading lawyers, commissioned by the Law Society of England and Wales, its President Lucy Scott-Moncrieff has spoken out on the lack of women at the top of the legal profession. 'Unwittingly, [some] firms may be losing talented women and promoting mediocre men,' says Scott-Moncrieff. 'If career progression was based on pure merit, some male business leaders and law firm senior partners would never even have seen the paintings on the boardroom wall. This is disappointing for the talented women who lose out, but is also damaging to the organisations, which lose what they have to offer.'

Speaking at an IBA discussion panel, senior professionals confronted this problem. The panel consisted of Helena Kennedy QC, barrister and human rights expert; Katie Ghose, Chief Executive of the Electoral Reform Society; Elizabeth Barrett, partner and former Head of Dispute Resolution at Slaughter and May; and Margaret Cole, former Managing Director, Financial Services Authority Conduct Business Unit.

Helena Kennedy pointed out the profession's difficulty with flexible working hours: '...one of the pieces of work that was done recently about the Bar showed that when you saw a [falling away of women] it was usually in that age group of mid-to-late 30s where women were finding it very hard to do it with a family.'

Gender quotas as a potential solution appeared divisive. Elizabeth Barrett opposed quotas, urging people to 'to start thinking about themselves as people rather than necessarily as men or as women, and identify individual strengths and weaknesses'. Katie Ghose disagreed: 'Women and men can be equally rubbish and equally brilliant at things; we need to take the merit right out of it. The idea that there wouldn't be enough meritorious women out there to fill the handful of judicial posts that there are in our country is a nonsense and we've got to knock this one on the head.'

Gender equality is part of a wider problem, as Margaret Cole noted; in all professions, people have a tendency to choose those that they identify with, be it based on gender, background or ethnicity.

To view the discussion on the IBA's film platform, see tinyurl.com/women-in-the-law.



Lucy Scott-Moncrieff

New In-House Perspective website

In-House Perspective, the magazine of the Corporate Counsel Forum, has launched a new website at www.ibanet.org/ihp.aspx. IHP has news, features, columns and video covering issues of interest to in-house lawyers, as well as the wider business community. Featured this edition: banks start getting serious about sanctions; shareholders begin to assert their rights as paymasters; and the Harvard Kennedy School CSR Initiative's film about company/community dialogue in Nigeria: The Only Government We See.

To view IHP online, see www.ibanet.org/IHP.aspx.



Spain's 'bad bank' hopes to draw on Irish lessons

SCOTT APPLETON

December 2012 witnessed the formal launch of Spain's new asset management company, a so-called 'bad bank' intended to relieve its fragile financial institutions of their toxic real estate assets.

The Sociedad de Gestión de Activos Procedentes de la Reestructuración Bancaria (SAREB) has been created under the terms of the €100bn financial injection into Spain's banks agreed by the European Union (EU) in July. Following the 2008 collapse of the country's real estate sector, Spanish banks – notably the regional savings banks (*cajas*) – were left holding an estimated €180bn of increasingly sour real estate assets.

The creation of SAREB echoes the establishment of bad banks elsewhere in the EU, including United Kingdom Asset Resolution (UKAR), which manages £90bn worth of loans previously held by Northern Rock and Bradford & Bingley, and Ireland's National Asset Management Agency (NAMA), which controls €74bn in loans previously held by the country's five largest banks.

It is the purported success of the latter that inspired those tasked with designing SAREB.

'In determining the asset management structure to be used we made a deep analysis of NAMA, which seemed to us to be an example of best practice: a bespoke institution backed with statutory powers,' says Fernando Mínguez, banking partner with Cuatrecasas Gonçalves Pereira, which advised the Spanish Government and its Fund for the Orderly Restructuring of the Banks (FROB) on the formation of SAREB.

'But we faced our own reality. Specifically, a very tight timeframe agreed by the EU and Spanish government, which itself was only approved through primary legislation in August. The demand for an operational deadline of the start of December presented very real practical barriers to replicating the complexity of NAMA and to obtaining statutory powers,' Mínguez explains.

In contrast to the Act of Parliament

that defines the remit of NAMA, SAREB is constituted as a corporate entity that, it is hoped, will ultimately derive half of its capital from private funds and realise a 15 per cent profit through asset sales over 15 years.



'We felt that we did not have to reinvent the wheel. The corporate structure chosen enables SAREB to do virtually all that is required while providing the flexibility to address operational issues when they occur,' says Mínguez.

With initial access to €60bn in working capital, SAREB has a mandate to acquire assets held by the most vulnerable domestic banks, removing potentially crippling liabilities, albeit at an average discount of some 50 per cent of their book value.

A significant proportion of the initial €45bn of assets to be transferred will come from Bankia, Spain's largest domestic bank, nationalised in July in the face of an increasingly uncertain balance sheet, and in part the result of the introduction of more rigorous real estate loan default provisions.

Mínguez is confident that the transfer of assets from banks to SAREB will begin on time and progress smoothly. But while many in Spain applaud the efforts made to bring greater certainty to banks' profit and loss accounts, some commentators have lamented that it comes four years too late. In addition, as a non-statutory institution SAREB will have limited powers, and uncertainty surrounds its attractiveness to outside investors – the parameters

that define SAREB's operation mean that it will absorb a disproportionate amount of the most toxic assets (half-finished projects and undeveloped land), critics say.

Indeed, the relative success of NAMA, which came into operation in March 2010, is a result of the speed at which it was introduced, according to Pádraig Ó Ríordáin, of Arthur Cox, who advised the Irish government on its formation.

'Ireland was initially criticised for putting its hand up and recognising early the problems it had, but ever since the onset of the financial crisis, the government has taken a very pragmatic approach and NAMA reflects this,' he says. 'We clearly faced our own deadline pressures, but what proved critical was the forethought undertaken to determine the powers and operational processes NAMA would require, how thousands of assets would be valued and transferred in such a short period of time. We didn't want any major surprises and we haven't had any.'

Peter O'Brien, a banking and finance partner at Matheson, which advises extensively on NAMA-related transactions, agrees that it does provide a solid template for similar institutions. 'There have been some concerns over the write-down of assets, but it has worked. It has brought sufficient certainty to allow a number of banks to recapitalise. There remains a long way to go but recent months have seen the two pillar Irish banks raise new funds, which is a sign of investor confidence that was not necessarily there prior to NAMA.'

However, Ó Ríordáin echoes Mínguez's own caution that each situation requires its own solution.

'Ireland's banking sector faced crippling problems but ultimately we could narrow our focus to the problems facing five major banks. Clearly the scale and number of banks potentially affected is much more acute in Spain. But what we must emphasise is that NAMA, like SAREB, is only one tool in the box. As effective as it is, it has to be taken in context. A bad bank is no panacea for all of a country's financial problems.'

Human Rights News

International law 'not equipped' to deal with drone attacks

REBECCA LOWE

International humanitarian law is inadequate for dealing with modern forms of warfare such as drone strikes, according to leading experts in the field.

The United States has faced mounting criticism over its unmanned drone attacks in Pakistan, Yemen and Somalia in recent months. Reports estimate that between 550 and 4,000 unarmed civilians have been killed in operations since 2002.

John Shattuck, US Assistant Secretary of State for Democracy, Human Rights and Labor under President Clinton,

many that terrorist threats are the proper purview of policing and criminal justice, rather than military intervention and the law of war,' he says. 'Some, nevertheless, have questioned whether contemporary international law is equipped to meet the challenges of modern terrorism.'

Ben Emmerson QC, UN Special Rapporteur on Counter-Terrorism and Human Rights, is due to launch an official inquiry into drone strikes later this month. His aim is to end the 'conspiracy of silence' over drone attacks, he says,

John Bellinger, former legal adviser to the US Secretary of State under George W Bush, believes drone strikes will pose a 'problem' for the President during his second term. 'Last year there was an increasing drumbeat of criticism,' he tells *IBA Global Insight*. 'Obama didn't expect this – to face the same criticism Bush faced [over Guantanamo].'

If strikes continue to escalate, Bellinger suggests that the administration will find itself pushed into a corner. 'The question on many people's minds,' he says, 'is what happens if another country launches a drone strike, whether it's Russia or Turkey or someone, and then putting the US in the difficult position of commenting on someone else's use of drones'.

International pressure on the US government to rethink its drone policy has increased in recent months. Christof Heyns, UN Special Rapporteur on Extrajudicial Killings, summary or arbitrary executions, has suggested that drone strikes may constitute war crimes, while Michael Boyle, Obama's former security adviser, has claimed that the strategy is 'encouraging a new arms race that will empower current, and future, rivals and lay the foundations for an international system that is increasingly violent'.

However Jamie Shea, Deputy Assistant Secretary-General for Emerging Security Challenges at NATO, argues that the US has no choice but to engage in drone strikes. Speaking to *IBA Global Insight*, he says: 'In the first instance, the US would very much hope that Pakistan would take the issue in hand and stop this. But if the local authorities are not able to deal with the situation themselves, then obviously you need to use other means.'

He adds: 'The US, being a democratically elected government governed by the rule of law, does ensure legal advice is taken before these operations go on.'

Read the full story at tinyurl.com/IBANews-drone-attacks.

John Bellinger, former legal adviser to the US Secretary of State under George W Bush, believes drone strikes will pose a 'problem' for the President during his second term.



believes the law of nations is ill-equipped to address the rules of drone combat in counter-terrorism operations. 'We are living in a very volatile and rapidly changing world when it comes to the means by which warfare is conducted,' he tells *IBA Global Insight*. 'I think international law is not fully equipped to address the rules that need to exist in these areas.'

Shattuck is also troubled by the drift towards drone warfare 'from the standpoint of democracy'. 'Democratic nations shouldn't go to war without serious consideration by the public. And I'm afraid the drone distant warfare doesn't seem to be consistent with that.'

Justice Richard Goldstone, Chair of the IBA Task Force on International Terrorism, concedes there is an important debate to be had on the subject. 'The rhetoric of the George Bush administration's "war on terror" has stood in sharp contrast to the belief of

and 'shine the light of independent investigation' onto the process. The inquiry's findings will be reported to the UN General Assembly in the autumn, with a view to making recommendations for further action.

According to official US policy, drone attacks against terrorists should be judged according to the conventional laws of engagement, as a means of self-defence. Congress approved the use of military force as a means of defence against the perpetrators of 9/11 – the Authorization for Use of Military Force Against Terrorists statute – in September 2001.

The White House contends that drones – unmanned aircraft piloted from the safety of an American container – are more humane than conventional warfare as fewer civilians are killed. However, the Obama administration has come under growing criticism as the reported number of innocent civilians killed continues to rise.

ICC Ngudjolo decision

The decision of the judges of Trial Chamber II of the International Criminal Court (ICC) to acquit Mathieu Ngudjolo Chui, a Congolese national, based on insufficient evidence to establish his guilt, is consistent with the well-established principles of due process and the rule of law, said the IBA ICC Programme, in a statement issued 21 December 2012.

The ICC Trial Chamber II unanimously found that the prosecution failed to prove beyond reasonable doubt that Mr Ngudjolo was criminally responsible for the war crimes and crimes against humanity committed during the 24 February 2003 attack on the village of Bogoro, in the Ituri District of the Democratic Republic of the Congo. While the judges acknowledged the factual incidence of the crime and the suffering of victims, the evidence presented by the prosecution failed to convince them of the guilt of the accused.

The ICC's second trial has enjoyed little public attention in comparison to its first case against Thomas Lubanga Dyilo, who was convicted by the Court earlier in 2012. While this case may now be remembered as the ICC's first acquittal, the trial itself was notable for its procedural efficiency. The case is the only one to date in which judges conducted a site visit to obtain a better understanding of the facts. However, the judges' decision not to convict, owing to insufficient credible evidence to convince them of the accused's guilt, raises concerning questions over the quality of investigations by the prosecution.

Read the full story at tinyurl.com/Ngudjolo.



The rule of law in Myanmar: prospects and challenges



On 17 January at the Law Society of England and Wales, an expert panel discussed the major findings and recommendations of the IBAHRI fact-finding report on Myanmar (Burma). Moderated by Owen Bennett-Jones, British Journalist and BBC World Service Presenter, the panel comprised members of the fact-finding delegation, including: Judge Philippe Kirsch OC QC, former President of the International Criminal Court; Professor Nicholas Cowdery AM QC, former Director of Public Prosecutions of New South Wales, Australia; and the mission rapporteur Sadakat Kadri, Barrister at Doughty Street Chambers, UK.

Panellists agreed that, based on their meetings and experience in country, there was genuine interest in reform in Myanmar, coming from the top. While there is still a long way to go, the panel was unified in stating that reform was headed in the right direction. However, the panel warned that reform must be realistically paced and emphasised the need to build mechanisms to enforce the newly granted rights. The panel also answered questions on legislative reform, parliamentary committees, the newly established Human Rights Commission, and accountability for past crimes. In addition, they provided insight into the independence of the judiciary and the role of the prosecutor and of the wider legal profession, including the local bar associations, in the reform process.

The report, *The Rule of Law in Myanmar: Challenges and Prospects*, was written on the basis of material gathered by a high-level fact-finding mission to Myanmar in August 2012, mandated to examine the reform progress made so far by the Myanmar government and the extent to which it adhered to globally prevalent understandings of the rule of law. The delegation held meetings in Yangon, Nay Pyi Taw, Mandalay and Bago with over 100 people, including the Attorney-General, the Deputy Chief Justice and the Director-General of the Supreme Court, the Director-General of Myanmar Police, the Chair and other members of the Myanmar National Human Rights Commission, several senior parliamentarians and two advisers to President Thein Sein. The delegates also held discussions with members of the National League for Democracy party, including its leader, Daw Aung San Suu Kyi and deputy-leader, U Tin Oo. *The Rule of Law in Myanmar* shows that the path ahead for Myanmar is marked with both opportunities and challenges and concludes that the success of future reforms will require the creation of transparent bodies and processes that practically safeguard fundamental rights for all the people of Myanmar – regardless of gender, ethnicity and other factors – by providing them with an effective remedy for violations.

For more information see tinyurl.com/IBAHRI-Myanmar.

Chávez inauguration absence causes constitutional uncertainty

LATIN AMERICA CORRESPONDENT

The absence of Hugo Chávez for Venezuela's presidential inauguration ceremony in January and the government's handling of reporting of his medical treatment in Cuba, caused widespread both widespread speculation and a constitutional crisis. Chávez, who was re-elected last year by a nine per cent margin, was due to be sworn in for another six-year term on 10 January. However, his health had deteriorated and he was receiving further surgical treatment of his cancer in Cuba.

Information about his state of health was carefully controlled, causing uncertainty about his whereabouts, whether he would be fit to be sworn in or even whether he would survive his current treatment. Opposition leader Henrique Capriles called on the country's Supreme Court to rule on what would happen if President Hugo Chávez was not sworn in on 10 January.

The day before the ceremony was due to take place, the Supreme Court ruled that Chávez could be sworn in at a later period, when he is able to attend his inauguration in person.

As Dr Julia Buxton, head of International Relations and Security Studies (IRSS), Peace Studies at the University of Bradford, notes, the constitutionality debate has been widely discussed across Venezuela. 'The government maintains that the will of the democratic majority (the 55 per cent of voters that backed Chávez in October) overrides constitutional rigidity and in not anticipating the inability of the President to attend his own inauguration, the Constitution has left the situation open to interpretation.'

According to the Constitution, the President's absence from the country – for any reason – always constitutes an 'absence of office,' according to Venezuelan constitutional law expert Allan Brewer-Carías. 'In such cases, the Executive Vice-President will stand in for the President automatically, assuming the role of President for a maximum period of ninety days, which can only be extended for a maximum period of ninety additional



days following a ruling by the National Assembly.'

'In accordance with the Constitution, if the temporary absence lasts for more than 90 consecutive days then the National Assembly must decide by a majority vote among its members if this should be deemed an absolute absence from office,' he adds.

Such is the extent to which the debate has gripped the country that, on 10E itself, Venezuelan opposition newspaper *El Universal* hosted a live webchat with constitutional lawyer Luis Beltrán Guerra, where viewers could submit queries via Twitter about the Constitution and what the inauguration delay means.

Although social media has been instrumental in recent years in keeping Chávez at the forefront of people's minds, the ongoing silence by the government and its refusal to reveal details of Chávez's health have sparked criticism from the opposition, and stimulated a high level of curiosity from the public, notes Buxton.

'The impact of his silence has been to galvanise popular concern for the President and strengthen the loyalty to him that led 55 per cent of the electorate to vote for Chávez in October – when he was already of indeterminate health,' she says. 'Silence has proved a powerful weapon for the government during a period of constitutional uncertainty. It has put public opinion behind the ruling PSUV [United Socialist Party of Venezuela] and this will ensure that the government prevails in constitutional wrangles with the opposition.'

Meanwhile, Vice-President Nicolas Maduro – who was recently announced as Chávez's preferred successor

should he lose his battle with cancer – continues to stand in for him, and led a pro-Chávez rally that attracted tens of thousands of people.

El Universal is not the only news outlet to encourage debate about the constitutional issues surrounding Chávez's delayed inauguration, but the government has been quick to clamp down on what it sees as anti-Chávez propaganda.

'The ruling PSUV has put out a number of statements condemning media conspiracies against Chávez and Venezuela following feverish speculation over Chávez's health – and possible death – in the media,' comments Buxton. 'By raising fears of destabilisation and conspiracy, the PSUV can canalise nationalist and pro-Chávez sentiment to the advantage of the President.'

In the aftermath of the 10 January debacle, Venezuela's National Telecommunications Commission (Conatel) fined local television broadcaster Globovisión, which has long been an opponent of Chávez, for allegedly seeking to 'manipulate and incite panic among the population' by broadcasting a series of videos relating to the President's health and inability to attend the inauguration ceremony. According to *El Universal*, this is the government's third such legal challenge against the broadcaster.

Although Chávez's Twitter account has lain dormant for several months, the government has opted to broadcast archive footage of the President looking healthy, and has released 30 official health updates since his operation in December.

'This latest conflict in 14 years of legal and constitutional dispute between the government and the opposition will serve only to entrench polarisation and political uncertainty in the country,' concludes Buxton.

While the inauguration has been postponed indefinitely, it seems clear that the constitutionality debate shows little sign of abating.

Security Council must sanction Libya over al-Senussi trial, says top barrister

REBECCA LOWE

A leading human rights lawyer has demanded that the UN Security Council imposes sanctions on Libya if the country fails to hand over a senior official of the Gaddafi regime to the International Criminal Court.

Libya is in 'flagrant violation' of international law by refusing to relinquish custody of former intelligence chief Abdullah al-Senussi to The Hague, Ben Emmerson QC has claimed. Libya has announced it intends to try al-Senussi within a month, and is likely to impose the death penalty.

Al-Senussi was one of the closest confidants of Libya's former leader Colonel Muammar Gaddafi. He is wanted by the ICC, along with Gaddafi's son Saif al-Islam, for two counts of crimes against humanity – murder and persecution – alleged to have been committed against protesters at the start of the Libyan uprising in February 2011.

Emmerson, counsel to al-Senussi, issued an emergency application to the ICC's Pre-Trial Chamber on 9 January urging the judges to order the Libyans to comply with their legal obligations. He has also written to the president of the Security Council, Masood Khan of Pakistan, and British Foreign Secretary William Hague to ask them to use their influence to put pressure on the Libyans.

A UK Foreign Office spokesman confirmed receipt of Emmerson's letter, but said the foreign secretary would need time to respond fully. He said: 'We continue to engage with the Libyan authorities on their plans following the extradition of al-Senussi back to Libya. We have underlined with the Libyan authorities that it is important al-Senussi is detained in accordance with Libyan law, that he is held by a legitimate authority and that any potential criminal trial held in Libya meets international standards.'

Speaking exclusively to *IBA Global Insight*, Emmerson stressed that the ICC judges should 'not be cowed by the lawless threats of an emerging nation'.

'It is absolutely clear that there is a current, subsisting and binding obligation on Libya immediately to surrender al-Senussi to the ICC,' he said. 'The Security Council now needs to take action. If Libya fails to comply, sanctions should be imposed.'

'Mr al-Senussi has been charged with some of the most serious offences imaginable – crimes of exceptional gravity – but that can never justify or excuse a flagrant breach of international law that has the effect of denying a fair trial and a process that would inevitably culminate in his execution. The days of victors' justice are over.'

'Either we believe in the international rule of law, and a fair trial even for those accused of the worst international crimes, or go back to the days when we left it to the dogs of war to tear their enemies to pieces. It's a stark choice. This is a critical moment in the history of international criminal law.'

Prosecutors believe al-Senussi's knowledge of Gaddafi's regime could help expose some of its most notorious acts. In 1996, Libyans allege he was involved in the massacre of over 1,000 inmates at the Abu Salim prison in Tripoli. Three years later he was convicted in absentia by France for his alleged role in the 1989 bombing of a French passenger plane, in which 170 people were killed.

It is also believed he may have knowledge about the 1988 Lockerbie bombing, when a Pan-Am flight from London to New York exploded in Scotland, killing 270 people.

Speaking to *IBA Global Insight*, former ICC chief prosecutor Luis Moreno Ocampo conceded that Libya needed permission from the ICC judges to try both men, but said the Libyans had clear jurisdiction over the case. The controversial Argentine has previously been criticised by the ICC Appeals Chamber for perceived bias in favour of Libya.

'The ICC is not an appeal court and the primacy is with Libya, the national system,' Ocampo said. 'And this is what



the ICC should decide [...]. The new government wants to show to the world that they can do justice here. For them, it is a matter of pride and dignity that they can conduct this themselves.'

The ICC issued arrest warrants for al-Senussi and Saif al-Islam in June 2011. Libya is not a member of the Rome Statute, which brought the ICC into being, but the Security Council has the power to refer non-members to the Court.

Under the principle of complementarity, the ICC can only accept jurisdiction when a member state is unable or unwilling to do so itself. Following an admissibility challenge from Libya, the judges of the Pre-Trial Chamber are currently in the process of deciding whether al-Islam could be afforded a fair trial on domestic soil.

However, Libya has not officially challenged the jurisdiction of the al-Senussi case and is therefore in violation of international law by not handing him over to the Court.

A spokesperson for the ICC stressed that it 'is up to the judges to make a finding in cases of non-cooperation and to inform the Security Council to take necessary actions'.

He said: 'We are not in a position to speculate on the findings that judges would make – or not. It is however clear that the ICC is part of the international justice system and strives at ensuring the highest principles of international law, as well as respecting defence rights.'

To read the full story, see tinyurl.com/al-Senussi.

William Reece Smith Jr

IBA President 1988–1990



Reece Smith's introduction to the IBA was attending, as the newly appointed Council delegate of the American Bar Association, the first IBA Conference to be held in Asia, in New Delhi in October 1982. Reece's resourcefulness – which stood him in good stead throughout his IBA travels to all six continents – was shown by his avoiding the 'Delhi Belly' which afflicted many delegates by drinking no liquids other than whisky! Two years later he was elected Secretary-General, then Vice-President and, in 1988, President of the IBA.

Reece was the consummate model of a successful lawyer, advocate for the poor and community leader. His interests as President were largely directed to the broader public and professional responsibilities of the legal profession. Those interests led him to visit judges, lawyers and bar associations in 22 countries, and to set up a 'twinning' programme, in which a developed bar helped a developing bar. In 1985 Reece was asked by the then President, James Sutherland, to chair a committee to develop and implement the setting up of a new section, the General Professional Programme Section (a forerunner of

the Bar Issues Commission) with the aim of identifying and addressing the concerns of the legal profession. The Section was duly established in 1986 and Reece was invited to chair the first conference it organised for bar leaders.

'Reece organised a successful march by lawyers on Capitol Hill to protest at plans to cut legal aid funding'

Given Reece's interest in assisting developing bars, it was fitting that his conference as President should be the first to be held in Africa, in Nairobi. However, eight weeks beforehand, three Nairobi lawyers visiting their clients in jail were arrested. The IBA gave an ultimatum: either charge the lawyers or release them, or we will cancel the conference, worth many hundreds of thousands of dollars to the local economy. The ultimatum

was ignored and the conference moved, with great success, to New York.

Following two years at Oxford University as a Rhodes Scholar, Reece returned to his home town of Tampa, Florida and began his career at Carlton Fields as a litigation lawyer, arguing cases at every level of the state and federal systems, including the US Supreme Court. Throughout his career, he urged that every lawyer should be active in voluntary work, setting up the American Bar Centre for Pro Bono and championing legal aid funding.

Reece was President of the American Bar, 1980–1981, as well as of his local and State junior and senior bars. Memorably, while President, he organised a successful march by lawyers on Capitol Hill to protest at plans to cut legal aid funding. His work for society and the bar was recognised by over 50 awards, including those from the Canadian, Mexican and Cuban Bars. In 2008, the IBA created the Young Lawyers' Committee Outstanding Young Lawyer of the Year Award, in recognition of Reece. He will be sorely missed by his family, friends, colleagues and his community.

IBA GLOBAL INSIGHT

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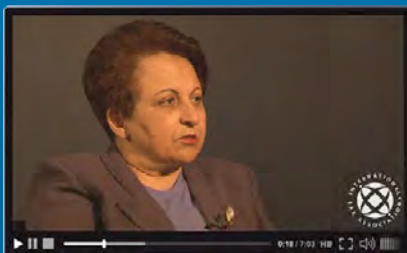
The IBA's flagship magazine is delivered to all members of the Association six times each year and is also available for subscription or individual purchase, as well as being accessible online, and in app format.



in film



Mark Malloch Brown, former UN Deputy Secretary-General, took part in an IBA webcast interview with IBA Director of Content, James Lewis, in November 2012. Lord Malloch-Brown shared his experience in foreign affairs and covered topics such as development, globalisation, and conflict in the Middle East.



Judge and lawyer **Shirin Ebadi**, who became the first Iranian to win the Nobel Peace Prize in 2003 for her fearless human rights work, spoke to IBA Senior Reporter Rebecca Lowe in August 2012. Dr Ebadi discussed the severe persecution facing lawyers and human rights activists in her country, from which she was forced to flee in 2009.



Médecins Sans Frontières Co-Founder **Bernard Kouchner**, the former French Minister of Foreign Affairs, discussed the intractable problem of Syria and his frustration at the failure of global powers to live up to their obligations. Full video coverage of the Dublin conference can be found at www.tinyurl/dublinfilms

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Leveson:

watershed for press ethics or expensive white elephant

What will come of the inquiry into press culture? And what could it mean for journalists?

CARL GARDNER

When Lord Justice Leveson concluded his 22-minute London press conference on 29 November, he was applauded by journalists. Since then, though, he's found press plaudits hard to come by. To read British newspapers over recent days, you might be forgiven for thinking 'Lord Leveson' as he's so often wrongly called, was some sort of traitor bent on abolishing British freedom ('Lord Justice' is his judicial title as a High Court judge; but Leveson is not a lord). Such is the pitch of the public and especially the media debate about his report on the culture, practices and ethics of the press.

Leveson's inquiry was ordered by the UK Prime Minister in 2011 as a result of the emerging scandal of 'phone hacking' by the *News of the World*, which closed following the revelation that someone working for it had, in 2002, illegally accessed the mobile phone messages of a missing schoolgirl, Milly Dowler – who was later found murdered. This was the culmination of a series of claims and discoveries about the extent of phone hacking of celebrities and others. Leveson has spent nearly 18 months gathering evidence from editors, politicians and victims of press intrusion.

The British press currently regulates itself by means of the Press Complaints Commission (PCC) – a body set up after Sir David Calcutt QC's inquiry more than 20 years ago. Almost everyone agrees that the PCC, which is funded and dominated by the press, and whose chairs tend to act as the press's public champions rather than its invigilators, has conspicuously failed. The key decision for Leveson was whether to try again with some beefed-up form of pure self-regulation – with the risk that nothing would really change – or argue for formal press regulation enshrined in legislation. That, as was made clear in a number of editorials and comment pieces in the run up to the report's publication, would be regarded by at least some sections of the UK press as tantamount to ending press freedom.

'Leveson proposes that the independence and effectiveness of the new self-regulatory system be checked by a separate body – some legislation, or 'statutory underpinning', being needed simply to empower this recognition authority'

Leveson's solution was, his supporters would claim, subtle and ingenious: he recommends voluntary self-regulation designed, as before, by the press itself. He rejects (except perhaps as a backstop, should his key recommendation be spurned by the press) direct regulation by a statutory body, and any prior restraint of publication. What's new, though, is his proposal that the independence and effectiveness of the new self-regulatory system be checked by a separate body – some legislation, or 'statutory underpinning', being needed simply to empower this recognition authority. If the press's system passed muster, then publishers joining it would benefit from an arbitration system designed, by means of costs incentives and penalties, to require libel and privacy actions to be resolved by the regulator rather than in court. Those outside self-regulation would risk exemplary damages if sued, and

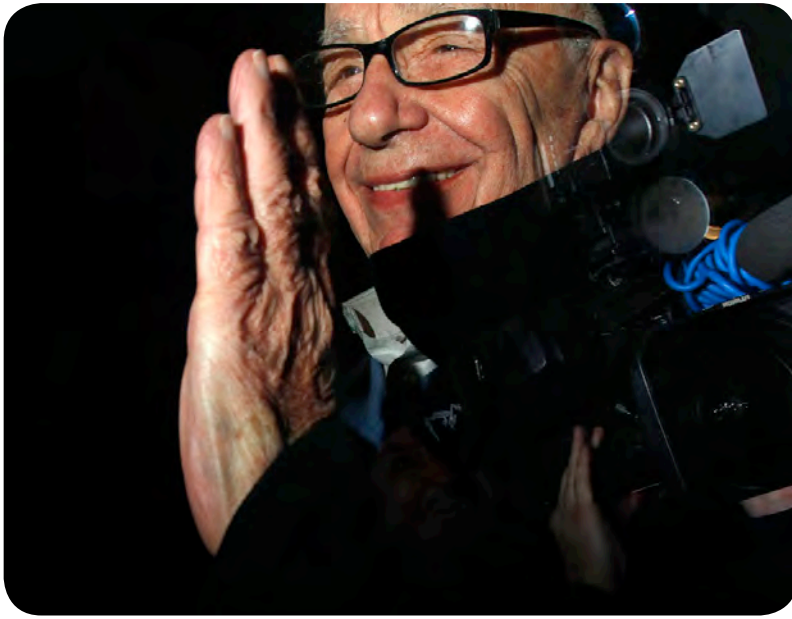


costs even if they successfully defended a libel action.

To some, even this is the path to state control. Tim Luckhurst, Professor of Journalism and head of the Centre for Journalism at the University of Kent, is clear: 'I'm incensed by the arrogant pretence that statutory underpinning is not synonymous with statutory regulation – it's pure sophistry.' Free speech, he argues, 'underpins all other freedoms. Without it, all other freedoms are impossible.' The press may have done wrong but, he says, 'involving the state in any way is far too high a price to pay'. Instead he bemoans 'a tendency to blame a failure of regulation for what was in fact a failure of criminal law'.

The journalist and media consultant David Banks, former co-editor of the journalists's media law bible, *McNae's*, broadly agrees. 'An inquiry into why the metropolitan police didn't investigate the original phone-hacking allegations would have been more useful. But Leveson was unable to because of the risk of prejudice to future trials.' Banks is more prepared to accept that Leveson 'has some very sensible suggestions in terms of the structure of regulation, public involvement and so on.' But he's wary of legislation. 'To my mind, the executive has no business being involved with regulation of the press – it's a principle you cannot accept in a democracy.'

Natalie Peck, a lecturer in Investigative Journalism at South Bank University, attended almost every day of the inquiry, and found sitting in the media annex watching proceedings 'a bizarre, self-reflexive experience.' During the hearings, she says, 'at no point was what I'd call state regulation mentioned.' And since the report came out 'there has been a misrepresentation of what statutory underpinning means.'



Last-chance saloon

Prime Minister David Cameron, taking a considerable risk with his premiership by appearing to side with the press against a majority in Parliament and the public, has at the last moment expressed 'serious concerns and misgivings' about legislating. The novelist J K Rowling, herself a target of press intrusion, has accused him of backing away from his own assurances to act on

'To my mind, the executive has no business being involved with regulation of the press – it's a principle you cannot accept in a democracy'

David Banks

Former co-author, McNae's Essential Law for Journalists

Leveson as long as the recommendations were not, to use Cameron's word, 'bonkers'. But the government is preparing draft legislation so that MPs can see what Leveson's model would mean.

Many think the real intention of Cameron and his culture minister, Maria Miller, may be to demonstrate that a statute would have to be big and intrusive. The Liberal Democrats, the junior partner in the UK coalition government, insist they'll make sure the draft is an honest one. At the same time, the press has begun a round of meetings in a last-ditch attempt to agree much stronger, visibly independent self-regulation aimed at heading off legislation. 'We almost certainly will get a tougher regulatory regime,' concludes David Banks.

Whatever happens, Leveson will go down in history as an important moment in the history of press regulation. Lord Justice Leveson, Peck says, has repeatedly made clear he wants his work to be useful – not for his report to gather dust. 'My main fear is that just nothing will happen,' Peck says.

But so much has already happened. Jobs and careers have been lost, and some – notably the former *News of The World* editor Rebekah Brooks and her successor, later David Cameron's communications director, Andy Coulson – face trial on criminal charges next year. The *News of The World* is history, and Rupert Murdoch's News Corp was forced by the hacking revelations to abandon its bid for full control of the satellite broadcaster, BSkyB. While News Corp's shares have rallied since then, the company is being cut in two – and Murdoch himself is a diminished figure, surely past the peak of his powers. The cathartic process of the inquiry may have affected irrevocably the way readers think about the press.

Regulatory change of some kind is now certain, although experience suggests the press, left to itself, will move, at most, inch by painful inch. Press regulation will be the most important political issue in Britain in early 2013. David Cameron could be defeated by the House of Commons, his authority perhaps irreparably diminished. But the press will owe him a great deal if, in the short space of time he's bought, he and they can cobble together some arrangement that holds the line against statute.

Whether this political blood-bond between editors and the head of the executive really amounts to freedom from 'state control' is another question. ☒

Carl Gardner is a former UK government lawyer. He writes about law at Head of Legal and can be contacted at carl@headoflegal.com



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Judicious activism

As a district judge in New York, Jed Rakoff has drawn praise and opprobrium for standing up to both the banks and the regulators in the aftermath of wrongdoing uncovered by the global crisis. *IBA Global Insight* meets the man putting rule of law back at the heart of the financial system.

TOM WICKER

Photography: Michael Lewis

I am sitting opposite Jed Rakoff, judge for the Southern District of New York. We are meeting in his chambers on a Friday evening in mid-October. A theatre enthusiast and former English major, Rakoff is pondering which dramatic work best captures his experience of courtroom life.

'Too often, what I see would fit nicely with a *Molière* or a Ben Jonson play,' he says, after a pause, invoking farce and satire. 'And a lot of what I see in my day-to-day court would fit nicely with *Guys and Dolls*,' he concludes wryly.

Rakoff's choice of a musical about gamblers wheeling and dealing in Prohibition-era New York reflects the larger-than-life characters that have passed through his court since his appointment in 1995. Before that, he headed up Fried, Frank, Harris, Shriver & Jacobson's criminal defence and RICO groups.

A small, white-bearded man with a gentle rumble of a laugh, Rakoff, 69, doesn't seem like an obvious candidate for the title of 'activist judge' bestowed on him in recent years by the United States media. But while he doesn't find the term particularly helpful, 'I don't run away from it either,' he says.

Taking on the SEC

In the past decade, Rakoff has ruled the death penalty unconstitutional (a decision reversed by the Court of Appeals for the Second Circuit), awarded the longest sentence and highest fine in history to an individual for insider trading and shone a light on the closed-door workings of corporate America.

In particular, Rakoff has attracted headlines for his criticism of the US Securities and Exchange Commission's (SEC) policy of allowing defendants to neither admit nor deny guilt as a condition of settlement in civil cases.

In November 2011, he rejected Citigroup's \$285m settlement with the SEC relating to the sale of toxic mortgage assets. He said the deal was 'neither fair, nor reasonable, nor adequate, nor in the public interest.' This decision – which the SEC has appealed to the Court of Appeals – is the latest high-profile tussle between Rakoff and the regulator in whose side he has become a sizeable thorn.

He and the agency clashed in 2009, when he overturned a \$33m settlement between the SEC and Bank of America relating to the bank's

failure to disclose that it had paid bonuses to Merrill Lynch executives shortly before it acquired Merrill.

In his ruling, Rakoff lambasted the proposed consent decree as ‘a contrivance designed to provide the SEC with the façade of enforcement and the management of the Bank with a quick resolution of an embarrassing inquiry.’

Rakoff eventually signed off on a settlement with a much higher penalty in 2010, following his demand that Bank of America and the SEC produce a more extensive account of the facts surrounding the bonus payments.

Rakoff’s determination not to rubber-stamp deals in his courtroom spurred Matt Taibbi, contributing editor of *Rolling Stone*, into praising him as a ‘sort of legal hero of our time’ for his pursuit of corporate accountability.

But while Rakoff concedes that the effects of the financial crisis have ‘probably made me take a harder look’ at the activities of major corporations and their regulators, he insists that he isn’t on a moral crusade, just someone trying to do their job properly. This is echoed by lawyers who have been before him.

‘He’s fair to all sides, but he doesn’t like anyone to fall down on their job,’ says one partner at a leading US litigation firm. ‘He’s a former prosecutor who thinks the government has a job to do. He wants the attorney’s office and the SEC to do their jobs. And if he thinks they’re letting people off too lightly, he doesn’t like that anymore than if he thinks they’re going too hard.’

Rakoff characterises the period preceding the Bank of America case as one in which the US courts had fallen into the habit of ‘just signing off on whatever a regulator gave them.’

He continues: ‘Most of us, and this included me, would get something from the regulator and the party they were going after – presented without argument, without even an attempted rationale – and we would sign.’

Why did this happen? ‘First and foremost, it was the easy thing to do – it got another case off our docket,’ Rakoff answers with disarming honesty. Judges ‘always have more cases than they want to think about.’ Secondly, ‘if a well-respected agency like the SEC and a big company like Bank of America, with lots of resources, could find an agreement, why should a judge intervene?’

Regulatory capture

Rakoff found several answers when he looked more deeply into the case. A confluence of factors concerned him about the process and nature of the settlement, and convinced him to challenge it.

He was well aware of how much had been

written about the phenomenon of regulatory capture in recent years. ‘And I knew from the Madoff case and others that the SEC was probably not at its strongest in the years preceding the economic crisis.’

But what troubled Rakoff most was that ‘the allegations were that Bank of America’s management had defrauded their own shareholders and yet, who was paying the fine? The shareholders! It was like, “hit me again!”’ he says incredulously.

The US legal system’s preference for targeting companies rather than individuals is one of Rakoff’s biggest bugbears. It’s hard not to detect this in his reluctant signing of Bank of America’s upwardly revised \$150m settlement, which he called ‘half-baked justice at best’ at the time.

Rakoff concedes that where companies benefit from the illegal actions of individuals, they should bear liability. ‘But in the end it was human beings who made the decision to

‘There have been situations where I’ve thought settling would be terrible, where there would be genuine benefit in the facts coming out. And yet the parties came in on the morning of trial and said they’d settled the case, and I had no choice but to accept it’



do something wrong. If you're going to have deterrents, you need to punish them, not some abstraction or innocent shareholders.'

Rakoff sees going after the company instead as a response to the raised stakes on Wall Street in the 1980s. 'A company was going to be in a very hard position to fight its main regulator, the SEC, let alone run the risk of a big criminal indictment that would ruin its reputation.' So the company settled, 'in a way that no individual can, because they're going to go to jail. All a company has to do is pay the money. Those were easy cases.'

Rakoff characterises what followed as 'prosecutors and regulators getting a little lazy.' The SEC and Department of Justice 'could have this big headline' for settling cases or entering deferred prosecution agreements, and companies could structure the deals to avoid private liability and securities actions.

'They were all happy. The only trouble was that [the agencies] weren't going after the people who had actually done the wrong deed, which would have required a lot more work.'

Rakoff also detects the influence of a tendency first fostered in academia to talk about 'corporate culture' and that 'what we really had to change was not just the ethics of any given individual but this greed being fostered by Wall Street.'

He has little time for this. 'I think a lot of that is hogwash. I represented a lot of big companies when I was in private practice and the CEO would change and the corporate culture would change overnight.'

One rivulet in the stream

In November 2011, Rakoff ordered convicted hedge fund billionaire Raj Rajaratnam to pay a \$92.8m penalty – the biggest fine for insider trading to date. Rajaratnam is serving an 11-year sentence.

'I think there's been actually been a shift back in the last few years, a small shift, to going after individuals,' Rakoff observes. 'And I'm frank to say that my contribution has been part of that. I'm smart enough to know that I'm just one small little rivulet in the stream, but I do think I'm one of the factors.'

But Rakoff does not make examples of people for the sake of it. Two weeks after our meeting, he sentenced former Goldman Sachs director Rajat Gupta to the relatively lenient jail term of two years for passing secrets to Rajaratnam. Rakoff described Gupta as 'a good man' who had done wrong.

'He hardly threw the book at him,' a leading US litigator observes. 'It was a very judicious sentence. He just wants to make sure that the

job is being done in his courtroom by all the participants.'

Nonetheless, Rakoff's critics argue that he goes beyond his brief as a district court judge with some of his decisions. A cornerstone of the SEC's and Citigroup's pending appeal against his rejection of their deal is that it is not a court's job to decide how a regulator should settle its cases.

Rakoff can't comment on ongoing matters. But is bouncing back deals like the SEC's original agreement with Bank of America tantamount to challenging the US government's separation of powers? Was he stepping outside his remit as part of the judiciary by questioning agency policy?

'This isn't a separation-of-powers issue at all,' Rakoff replies firmly. 'And just as a technical matter,' he adds pointedly, 'it's unclear where in the constitution you would even put a regulatory agency.'

Rakoff stresses that 'if the law tells me I don't have the power to review a settlement, I would, of course, follow the law.' He points to agreements between purely private parties as an example. 'There have been situations where I've thought settling would be terrible, where there would be genuine benefit in the facts coming out. And yet the parties came in on the morning of trial and said they'd settled the case, and I had no choice but to accept it.'

In contrast, 'because of the pre-condition that there must be oversight of the regulators,' Rakoff maintains that the law as it applied to the Bank of America agreement was unambiguous.

Even before, 'you had a crystal-clear obligation as a district judge to examine a consent decree to see if it was fair, adequate and reasonable,' he affirms. 'So I absolutely was doing my job. In the old days, when I just used to sign off on deals, I would say I wasn't.'

'Fair' and 'reasonable' are watchwords for Rakoff. 'Any trial lawyer will tell you they've been before judges who they think aren't fair, who make rulings to determine a case's outcome even if the jury is making the final decision. And there are others who strive to be fair. I aspire to the latter category,' he says with a smile.

'He's a stickler for the rules of evidence and he runs a very tight ship,' reports a source at a top litigation firm. 'He'll let you know if he has a problem with something and give you a chance to explain yourself. He understands every argument you're making. That's what you want – a judge who understands what you're trying to say, even if he doesn't agree with you.'

Endless discovery

For Rakoff, 'the bane of the US legal system, which has many positive things to be said for it, is delay.' His frustration with the sometimes

glacial progress of district court proceedings is well documented.

Rakoff places much of the blame on an over-extensive discovery process. 'We've taken what was a good idea, namely that there shouldn't be trial by ambush, that people should be able to know the facts before they go to court, beyond its logic,' he argues. 'It's now an excuse for endless and very expensive discovery, which leads not only to delay but to parties settling cases that ought not to be settled, just because they can't afford to continue with huge legal bills.'

For this reason, Rakoff argues, the best scenario for everyone concerned is one where 'the desire to learn ever more facts' is balanced against 'the equally compelling argument for moving the case forward at a reasonable speed.'

'He doesn't let anything languish,' a source at a leading litigation firm confirms. 'He always wants to push things forward to trial. If there are disputes, he resolves a lot of them without motion practice, over the phone. He doesn't waste a lot of attorney time, which we appreciate.'

But providing parties with a fair platform is

Attorney's Office – eventually becoming division chief – because it offered the 'most complex, most challenging' work and had 'the best, most innovative lawyers on the other side.'

When Rakoff re-entered private practice, he did so as part of the first wave of big-firm litigators to specialise in white-collar criminal law. Before joining Fried Frank, he was at Mudge, Rose, Guthrie, Alexander & Ferdon. ('What better place to learn about defending white-collar criminals than Richard Nixon's old firm?' he jokes).

Throughout his career, Rakoff has demonstrated a reluctance simply to follow in the footsteps of others. This can be seen in his disputes with the SEC; it was there in his 2002 ruling that the death penalty was unconstitutional, based on discoveries engendered by DNA testing; and it underpins why he became a judge.

'When you're a trial lawyer, you love what's going on in the courtroom. There's nothing like it,' he tells me. 'But I think any trial lawyer pines after a while to express what he thinks, as opposed to what his client thinks. The place to do that is on the bench.'



'The allegations were that Bank of America's management had defrauded their own shareholders and yet, who was paying the fine? The shareholders!'

only one aspect of the *raison d'être* of a district court judge for Rakoff. He disagrees with Chief Justice Roberts's equation of the role with that of an umpire's. Rakoff sees taking 'the first crack at new issues' as no less crucial.

'You have to be concerned not only to do justice between the immediate parties but also to exercise foresight. How is your ruling on this new issue going to play in the ten cases to come next year? It's a tough challenge but a very interesting one.'

Rakoff is 'amazed' at how many new issues of law he encounters, thanks to the 'high quality' lawyers in the Southern District of New York. While 'the ultimate crack is going to be taken by the Supreme Court, it's a lot more exciting – to tell you the truth – to go first. I find that quite thrilling.'

When I ask whether he enjoys umpiring or precedent-setting more, Rakoff asserts that both are equally fulfilling. Nonetheless, his enthusiasm for what he calls 'playing a shaper of law' echoes back to his earliest years in the US legal world.

He left Debevoise & Plimpton to join the Business and Securities Fraud Unit at the US

The district court has allowed Rakoff to speak his mind, rather than deliver the arguments of others 'transmuted into legal clothing.' But, as he himself points out, there are still limits: precedent, statutes and the rulings of higher authorities like the Supreme Court. So is the next step a move up in the court system?

Rakoff tells me that, while this once appealed, it no longer does, partly because he knows it won't happen. The age criterion underlying Supreme Court appointments puts him at the wrong end of the spectrum in terms of years. 'In my view, a very stupid policy, because experienced judges make the best higher judges,' he says.

Unacceptable face of justice

Age isn't the only reason Rakoff doesn't see the Supreme or Appeals courts in his future. 'Putting that aside, I knew when I decided the death penalty case that would make me unacceptable,' he reveals. 'I knew that there would always be enough votes to defeat any nomination of me to a higher court.'

Rakoff found this upsetting at first. 'But the more I thought about it, the more I sort of

Rakoff on...

...the commercialisation of the legal profession

'The lawyer in America is ever more a business person, ever less a professional. Just to give you an example, the single biggest growing part of the legal profession are in-house lawyers. There are now something like 80,000 in-house lawyers in the USA. That is, I'm told, a 500 per cent increase between 1970 and 2010. This has come about largely for economic reasons: it is a lot cheaper to use in-house lawyers than outside lawyers. But it is much harder for an in-house lawyer to be an independent professional. He is so dependent on the people he is giving advice to. They are his bosses, they determine his salary, they determine his perks; they determine his career. You can pass things like section 307 of the Sarbanes-Oxley Act, which says that if in-house counsel sees severe illegality they have to report it all the way up to the board. That's fine, but on a day-to-day basis the situation is never (or very rarely) "shall we do something illegal?" It is "here are two choices and they're both arguably legal. One is really pushing the envelope, while the other is much more consistent with the spirit of the law." A real professional will say that the right thing to do is the latter, but for a guy who knows that he's dependent on the people asking that advice, and who desperately want to have that new widget or new approach? It's much harder for him to say no.

'The related aspect is that, because so much of the ordinary work has gone in-house, outside lawyers are now much more specialised; they do not have the long-term relationship with the client that they used to; and they are always looking over their shoulder at the other guy who has that speciality. Where they used to have the independence and security to say "no" to a client, now they can't. Just in the time I've been practising law, I've seen that development go from a small problem to a major problem, and, frankly, I don't see any solution to it. It is a function of who you are working for and what your power is, vis-à-vis that person. If you have the power to walk away, you can be independent. The legal profession has done its best – in a certain way – to try to combat this, by having more professional responsibility requirements, and things of that sort. But in the end, I think the power relationship has changed and not for the good. It really diminishes professionalism on the part of lawyers in-house and outside.'

'In the end it was human beings who made the decision to do something wrong. If you're going to have deterrents, you need to punish them, not some abstraction or innocent shareholders'

revelled in it.' It freed him from the politics and obligations of higher court life, allowing him to continue to decide cases as he thought they should be. 'If I was always looking over my shoulder, it would really encroach on my independence.'

Rakoff loves the district court because it never fails to engage and challenge him. 'You're the first to deal with the legal issues and you have this panoply of human types in your court every day. The higher courts don't deal with people, they just deal with lawyers!' he laughs.

'I get to see all the witnesses, the real folks, so to speak, with all their warts, and it's really interesting – people I would never have met otherwise in my life.'

Rakoff assumed senior status in December

2010, but don't expect his caseload to diminish any time soon. He stresses that this was a strategic move, to free up space to appoint more judges to shoulder the burden of the Southern District's over-stuffed docket.

And one thing becomes obvious as he expresses concerns about the decreasing number of cases going to trial, the use of 'suspect' science as evidence and a fear that lawyers are increasingly beholden to commercial drivers rather than legal principles – driven by what one leading litigator describes as 'his intolerance for gamesmanship and delay tactics,' Rakoff won't be out of the headlines just yet. ☒

Tom Wicker is a freelance writer and editor. He can be contacted at wicker.tom@googlemail.com



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End of a class act?

Facebook's IPO faltered last year, sparking talk of the dotcom booms and busts, and another big class action payout for disgruntled investors. But *IBA Global Insight* finds this hitherto lucrative area of litigation in decline.

ARTHUR PIPER

On 4 November 2012, computer games developer Craig Harris had a surprise waiting for him in his letterbox at his San Francisco Bay Area home – a gift card for \$9. Puzzled, he read the accompanying letter. To his surprise, he had won compensation from Lowe's Companies Inc, the United States's second largest home improvement store, over a drywall product that the chain had sold.

'I had to Google what the lawsuit was,' he says. He discovered that he was part of a class action litigation – *Glen Vereen v Lowe's Home Centers, Inc* – that alleged Lowe's sold defective Chinese drywall. Plaintiffs claimed that when they'd bought the substance from the store and applied it on their homes, it had emitted gasses and chemicals that were potentially harmful. And it corroded metal surfaces. While Lowe's denied it

had done anything wrong, it settled for \$7.75m – \$6.5m for victims such as Harris and \$2.1m for the legal team that brought the case.

Harris was unimpressed, saying that he did not even remember shopping at Lowe's. Later that day, he tweeted a message that offered other users of the social media platform a share of his windfall.

Critics say that such low-settlement lawsuits show that the class action industry has peaked and may even be in decline. One UK lawyer quipped: 'Class actions are not what they used to be.' And Lowe's is certainly a world away from the cases brought in the late 1970s and early 1980s when the field was dominated by mass tort. Those settlements resulted in huge payouts on personal injury from asbestos and, later, silicone breast implants.

Shifting the goalposts

Legislation has shaped the way that the class action industry operates in the US. One major piece of legislation that has come into effect over the past decade is the Class Action Fairness Act (CAFA) of 2005. Prior to that Act, many class actions were brought under state law. While this is still possible under the Securities Act of 1933, in most jurisdictions cases are often removed to the federal court using the provisions in CAFA where sophisticated commercial disputes are more commonly heard.

CAFA has also restricted the practice of so-called 'coupon settlements'. In those cases, a defending company could easily fob off a nuisance claim that was unlikely to make it to trial by giving the plaintiffs non-cash settlements. The company saved on legal fees and potentially high payouts, while the claimants got something for their efforts.

While CAFA still allows companies to take the coupon route, it now requires a fairness test on the proposed settlement, and, just as importantly, the plaintiff counsel's fees have to be approved by court. Even though that has not prevented lawyers bringing cases where their fees are disproportionate to the compensation their clients receive, CAFA has generally

been welcomed as putting the breaks on that practice. Companies often offer products, services, or gift cards – such as the one received by Craig Harris – to settle such cases.

Ten years earlier, the Private Securities Litigation Reform Act 1995 (PSLRA) was credited with affecting the way that class action suits could be brought under federal securities laws – provisions that are effectively strengthened by the fact that CAFA has moved many cases away from state courts since 2005.

Again, PSLRA was designed to put a cap on frivolous securities lawsuits. Prior to PSLRA, plaintiffs needed very little evidence of fraud to launch a case and would use pre-trial discovery to obtain the kind of proof that the prosecutors hoped might be there. This created a low barrier to litigation, so claimants had little to lose in launching weak or even completely spurious cases.

To defend against such a case could prove expensive and organisations often found it cheaper to settle than fight and win. PSLRA demanded that plaintiffs produce proof of fraud before they can bring their suit. It is now much harder to bring spurious cases, but critics argue that PSLRA has also made more difficult to file legitimate ones too.

Bubbles burst

One area that had until recently seen rapid growth is securities litigation. At the end of November 2012, thousands of investors began receiving their share of the record payments for the eight-year legal wrangle that followed the end of the dotcom boom and bust. The giant, multidistrict lawsuit that became known as the Initial Public Offering Securities Litigation settled for \$586m in September 2009. It involved over 300 investor groups that had put money into the first internet boom companies when they came to market with their initial public offerings (IPOs) in the late 1990s.

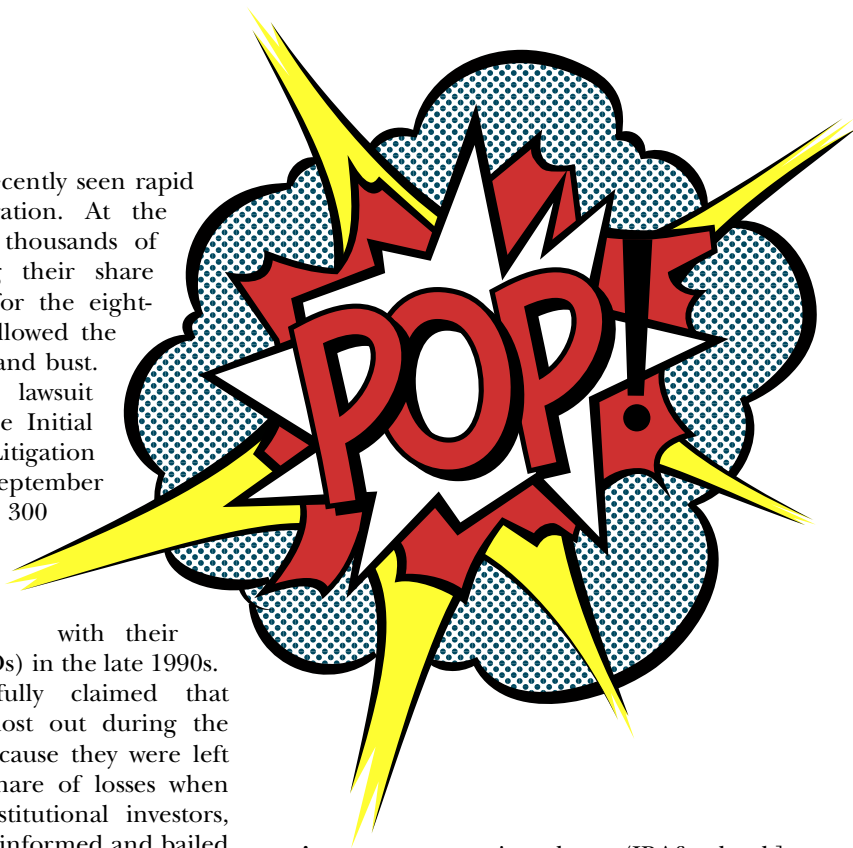
The plaintiffs successfully claimed that individual investors had lost out during the stock market flotations because they were left with a disproportionate share of losses when the market collapsed. Institutional investors, they said, were kept better informed and bailed out of stocks before their value fell. There was poor disclosure, too much hype and not enough understanding of how to value companies based on the new paradigm of e-commerce. In retrospect, it seems impossible that the boom ever happened.

‘The class action securities fraud market is a business, just like any other, and the 2011 settlements data indicate the plaintiffs and their counsel are coming off a weak year’

Professor Joseph Grundfest
Director of Stanford Law School Securities
Class Action Clearinghouse

‘It’s easy to say that everyone got it wrong in the dotcom years’ says Joost Schutte, partner at De Brauw Blackstone Westbroek in the Netherlands and an IBA spokesperson on IPOs, ‘but valuing such technology shares is still not easy, as the Facebook IPO in May demonstrated.’

Disgruntled investors brought a similar class action lawsuit against Facebook last year because of a sharp drop in its share price soon after its IPO [see **Faltering Facebook IPO sparks class**



action – tinyurl.com/IBAFacebook]. And, while there was talk of a return to unrealistic market exuberance, Schutte doubts that this single action heralds a return to the sort of claims the market saw during the dizzy heights of the late 1990s.

A new tone of realism has entered both the IPO market and the class action industry since then. Attorney Stanley Bernstein of Bernstein Liebhard, the veteran chair of the plaintiff’s executive committee in the dotcom litigation, told Thomson Reuters news agency at the time: ‘The evils that caused the 100 per cent and 200 per cent pops on IPOs in the days of dotcom have basically been eliminated as a result of our litigation.’

Bernstein also claimed in the same interview that institutions had failed to learn all the lessons from the debacle. But the figures may suggest otherwise. The number of securities class action settlements approved in 2011 is the lowest in more than a decade. An annual report on the topic by Cornerstone Research – *Securities Class Action Settlements – 2011 Review and Analysis* – showed that there were 65 court-approved securities class action settlements in the year, which were valued at about \$1.4bn in total.

That means that the number of settlements is down 25 per cent on 2010 and down more than 35 per cent on the average for the past decade. The figures on how much they are worth show an even steeper drop. The value of settlements has plummeted almost 60 per cent in 2011 from \$3.2bn in 2010.

‘The class action securities fraud market is a business, just like any other, and the 2011 settlements data indicate the plaintiffs and

their counsel are coming off a weak year,' says Professor Joseph Grundfest, director of Stanford Law School Securities Class Action Clearinghouse who worked with Cornerstone on the research. 'The softness in the data suggests the plaintiffs have been settling a smaller number of cases at a lower price point than in the past.'

He says that lawyers are likely to debate whether the fall is a result of plaintiffs bringing weaker or smaller claims, or whether regulation has begun to favour defendants in the legal process. '[It may be] some combination of the two,' he says, 'but the reality appears clear – the really big litigation bucks were not in the class action securities fraud markets in 2011.'

There is plenty of support to the argument that recent legislation has favoured defendants [see **Shifting the goalposts** box, page 24]. 'Legislation has changed the dynamic of the way cases are brought,' says David Keyko, litigation partner at Pillsbury in New York. 'In the past, whichever group claimed first became the lead plaintiff and their lawyers were the counsel. Now, the class action groups have a choice who leads the case, and that means lawyers take care looking at which of those claims are good ones to invest money in.'

But proof of loss has made it more onerous on people bringing cases, he says. Today, claimants have to show that the losses that they have suffered have arisen intentionally. 'That's difficult,' Keyko says. 'If you have to prove "loss causation," it means that bad behaviour must have caused the loss, not a drop in the stock market, for example.'

There are other problems for claimants too, such as the lack of symmetry in disclosure. There is very little discovery from the defendant. That means that once a case is filed, assuming that it is not refused – as about 25 per cent of all class action cases are – the defendant can request written documentation and files in both paper and electronic formats.

'Plaintiffs can make defendants spend vast amounts of money getting electronic records,' Keyko says, 'and oftentimes this drives a settlement.' While insurance tends to cover defendant legal costs, there is no such cover for plaintiffs. That may be why so few class action cases ever go to trial.

Another reason for the drop in the number of cases could be recent case law. In 2009, the Supreme Court reinforced a decision in *Bell Atlantic Corp v Twombly*, which had tightened up the evidence needed in a plea for federal civil actions.

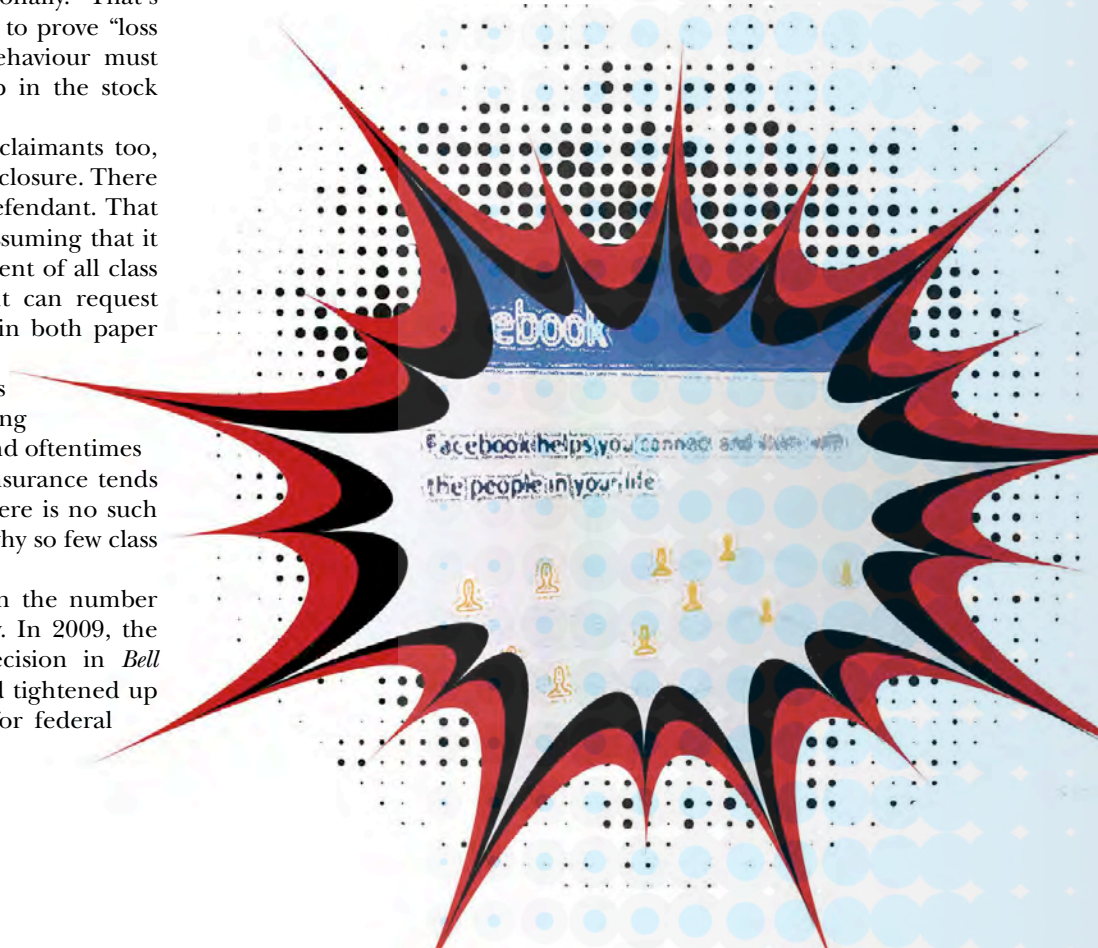
Terrorism brings progress

After the terrorist strike in the US on 11 September 2001, the authorities arrested Javid Iqbal, a Pakistani Muslim they said was of 'high interest' to their investigations. Iqbal filed an action against federal agents alleging that the arrest orchestrated by the former attorney general John Ashcroft and others was unconstitutional.

'It's easy to say that everyone got it wrong in the dotcom years, but valuing such technology shares is still not easy, as the Facebook IPO demonstrated'

Joost Schutte

Partner at De Brauw Blackstone Westbroek



The central question that eventually came before the Supreme Court in *Ashcroft v Iqbal* was whether the respondent pleaded factual matter as it was set out under *Twombly*. Specifically, did his complaint contain a 'short and plain statement of the claim showing that the plaintiff is entitled to relief'?

Iqbal had claimed that the federal agencies had subjected him to tough treatment and imprisonment on account of his race, religion and national origin. They were, he argued, in breach the First and Fifth Amendments. The Supreme Court ruled that his complaint had to be more than conceivable; it had to be plausible. Following *Twombly*, it had to be backed up by factual allegations. They rejected his claims.

The ruling has been important in class actions for two reasons. It clarified that *Twombly* should be applied beyond antitrust cases. And, it set new tests for plausibility standards in pleas. In particular, it has greatly cut down on a plaintiff's ability to obtain discovery by pleading unsupported allegations.

Despite these barriers and the lower level of settlements, the industry is diversifying. There is nothing to say that a class action suit has to be big to be successful. At its simplest, it is just a device that allows a large number of people with a common interest to sue or be sued as a group. Such actions are now brought in everything from consumer disputes such as Lowe's, to employment disagreements, medical disputes and even against foreign companies trading in the US.

In fact, globalisation is a major trend in the class action industry in two ways. First, US plaintiffs continue to pursue foreign companies over securities fraud allegations. This is despite a landmark US Supreme Court decision in 2010, which many believed would reduce the number of securities suits against non-US companies.

Robert Patton, a senior consultant at NERA Economic Consulting, found, paradoxically, that US filings against foreign companies hit a record high shortly after the ruling in *Morrison v National Australia Bank* was handed down. Some of these suits were brought against US-listed Chinese businesses that have been hit with a series of allegations over accounting and reporting irregularities. But commentators that have focused on those companies have often missed the underlying reason why *Morrison* is likely to have a limited impact on the volume of litigation in future. '*Morrison* says you can't make a claim in a US securities class action based on trading outside the US,' says Patton, 'but if you look at the actions against foreign companies before *Morrison*, there is always at least some US trading during the class period.'

In other words, most of the cases could have been brought under *Morrison* anyway. 'That may

be why we haven't seen a noticeable decline in filings against non-US companies post-*Morrison*, even if you ignore the Chinese-company filings,' Patton says. 'However, some of the actions brought post-*Morrison* may be smaller in scope than they would have been before the decision.'

Moreover, US lawyers are finding foreign jurisdictions where the laws are becoming more amenable to class action-style lawsuits. One such country is the United Kingdom. Historically, the UK has seen class actions primarily in the area of competition litigation – particularly around alleged cartel and price-fixing practices by large businesses.

The area of private enforcement in the UK is much more recent. In fact, the first consumer case to be brought in the UK was settled in 2008 – *Consumers' Association v JJB Sports PLC*. A limited number of consumers received £20 compensation each over the price they'd paid for replica soccer shirts.

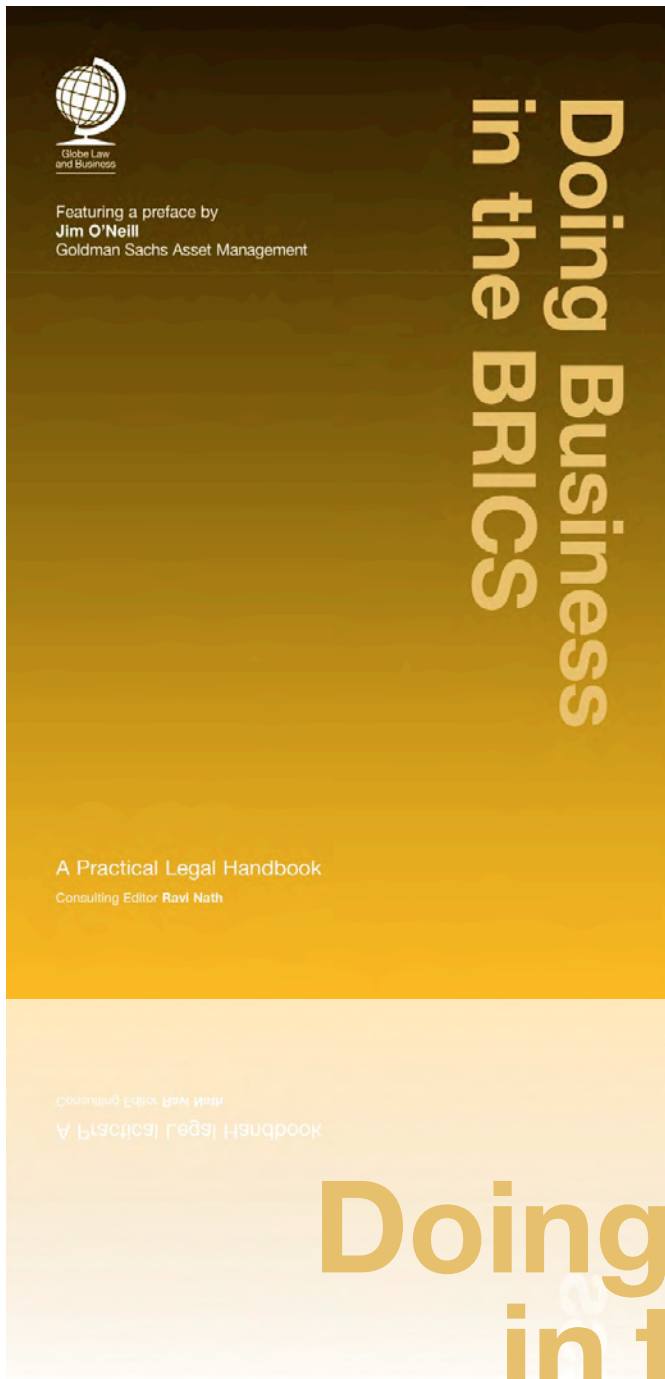
'The process is tightly controlled and judicially managed in Europe,' says Ingrid Gubbay, off-counsel for the London branch of the US firm Hausfeld & Co and the lawyer who brought the case on behalf of the Consumers' Association. In the US, claimants can join an action at many different points in the process. But that does not apply in the UK. 'Here, if you're not in at the beginning, then you are not in full stop,' she says.

In the case against JJB Sports, the claimants estimated that the company had sold over one million shirts for £39, so the damages could have been substantial. But because of the opt-in rule, only a small number of claimants joined the action and it was reported that JJB set aside only £100,000 to cover the payments.

That system could be about to change. The Department for Business, Innovation and Skills is currently consulting on the issue. 'What the consultation is trying to do is to address the gap between the top companies who are already bringing large-scale class actions, and those SMEs and consumers at the lower end who currently cannot,' she says. If the proposals are passed into UK law, the industry is sure to grow – and there are similar moves afoot in Europe.

While the class action industry in the US may have matured, newer markets and opportunities are continuing to present themselves. And even if the Initial Public Offering Securities Litigation settlement will in time come to be seen as the high watermark for class action payouts, the number of people throughout the globe eligible to join smaller actions looks set to rise. ☒

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How Israel lost even its closest ally

The answer may not be what you immediately assume: Israel's repeated, provocative settlement announcements. Actually, America shares a large part of the blame.

JOEL BRINKLEY

Relations between Israel and the United States, Israel's patron state, have never been worse. And the election of Prime Minister Benjamin Netanyahu's new, far-right-wing government promises only to aggravate the problem.

It's easy to blame all of this on Netanyahu. And of course, with his belligerent, bellicose manner, he shoulders a lion's share of blame. Since he took office this time, and especially now, he has been using settlement construction as a cudgel – 6,600 new settlers'

homes announced in a period of just a few days late last year.

That brought howls of complaint from around the world and set off tit-for-tat retaliation from the Palestinians – including a threat, not yet carried out, to take Israel to the International Criminal Court.

In fact, however, even with all of that, President Barack Obama holds a significant share of the responsibility. And in the US his is a familiar story. An exceedingly popular new president with a strong electoral

mandate decides shortly after taking office to advance Middle East peace efforts. But first he must push Israel to freeze construction of Jewish settlements in the West Bank. 'The most significant action Israel could take to demonstrate good faith,' the new president says, 'would be a settlement freeze.'

As soon as he voices the idea, Israel's prime minister publicly refuses. Within weeks, reporters discover that settlers are putting up even more new West Bank homes, in defiance of the president's request. The White House expresses irritation, and soon the matter passes.

'Look at the early years of almost any US presidency over the last three decades, and you'll discover a similar effort – and identical disappointing results – even though the US gives Israel at least \$3bn in aid each year'

History repeats itself

That episode took place in 1983, early in Ronald Reagan's presidency. But look at the early years of almost any US presidency over the last three decades, and you'll discover a similar effort – and identical disappointing results – even though the US gives Israel at least \$3bn in aid each year.

Shortly after leaving office in 1980, former President Jimmy Carter famously declared: 'Settlements are illegal and an obstacle to peace.' At that time, 23,000 Israeli Jews lived in West Bank settlements. He continues to be an outspoken critic even now.

Well, weeks after Obama first took office in 2009, obviously naive on this issue, he told an appreciative audience in Cairo: 'The United States does not accept the legitimacy of continued Israeli settlements. The construction violates previous agreements.'

After a brief hiatus, Israel resumed settlement construction with gusto, though as frequently happened, the government did put on a little show to make it seem like it was listening to Washington. Israeli TV news recorded security officers tearing

down an illegal settlement outpost. That tape got a lot of air play. But no one was there with a camera that same evening, when settlers came back and put up even more buildings.

Today nothing is covert. Already more than 350,000 settlers live in the West Bank – 15 times more than during Ronald Reagan's time. And in recent weeks, Netanyahu, heedless of the international community's open anger, has announced plans to build at least 6,600 new settler homes in the West Bank and Arab East Jerusalem – including one in a particularly controversial spot known to Israelis as 'E1'. For years, the US has warned Israel not to build there because settlements would block Palestinian travel between West Bank cities. (Israeli officials now claim a series of circuitous roads and tunnels would solve the problem.)

Where exactly is East Jerusalem?

Of course, Israel does not consider Jewish homes in East Jerusalem to be settlements. Israel annexed the area shortly after the 1967 war, and as Netanyahu puts it now, 'Jerusalem is the eternal capital of the state of Israel, and we will continue to build on it' – even though not one nation in the world recognises Israel's annexation.

While Obama may have been channeling his predecessors with his settlement-freeze request, the ramifications of his remarks were more serious and lasting this time. A short time later, Mahmoud Abbas, the Palestinian president, remarked that Obama 'was the one who declared that settlement construction must be stopped. The US says it, Europe says it and the whole world is saying it. Why should I not say it?' Negotiations have foundered on that point ever since, and there's little indication that will change.

By most accounts, the vast majority of Netanyahu's coalition members utterly reject the so-called 'two-state solution' to the Palestinian problem. They consider the entire West Bank an integral part of the historical Land of Israel.

The Fourth Geneva Convention, ratified in 1949, unequivocally states: 'The occupying power shall not deport or transfer parts of its own civilian population into the territory it occupies.' But right-wing Israelis believe that, in their case, the convention declaration is irrelevant, despite outside views to the contrary. British Foreign Secretary William Hague recently called all Israeli settlements 'illegal under international law.'

With all of that, Palestinians, too, have



simply given up on peace negotiations, at least under the present government. That's why Abbas finally took his case to the United Nations, where more than 130 countries voted to upgrade Palestine to a nonmember observer UN state.

Final blow

The new Israeli settlement announcements were intended as retaliation for the UN move. Israel also cut off the Palestinians' tax and customs transfers. As a result, Prime Minister Salam Fayyad said he would no longer be able to pay government salaries. In turn, he told his people: 'We call on Palestinian citizens to stop purchasing Israeli goods as a way of resisting the occupation.' That's unusual for Fayyad, a US-educated economist who previously worked for the International Monetary Fund. He's not known for inflammatory rhetoric.

With Abbas and Fayyad in power, militant attacks from the West Bank have been few and far between. Palestinian police – and Israel's border wall – have stood in the way. But now, the situation is deteriorating quickly, each side provoking the other.

Palestinian militants formed a new umbrella group called the National Unity Brigades and openly called for a third intifada. Already we have seen a few small clashes between Israeli soldiers, Palestinians and Palestinian police – relatively rare in recent times. The situation has grown so tense that more than 400 American Jewish rabbis and other clergy wrote to Netanyahu in December and urged him to call off his settlement plans, saying they 'would be a final blow to a peaceful solution.'

Even the US State Department roused itself to declare: 'We are deeply disappointed that Israel insists on continuing their pattern of provocative actions.' ☒

Joel Brinkley, a professor of journalism at Stanford University, is a Pulitzer Prize-winning former foreign correspondent for *The New York Times*.



Global leaders:

Luis Moreno Ocampo

Luis Moreno Ocampo is the former Chief Prosecutor at the International Criminal Court, and has returned to private practice in New York, focusing on fraud and defending whistleblowers. In this in-depth interview, conducted by award-winning former CNN news anchor, Todd Benjamin, he assesses the ICC's first decade and the future challenges for international justice.

Todd Benjamin: You stepped down in June 2012 from the International Criminal Court (ICC); it was a nine-year term. In a sense, you really were at the beginning. Now that you've had just slight distance from it, what do you think you did right and what do you think you didn't do right?

Luis Moreno Ocampo: I would say my responsibility was to build an institution. As you see it was a great idea, it was transforming Nuremburg into a general court, and was an idea [on] paper. I arrived here with two employees and the idea was, yes, we'd like to do something general, but be careful about political implications. So it was different fears: some people were afraid of a prosecutor who would prosecute for political reasons; and other people were afraid that I would do nothing, so it was a huge challenge. So at the beginning we had to build an institution. We had to show the policies, clear policy standards, what were our standards – that probably was a priority – and then hire the best people I could. I ended with 300 persons from 80 different countries. And then we started to work, and we started to open cases in different parts of the world. We opened seven situations. At the end we were much further than I was expecting.

TB: Much further than expected? Because, as you know, there are a lot of critics who felt that it moved too slowly. Why do you say much further than expected?

LMO: A little bit. When I started there was the Bush administration – they were absolutely

furious with us. You have to understand. I started in June 2003 in the... in the first few months of the Iraq conflict, so there was a lot of political problems and debates, and there was a lot of hostilities against us. I remember the first day of my tenure, I had a person with international expertise, I asked her, okay, the best would be to harmonise the Court with the Security Council because, at the end of the day, the United Nations Security Council is responsible for peace and security in the world, so you need to work with them. We had to get a referral from them. They can do it if they want. Our Ambassador told me, 'you have no idea. You have nine years tenure. You will see none, no referral.' She was right; I was wrong. But, the mood changed so fast that just two years later – two years later – the full case was debated. The United Kingdom and France were pushing for a referral and, interestingly, nine of the 15 members of the Security Council were members of the Court, so they automatically have the majority. And then the United States and China were not able to veto, and then the case was referred in two years. After that you have Libya in 2011, showing how much we progressed. Libya was referred just after a one-day discussion. In a minute, 15 votes, including China, Russia, India, US, and Lebanon.

TB: Is the Court functioning as well as it could?

LMO: When I was appointed, I remember a colleague of mine at Harvard was telling me, 'Luis, refuse the position. Without UN support you can do nothing. How are you



going to arrest people? How are you going to conduct investigations? Where will you get the evidence?’ You know what? We got the evidence. We investigate ongoing crimes. We collect the evidence. We put in jail the leaders of different militias. He’s in The Hague waiting for trial, the former President of Côte d’Ivoire; so the Court is up and running.

TB: The Court *is* up and running, but, of course, as I said, it is not without its critics. It took you many, many years to get your first conviction. The evidentiary process is very slow, people say. How do you respond to that?

LMO: My first comment is you’re watching the detail. When you have a law saying you cannot go ahead when there’s a red light, you can move when there’s a green light, then if these laws are respected, you move to enforce them. Okay, how many people cross a red light; how many of them are prosecuted; how fast you go? In this case, this convention – we stop with the red light and we move on the green light – wasn’t existing in international relations. Leaders would commit crimes and nothing happened to them. Nothing. So, there were no red lights. And this was the first time: hey guys, leaders, there are red lights. If you commit atrocities, it will be a problem for you. That is the concept. We can discuss enforcement: I think we are great in enforcement. But the relationship, for the first time, we changed the world; we put red lights for leaders who commit massive atrocities.

TB: So to your critics you say you have to see it in the context, the bigger picture, not in the detail. Is that what you’re suggesting?

LMO: Exactly. The Court is a little piece of the global system. In fact, I remember, the judges were not happy with me, because the judges were appointed in March 2003, 18 judges, waiting for a case. In June, I said the best outcome for this Court will be zero case. Because zero case means there’s no genocide, or if there’s a genocide, the national court will do it, and as a system we should respect national courts. In Colombia they

have many crimes, but they are doing cases. So as long as they are doing the cases, we should respect the effort. So this Court will have no case and will fulfil its mission. It’s a misunderstanding to evaluate the Court for the number of cases that reach the Court.

TB: Is the ICC a step towards a world with less national sovereignty and towards universal

‘When I was appointed, I remember a colleague of mine at Harvard was telling me, “Luis, refuse the position. Without UN support you can do nothing. How are you going to arrest people?”’

international law? And if so, what should it be aiming towards?

LMO: No. I think national states organise the world. The problem is that they are small for global issues, and the world is more and more complicated, but no one will accept a global government. So the idea is to have this confederation of states who are in charge, to control and prevent massive atrocities, but if they fail, it’s the independent Court who intervenes. So it’s an integration of national and global efforts to play together. In this sense, I believe the ICC is a fascinating design that could be used in licensing, copyright, in many other aspects. The novelty of the ICC is we’re independent: we can decide to do it. And in this sense we are showing it’s working very well, and could be exported.

TB: You say it’s working very well, but others would point to the Court and say it has a



Western bias; all the cases are in Africa; it's very discretionary how it goes about its business.

LMO: You know who promoted this idea? President Bashir [...] he's abusing this idea of the colonial past, and pretending that he can kill African people, and because he's African nothing will happen to him. Come on, it's crazy, it's stupidity. When the Western world did not react to Rwanda, the discussion was how are you ignoring crimes in Rwanda? Now I'm the Prosecutor, I will not ignore crimes in Darfur. And of course I knew when I present my case against President Bashir it will be complicated, because he has a lot of power. He has money and oil, big countries are interested in his oil, and Gaddafi was supporting him. So Muammar Gaddafi was chairman of the African Union, and he personally included in the African Union the discussion in 2009 in Sirte, that the African countries should not cooperate with the ICC. So African bias is a campaign promoted by Bashir, which is a campaign which is winning. Because you're not asking me, 'how is it possible that the genocide in Darfur and President Bashir is still president of the country?' You're not asking me that. You're asking me 'have you an African bias?' So, basically that's the problem we have.

TB: What I find interesting: you have not admitted or even suggested there was anything you could have done differently. And I've interviewed a lot of leaders and they all, when they look back, see certain things they could have done better, could have done differently, and you're not suggesting there's one thing you could have done differently?

LMO: I will tell you, basically, my role was to build an institution, and what we did was not just my activity, because my activity was scrutinised severely by judges. There are 18 judges who were reviewing what we were doing. Many times they dismissed cases or affected our decisions, so the institution is much bigger than the prosecutor. I would suggest that the biggest problem is that political leaders and all the actors are still crossing the red line, or they don't care if someone else

crosses the red line. That's the problem...there are still leaders like Bashir or Gaddafi, who are committing crimes to stay in power, and they like to keep doing it. It's not that they like... it's the only way to survive as leaders...The real issue is that humanity has this opportunity to build a system to make never again a reality. We should not fail.

TB: You suggested certain national leaders who are not stopping at the red lights, so to speak, and keep committing crimes against humanity, genocide, war crimes, and so forth. But on the other hand, how big a stumbling block to the functioning of true equal-handed justice is the Security Council?

'When I started there was the Bush administration, they were absolutely furious with us...so there was a lot of political problems and debates, and hostilities against us'

LMO: No, that's a different issue, in the sense the Security Council is not based on the idea of equality or justice. The Security Council is based on the idea there are five big countries. They will drive the world and they will ensure the world is not going into any new global war. That's it. The ICC is a development of this idea. Okay, it's not just five big countries' interests we have. There are smaller countries from regions that suffer massive atrocities. Because Europe, Latin America, and Africa suffer massive atrocities, and these are the regions that are leading... this effort. So it's a new development, it's an evolution.

TB: This is a very hypothetical question, of course – if there was not the US, who is not part of the Rome Treaty, if there was not China, if there were not Russia, do you think you'd be having a lot of cases that you don't have now, ie, it wouldn't just be Africa-focused?

LMO: No, look: the issue is the Court works in the countries who accept it, the Court. So we have jurisdiction in 121 countries. I cannot go to Syria or Libya without Security Council approval. So what happens is the world today has two different standards. There are 121 countries who understand the law. Kenya is one of them, and then when I decided to prosecute even the Deputy Prime Minister, Kenya discussed, but they are moving in the right direction. I cannot intervene in 63 countries who are not members of the Treaty, and then it's like asking why a British prosecutor is not intervening in the conflict in Romania, because Romania is not under their jurisdiction. The issue, the complexity here, is that the Security Council is a political body who can provide jurisdiction, and why they provide jurisdiction on Libya and not on Syria, on Darfur and not on Palestine is a political debate for the political leaders, not for the Court.

TB: So, you're on the receiving end and you have no influence at all?

LMO: On this, no. I have influence on the territory of the States who have signed the Treaty. So I open the case in Kenya, you see my independent power. But I cannot go to Libya or Syria without Security Council approval.

TB: Do you think that the Security Council, therefore, is fit for purpose? Do you think that the way that the Security Council operates should be changed? For instance, some have suggested that those on the Security Council should only be able to veto something when it is in their national interest. Now 'national interest' has a lot of different interpretations.

LMO: I think Security Council was a model adopted after the Second World War to deal with the conflicts, was affected by the Cold War. Now the end of the Cold War promoted a different dynamic. It was different with Bush; Bush had a more hegemonic view; Bush was thinking they can impose some rules on the world. President Obama has a more nuanced position. They just choose a few conflicts: they're involved with Iraq, Afghanistan, and Middle East; that's it. So the world is changing, and probably no one is presenting this properly to the people. But, yes, that is what I saw from my office.

TB: So are you suggesting that the world is becoming more regional in a sense, and

therefore the ability of the Security Council to act effectively is diminished, and therefore the International Criminal Court's ability to pursue justice is more limited?

LMO: No. But I don't think the efficiency of the Security Council in protecting human rights was high. If you remember, US and China stopped Vietnam when Vietnam was trying to invade Cambodia to stop the Khmer Rouge crimes – and they did it for political reasons.

*'You have Libya in 2011
showing how much we
progressed. Libya was
referred just after a one day
discussion. In a minute,
15 votes, including China,
Russia, India, US, and
Lebanon'*

So the crimes committed in Latin America by our dictatorship was, in some way, supported by the US, so it was complicated. So I don't think the Security Council had a great record. It's moving, it's improving. And now it's a much more complex situation because they can make political decision and at the same time they're influenced by many countries that have now a different approach. And that is why when the UK and France presented the referral on Darfur, it was difficult to stop it because nine members of the Security Council were members of the Treaty, so they have an automatic majority. But this is also changing; when Libya was presented, everyone was in favour of justice through the ICC, so I would suggest the world is changing. Can we transfer this idea to all the areas like copyright or others? Probably yes. That's why it's interesting for me to have an interview with the International Bar Association, because lawyers will watch this, and lawyers can understand: 'okay, it's more than a case in the Hague. This design can be useful to manage all the conflicts, all the problems.' ☒



This is an edited version of the interview.
It can be viewed in full at tinyurl.com/IBAOcampo

Torture never again

ALI ROCHA, RIO DE JANEIRO

Three decades after ending its 21-year military dictatorship, Brazil is far from eradicating torture. *IBA Global Insight* finds out why.

Kicks and punches to the head and body, blows with truncheons and metal bars and electroshocks are part of the daily routine in detention centres across Brazil. While, during the dark years under authoritarian rule, the victims were political dissidents, students and intellectuals, today the preferred victims are poor people in conflict with the law.

After visiting pre-trial detention facilities, prisons, young offenders' institutions and psychiatric hospitals in four Brazilian states in September 2011, the United Nations

Subcommittee for Prevention of Torture (SPT) concluded that torture and ill-treatment are widespread and systematic in detention centres all over the country and identified a generalised failure in bringing state agents to justice.

Both military and civil police forces make frequent use of torture on people arrested while committing a crime and those arrested as suspects in order to extract confessions or information, and prison agents torture inmates as a form of punishment or humiliation to maintain discipline.



The conditions in most police facilities and prisons are terrible. The majority of cells are severely overcrowded and places of detention don't offer the slightest possibility for people inside to live with dignity or be reintegrated into society.

Brazilian law states that each prisoner should have a minimum floor space of six square metres but in some cells they hardly have 70 sq cm; the cells are so crowded there is not enough room for all inmates to lie down at the same time and they need to take turns to sleep.

A mass incarceration programme in place since the 1990s resulted in a 350 per cent increase in the number of prisoners in the last 20 years. December 2011 figures from the National Penitentiary Department (DEPEN) show Brazil's prison population at 514,582. In July 2012, this figure had jumped to 549,577. The construction of new prisons and vacancies does not correspond to the increase in the prisoner population and the deficit in vacancies stands at around 65 per cent, or 250,504 places.

The problem of overcrowding might be alleviated if alternative, non-custodial sanctions such as fines, community service or suspended sentences were applied to people who committed non-violent crimes, as recommended in a 1998 law. 'Society is not ready to give up on a prison system, but it should only be used to contain dangerous criminals,' says José de Jesus Filho of the National Prison Pastoral who believes that 'between 70 per cent and 80 per cent of prisoners could have received alternative sanctions such as paying compensation to victims, doing community services, electronic monitoring and nocturnal restrictions.' Unfortunately, however, only people from middle- and upper-class backgrounds seem to benefit from alternative sanctions.

At least half of the people serving time in Brazilian prisons are there simply because they could not pay a lawyer. Fifteen per cent of prisoners are there for theft, sometimes practised out of pure necessity, and thousands more were convicted for drug trafficking after being caught with small quantities of drugs – if they belonged to another social class they would be considered drug users and given alternative fines.

The 1988 Constitution determines that people who cannot afford a private lawyer – up to 80 per cent of people in prison, according to the Ministry of Justice – are entitled to free legal aid provided by public defence lawyers. But some Brazilian states still don't have a public defenders office and those which do generally have a fragile and under-resourced institution, incapable of serving all those in need and carrying out all the tasks required.

Up to one third of people in prison – approximately 173,000 – are still awaiting trial. They have not even been tried, let alone convicted. Some have already been incarcerated for more years than the maximum sentence they would receive if convicted. And many more have already served their time, but, with no one taking care of their case, are forgotten behind bars.

Brazil's criminal justice system hits the more disadvantaged sectors of society the hardest. The state of calamity in Brazilian prisons is nothing new and was recently publicly acknowledged by Justice Minister José Eduardo Cardozo who said he would rather die than serve a long sentence in a Brazilian prison. 'We have a medieval prison system which not only disrespects human rights

'Between 70 per cent and 80 per cent of prisoners could have received alternative sanctions such as paying compensation to victims'

José de Jesus Filho
National Prison Pastoral

but does not allow for reinsertion (in society).'

José de Jesus Filho says the government announced a \$1bn plan for the creation of 42,500 new vacancies in prisons in 2011, but did not allocate one cent for the resocialisation of prisoners. He believes the objective of incarceration for rehabilitating prisoners is being left aside and prisons in the country are 'seen more as a means of revenge from society and isolation of the more marginalised sectors of society.'

The situation in the country's juvenile detention centres is no different but causes more concern given the young age of people held there – 12–21 years old. Institutions for children and adolescents were created during the repressive years of the military rule and most of them are no different from ordinary prisons for adults with a very strict disciplinary system. There is no emphasis on the socio-educational dimension of the system and nothing to enable the reintegration of the child or adolescent into society.

Prosecutor Wilson Tafner was a member of the first team of prosecutors designated to inspect and monitor São Paulo's juvenile detention system, Fundação CASA, back in 1999. It was a particularly critical period, when riots were frequent and images of inmates threatening hostages with improvised weapons on the units' roofs shocked the world.

One step closer to justice: a torturer 'outed'

This year Brazil saw two important civil court decisions against one of the most notorious torturers of the dictatorship period – Colonel Carlos Alberto Brilhante Ustra, the man in charge of the intelligence and repression agency, DOI-CODI, in São Paulo in the early 1970s.

In the case brought by the sister (Regina Maria Merlino Dias de Almeida) and former partner (Ângela Mendes de Almeida) of journalist Luiz Eduardo da Rocha Merlino – whose death resulted from a 24-hour torture session while he was imprisoned at the DOI-CODI in 1971 – the judge handed down a verdict ordering Colonel Ustra to compensate the two women.

It is the first time an individual has been ordered to pay compensation to his victims. It has usually been the state who compensates victims and their relatives.

The other case involves three people of the same family – Criméia Alice Schmidt de Almeida, César Augusto Teles and Maria Amélia de Almeida Teles – who were tortured by Ustra in 1973. The Almeida family wanted to have Ustra recognised as the man who tortured them. They won the case in a São Paulo court in 2008, but Ustra appealed against the decision. The appeal was finally rejected in August and the decision that found Colonel Ustra guilty of torture was upheld.

This case marked the first time a Brazilian court had ever found any military official liable for dictatorship-era human rights crimes. The ruling was also remarkable in its extensive citing of international human rights law and its finding that the 1979 Amnesty Law did not protect Ustra from civil liability, giving some hope to victims seeking reparation or, as in the *Almeida* case, recognition of having been wronged.

As important as the *Almeida* verdict was, it is limited in scope, stemming from a private civil case against a torturer in his personal capacity. The state has yet to be held civilly liable in court, and no one has been held criminally accountable for state-sanctioned abuse during the military regime.

While these are great victories for the cause to rectify the dictatorship-era's human rights abuses, Ustra is still protected by the Amnesty Law in regards to criminal charges and his punishment now is seen as purely symbolic by most.

Torture is a crime against humanity – it does not prescribe and it sits above all domestic law.

'But people didn't know what went on under the roofs and behind the walls of those places. They resembled concentration camps where young offenders were treated like animals,' he recalls. When his team started their work there wasn't a single lawsuit in place against state agents accused of torture. But, during the ten years dedicated to this cause they managed to file more than 300 claims and win convictions of up to 70 years for some prison agents.

Tafner has seen changes and improvements in the system with a decentralisation and division into smaller units that began to be implemented in 2006. The units are smaller, hold fewer detainees, and supposedly put more focus on socio-educational activities. The main problem, he says, is that 'the old methods of repression and oppression by force are deeply rooted among staff who see the adolescent as an enemy who deserves harsh punishment and not as someone who has made a mistake and needs help to overcome difficulties and adapt to life in society.'

He believes the notion of human rights is being incorporated into the training methods for staff and reintegration of young offenders occupies a larger part on the agenda, but it is a very slow process that involves changing the mentality of people who do not understand these concepts.

Authorities responsible for managing the institution insist on the pedagogic nature of the units and respect for the spirit of the 1990 Law of the Child and the Adolescent (Estatuto da Criança e do Adolescente (ECA)), but Railda Alves, President of AMPARAR, an association that fights for the rights of juvenile offenders, refutes this claim.

According to Railda, only two or three newer units have a focus on the reintegration of young offenders and offer socio-educational activities, while all the others have kept the same old militaristic punishment practices. At most, she says, 'they have a handful of "model" inmates who have access to educational activities and might be used to demonstrate the pedagogic nature of the institution.' She adds that the majority of kids suffer constant physical and mental abuse from staff who believe their job is to re-educate them with violence.

AMPARAR receives regular complaints and denunciations of abuse from the families of children inside. They are not isolated cases, or the actions of individual members of staff. Everyone working at Fundação CASA is directly or indirectly responsible for the constant abuse: floor coordinators, social assistants, psychologists, doctors, directors and ombudsmen. One case AMPARAR has been following clearly illustrates this.



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The long road to justice

Like most detention centres in Brazil, Juvenile Internment Unit Jatobá, in the Raposo Tavares Complex, on the western side of São Paulo, has inadequate bedding, poor clothing, insufficient or inadequate food, inappropriate accommodation facilities and lack of hygiene or cleaning products. But added to the 'usual' problems, it had an open sewer running alongside the dining hall which was letting out a horrible stench provoking constant nausea and sickness in many of the children and adolescents in the unit.

In June 2011, the interns complained to unit coordinators, hoping for a solution, but instead of addressing the problem, staff members reacted aggressively and initiated a conflict with the adolescents. The director intervened and called an external security force in to deal with the issue.

The security force entered Jatobá armed with metal and wooden clubs which they used to beat up the kids while staff members and director looked on until 'order' was restored.

Despite serious injuries, the children were told to strip and sit in the cold in the outside courtyard for several hours – while members of staff washed

Less than a month after he took office, AMPARAR received another letter from the children at Jatobá reporting physical abuse and threats of violence from the new director.

In May, public prosecutors paid a routine visit to the unit and found several irregularities as well as evidence of violence. They filed a claim requesting the judge inspector to deactivate the unit and dismiss the director.

But to their surprise, the judge inspector dismissed the claim and said she was already dealing with the case. She had organised hearings with the parties involved and had ordered the president of Fundação CASA to improve the structure and overall conditions of the unit.

The prosecutors involved in the case were not satisfied with those measures as they were not holding anyone responsible for the problems. According to Fernando Araújo, one of the prosecutors involved in the case, the judge 'defined a deadline for the structural problems to be solved but the most important issues, such as the lack of medical assistance and physical abuse carried out by certain members of staff against some of the interns, were not being adequately investigated.' Araújo also pointed out that children and adolescents who are victims of violence often do not report it because they fear reprisals.

They appealed against the judge's decision and won. They have requested that the unit director, the regional director and the president of Fundação CASA are summoned to court, and are currently waiting for the outcome, which will probably happen next year.

Meanwhile, the problems persist. In early November, AMPARAR received another letter from Jatobá reporting physical violence and psychological abuse.

'They resembled concentration camps where young offenders were treated like animals'

Wilson Tafner
Prosecutor

the blood from the floors – and were only taken to see a doctor the following morning.

When mothers visited a few days later they noticed wounds on some of the children and found out what had happened. They tried to complain to the staff and to the unit director but were laughed at and discouraged from taking action with threats of further violence.

The mothers then went to AMPARAR who helped them report the case to the public defenders' office. The public defenders responsible for Jatobá visited the unit and submitted a report to the judge inspector. They also reported the case to the SPT who visited the unit and found evidence of dismissal and cover-up of injuries by medical staff.

Shortly after the SPT visit, the director was removed and the woman who replaced her took control without resorting to violent practices. But the truce was short lived. A few months later a male director some of the children knew well took charge of the unit. He had previously worked as a security agent and was known for being extremely violent.

Looking back on torture

In May 2012, Brazil installed the Brazilian National Truth Commission to investigate human rights abuses committed in the past.



One of the oldest forms of torture used in Brazil

The Commission's brief is to examine the period from 1946 to 1988, but the focus of the investigations will be on the military regime (1964–1985) when the use of torture against anyone who opposed the regime, even by peaceful means, was state policy.

The seven-member group will have the power to call victims and those accused of violations to be questioned, but a 1979 Amnesty Law means they cannot try or recommend punishments for those found guilty of human rights crimes.

Although victims of the regime would like to see those who caused their suffering punished, the findings of the Truth Commission will be important for the country by helping younger generations understand and know the truth about what happened in the so-called 'dark years' and by helping to write the true history of those times.

Other South American countries that went through the process of transitional justice, such as Argentina, Chile and Uruguay, overturned their various forms of amnesty laws so that they could prosecute and convict state agents who committed crimes during dictatorships.

In September 2010, Brazil had the opportunity to do the same when the Federal Supreme Court tried a case brought by the Brazilian Bar Association (OAB) alleging the unconstitutionality of the Amnesty Law but, to the disappointment of families and human rights organisations, five out of the seven judges voted to uphold it.

Three months later, the Inter-American Court found Brazil guilty of torture in the *Araguaia* case and ruled that an amnesty law cannot stop the punishment of serious crimes.

Although the decision was ignored by Brazil, it was considered a watershed for a group of federal prosecutors who are devoted to finding ways around the Amnesty Law and emphasising international law so they can bring culprits of the past to trial. They are aware they are a tiny minority, but hope that the facts uncovered by the Truth Commission will help to sensitise judges by revealing the human stories of the victims, most of whom had never held a weapon.

The fact that no torturer of the military period has ever faced justice is certainly a factor in the continuation of old methods. State agents fear no punishment.



At the Torture Never Again office in Rio; one of the walls is filled with photos of Brazilians who disappeared during Brazil's military dictatorship (1964–1985).

The rule of torture

Criminality is on the rise and this plays a part in making society more violent. As crimes become crueler and violence increases, so does society's tolerance to torture.

A recent study by São Paulo University's Center for Violence Studies found that the number of people who were totally against the idea that courts should accept proof obtained with the use

'They have a handful of "model" inmates who have access to educational activities and might be used to demonstrate the pedagogic nature of the institution'

Railda Alves
President, AMPARAR

of torture is getting smaller. It has gone down from 71 per cent in 2006 to 52 per cent in the latest research.

Matti Joutsen, of the European Institute for Crime Prevention and Control (HEUNI) – affiliated to the UN – states that, in many countries, politicians tend to find easy solutions for embarrassing problems. 'Are your citizens concerned about an increase in muggings and robberies? Increase the punishment. Are there more stories of drug trafficking in the media? Increase the punishment. Has there been a repulsive case of a kidnapping or rape? Increase the punishment. But they are never worried about trying to improve social policies offered to criminals such as life alternatives or investment in prevention measures,' he observes.

When serious crimes attract the attention of public opinion and provoke an outcry in society, there is enormous pressure on security forces to find those responsible. In these cases it is common to have the police presenting the alleged criminal who confessed to the crime as a trophy. Although they show clear signs of torture, the methods used are never questioned. Judges should not accept confessions obtained under torture, but they often do.

Most of the findings and recommendations of the SPT report, which was published in February 2012, were not being presented to Brazil for the first time. Other UN monitoring bodies and international human rights organisations which have visited Brazil in recent years highlight the same issues and problems.

Brazil is a signatory to most international human rights treaties and conventions and following the 1988 Constitution launched several initiatives to protect the human rights of people in vulnerable situations subject to torture and ill-treatment, such as adolescents in conflict with the law and adults who are detained or imprisoned.

The country has an adequate legal framework that complies with international standards but there is a huge gap between what's on paper and actual reality. Unreformed institutions, impunity for human rights violations of the past and a national culture that finds the use of torture against people who committed crimes acceptable, contribute to the impunity.

Probably the most important role in putting an end to impunity and eradicating torture is played by public defenders, public prosecutors and judges. They are the ones who have a prerogative of monitoring and inspecting detention centres; to report irregularities and abuse, and take action so that people who practise torture are punished for it.

State agents accused of torture should be removed from their post immediately and kept away during the investigations which should be conducted impartially and effectively. If the accusations prove to be true, they need to be criminally punished for it. Simply exonerating or transferring the person to another unit is not enough.

The Brazilian government has to make the eradication of torture more of a priority and send a clear message that torture is a crime, a crime against humanity and will not be tolerated. At the same time, it must improve the efficiency of the police, in order to reduce impunity. A better trained, better prepared police force, using the tools of intelligence, rather than physical coercion, would help to persuade the population that torture is unnecessary.

In 2007 Brazil ratified the international Optional Protocol to the Convention Against Torture (OPCAT) and had one year to install its national preventive mechanism against torture. But the draft law was only presented to the Brazilian Congress after the SPT visit in September 2011. It is now awaiting approval.

Brazilian authorities were due to respond to the SPT report in August 2012 but, at the time this issue of *IBA Global Insight* went to press, they still had not done so. ❖

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PROTECT RESPECT REMEDY

The *Kiobel* case at the US Supreme Court has put the issue of corporate liability for human rights abuses firmly in the spotlight. *IBA Global Insight* assesses whether businesses and law firms are doing enough to meet their obligations.

REBECCA LOWE

In the 1990s, it is alleged, Anglo-Dutch oil giant Shell was complicit in gross human rights abuses committed by the Nigerian military dictatorship, including torture, rape and extrajudicial killing, which Shell denies. The class action was brought over a decade ago by a group of Nigerians under the 1789 Alien Tort Statute (ATS), which allows foreign nationals to bring civil suits in United States federal courts for violations of customary international law.

Kiobel v Royal Dutch Petroleum (Shell) is the last in a long line of ATS suits against corporations. The first was in 1996, when a group of Burmese citizens alleged that California-based Unocal was complicit in serious human rights violations while installing a gas pipeline through their village. The parties eventually reached a confidential settlement in 2005, with Unocal providing funds for programmes in Burma to improve living conditions and protect the rights of people from the pipeline region. Dozens of other cases

have since have been dismissed. Indeed, despite over 120 claims against corporations – from labour trafficking in the Middle East to aiding and abetting apartheid in South Africa – there is yet to be a jury verdict against a multinational corporation in an ATS case.

Now, with the US Supreme Court due to rule on *Kiobel* imminently, there are fears that corporations may never get their day in court. In their attempts to have the case dismissed, Shell's lawyers have claimed the entire premise of the ATS is flawed; it does not apply to companies, they say, because international law 'refutes corporate responsibility' on these issues. To compound the ATS's woes, the Supreme Court justices are also examining a further question: whether the statute should be used *at all* for human rights violations occurring outside the US. In the 224 years since its creation, the ATS has never been so beleaguered.

For John Ruggie, the former UN Secretary-

General's Special Representative for Business and Human Rights, the case has taken an unfortunate turn. Having spent six years drawing up the UN Guiding Principles on Business and Human Rights, which establish a non-legally binding global standard for corporate human rights obligations [see box], Ruggie voices concern over how the Principles are being applied here. Is an attempt to undermine an entire statute dedicated to the remedy of egregious wrongdoing, he asks, really in line with the corporate 'responsibility to respect' human rights?

'Should the corporate responsibility to respect human rights remain entirely divorced from litigation strategy and tactics, particularly where the company has choices about the grounds on which to defend itself?' he writes in a September 2012 Harvard Kennedy School brief. 'Should the litigation strategy aim to destroy an entire juridical edifice for redressing gross violations of human rights, particularly where other legal grounds exist to protect the company's interests?'

Yet Ruggie reserves much of his concern for the role of the lawyers, who lie at the fulcrum of the decision-making. 'Would [their responsibilities] encompass laying out for their client the entire range of risks entailed by the litigation strategy and tactics?' he asks. 'Including concern for their client's commitments, reputation and the collateral damage to a wide range of third parties?'

Soft law, hard consequences

Ruggie admits he doesn't have the answers here. But the implication is clear: good lawyers need to start taking heed of his Principles. Law firms are going to have no choice but to do this as the Principles are now internationally recognised,' says Yasmin Batliwala, Chief Executive of Advocates for International Development (A4ID), referring to the endorsement of the Principles by the UN Human Rights Council in 2011. 'All businesses are likely to be increasingly judged on their record as the Principles become an established part of the global human rights framework.'

A handful of top corporate law firms are already leading the way here. It may not yet be integrated into normal practice, but Clifford Chance, Freshfields, Linklaters, Allen & Overy and others have taken steps to incorporate the Principles into their advice. Clifford Chance partner Rae Lindsay, who specialises in international law and litigation, says clients are taking Ruggie 'very seriously', and expecting their lawyers to do the same. 'There has certainly been a shift in thinking since the Principles were unanimously endorsed,' she

tells *IBA Global Insight*. 'It is therefore incumbent on law firms to be able to understand them and integrate them into the advice they give.'

Though the Principles are not legally binding, Lindsay points out that they could have legal consequences. It won't be long before corporations begin to work them into contracts, while regulations are already being formed around them. They have been absorbed into the OECD 'Guidelines for Multinational Enterprises', the International Organization for Standardization (ISO) guidance on social responsibility for companies and the sustainability policy of the International Finance Corporation. The European Commission is also developing guidance on corporate compliance with the Principles, including mandatory reporting obligations.

Eventually, explains John Sherman, an adviser to Ruggie and former chair of the IBA's Corporate Social Responsibility (IBA CSR) Committee, a judge is going to examine whether a company has lived up to universally accepted standards of

'Law firms are notoriously conservative and slow in terms of adapting to change. They are so focused on what they do for their clients that there is very little focus on their duties as a business entity'

Sif Thorgeirsson

Corporate Legal Accountability Project
Manager at the Business & Human Rights
Resource Centre

conduct in order to determine whether it has a duty of care, and will use the Principles as the legal yardstick. 'It is said that ethics are a leading indicator of the law, and what is unethical today is illegal tomorrow,' he says. 'I think that kind of trend you can apply to the Guiding Principles.'

For the majority of lawyers, it seems, 'that kind of trend' remains firmly in their blindspot. But former Clifford Chance partner Tim Soutar, Chair of the IBA Pro Bono Committee, believes a cultural shift may be on the horizon. 'I think there are still an awful lot of City [of London] lawyers that if you mentioned Ruggie, would



John Ruggie

not have a clue what you were talking about. But I think it is one of the things hovering on the horizon that could blow in quickly.'

Indeed, interest around Ruggie is evidently growing. The UN Forum on Business and Human Rights in Geneva in December 2012 attracted over 1,000 people – around ten times the number that had attended previous sessions on the subject – including dozens of lawyers. Sherman believes momentum will continue to increase as the human rights movement develops, just as environmental law grew out of the green movement. 'I don't know if law firms will ever have dedicated human rights practices, but you can see the trend,' he says. 'Those involved in licensing, in litigation, in governance are all going to run across human rights issues in some way.'

A look in the mirror

Lawyers may be starting to engage with the Guiding Principles in terms of their clients' responsibilities – but what about their own? As businesses, law firms have an obligation to 'Ruggie-proof' their own operations too. Yet not one firm in the world is currently believed to have its own human rights policy. Even Foley Hoag, where Ruggie acts as senior advisor, comes up empty-handed. Indeed, only a small coterie of firms – including Freshfields and Clifford Chance – have signed up to the UN Global Compact, which lists a series of human rights commitments for businesses, and which many see as a stepping-stone towards the Principles.

'Law firms are notoriously conservative and slow in terms of adapting to change,' says Sif Thorgeirsson, Corporate Legal Accountability Project Manager at the Business & Human Rights Resource Centre. 'They are so focused on what they do for their clients that there is very little focus on their duties as business entities.'

Lindsay concedes that law firms need to do more. 'The larger corporations have been quite advanced on this and law firms have possibly lagged a little behind. I think they just don't recognise they are part and parcel of the equation.'

Yet times may be changing. Clifford Chance, Linklaters and Freshfields are all currently putting together their own internal human rights policies, *IBA Global Insight* has learnt – though none have as yet been brave enough to put their head above the parapet. Traditionally outside the corporate comfort zone, human rights remains a sensitive topic, and getting partner buy-in has

proved no easy task.

The problem for many stems from the perceived difficulty of reconciling their responsibilities to their clients with their Ruggie obligations. Under the Principles, if a business finds it has contributed to a human rights violation, 'it should take the necessary steps to cease or prevent its contribution and use its leverage to mitigate any remaining impact'. Where the business has not directly contributed to a violation, but is simply associated with it via a business relationship, the Principles declare that various factors should be taken into account in

'Moral obligations are personal and uncertain; professional obligations are clear. The truth is, everyone wants to act for Shell'

Francis Neate

Former IBA President and former senior partner of Slaughter and May's litigation department

determining what action to take: the business's leverage over the entity concerned, how crucial the relationship is, the severity of the abuse and whether terminating the relationship would have adverse human rights consequences.

Where law firms are concerned, there are many questions to answer here. How much due diligence should a firm do before taking on a client? Should this cover a client's full operations or simply those within the firm's mandate? How can a firm prove its human rights credentials while maintaining client confidentiality? What happens if the client – as is often the case – is not forthcoming with information? What happens if it refuses to heed the firm's advice? Who pays for all this additional work anyway?

'It is an interesting ethical dilemma for lawyers,' says Sherman. 'A lawyer has the responsibility to represent a client to the best of their ability. If you decide you want to terminate the relationship, you have to weigh the issues of prejudice to the client. The Principles don't trump legal ethical rules, but there are ways they can work together.'

But lawyers are not hired to be moral arbiters, many contend; their job is to find the best way to use the law to help their client. It is a widely held view. Yet most countries' codes of conduct for lawyers encourage moral considerations to inform legal advice. Codes in Europe, Japan, the US and elsewhere state that lawyers' obligations

to their client should be balanced with their duty to the public good. In the US, the ABA allows a lawyer to terminate a contract if the client 'insists upon taking action the lawyer considers repugnant', while the Solicitors Regulation Authority for England and Wales says a lawyer can cease to act if they have 'good reason'. Indeed, the 'IBA International Principles on Conduct for the Legal Profession' are grounded in the Universal Declaration of Human Rights: the touchstone for the Guiding Principles.

Lawyers therefore ought not cry 'limited

mandate' as an excuse to ignore broader human rights concerns, stresses Lindsay. 'I think some lawyers use this as a cop-out. I believe it is incumbent on lawyers to highlight risks beyond their mandate, and if clients disregard the advice, they can then decide how to react.'

While law firms have proved they are not averse to addressing these issues – several large firms played a seminal role in advising Ruggie – it is clear that the issue of human rights is generally still seen as something distinct from normal policy, to be respected or ignored on a

The Guiding Principles explained

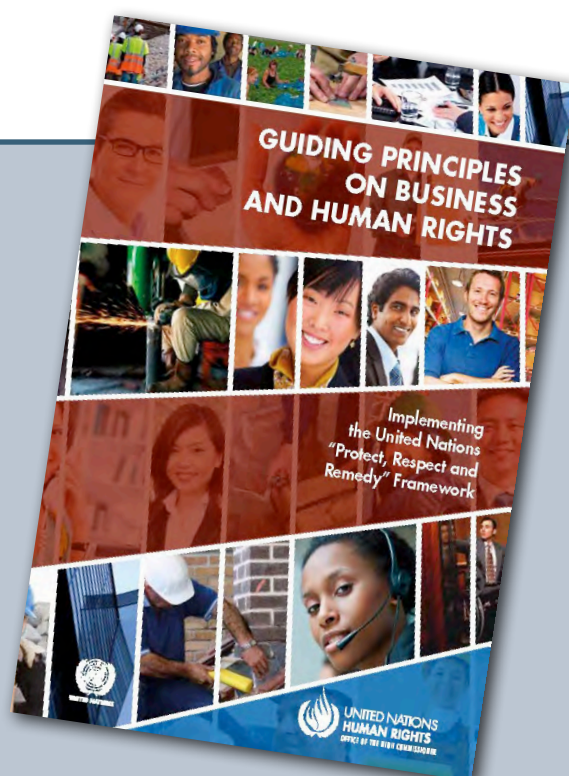
The UN Guiding Principles on Business and Human Rights are the product of six years of work by the former UN Secretary-General's Special Representative for Business and Human Rights, John Ruggie. The Principles are non-legally binding, but aim to establish a global standard for addressing the adverse human rights impacts of corporate activity. They build on Ruggie's three-pillar 'Protect, Respect and Remedy' framework:

- 1) the state duty to protect human rights;
- 2) the corporate responsibility to respect human rights;
- 3) the need for greater access to remedy – both judicial and non-judicial – for victims of business-related abuse.

The Principles were endorsed by the UN Human Rights Council in June 2011 and the American Bar Association in February 2012. They have also been incorporated into the OECD Guidelines for Multinational Enterprises, the International Organisation for Standardisation (ISO) 26000 guidance on social responsibility for companies, the sustainability policy of the International Finance Corporation and the European Commission's new corporate social responsibility strategy.

Corporate responsibility:

- The responsibility of business enterprises to respect human rights refers to internationally recognised human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in



the International Labour Organisation's Declaration on Fundamental Principles and Rights at Work.

- The responsibility to respect human rights requires that business enterprises:
 - o Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
 - o Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.
- In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances.

whim. Business and human rights is yet to form part of the standard law school curriculum, and 'human rights' for many remains an alienating term. This, says Lindsay, must change. 'People in corporate firms may think, why are human rights relevant? But making it workable and effective is about crossing those boundaries. It should be a common issue across all legal practice.'

Beating the bluwash

Others, however, are not so confident. Former IBA President Francis Neate, senior partner of Slaughter and May's litigation department from 1986 to 1997, firmly believes that ethics have a

role to play in the legal profession, but is highly doubtful the Principles will ever be truly accepted into the fold. 'Personal moral obligations are unclear; professional obligations are clear,' he says. 'The truth is, everyone wants to act for Shell. You'll just lose the client to someone else. With globalisation, it's a hugely competitive business.'

Neate points out that the success of Ruggie relies on there being strong reputational concerns at stake. This involves public grassroots pressure and a visible brand against which people can rally. Law firms, which tend to work in the shadowlands of client confidentiality and whose names are unknown to the average person, are unlikely to feel such pressure.

Indeed, Patricia Feeney, Executive Director of Rights & Accountability in Development (RAID), a campaigning organisation fighting

Rees on Ruggie

Peter Rees, Legal Director of Royal Dutch Shell, speaks to the IBA about Ruggie and the ATS [extracts from interview, 24 May 2011]



Respect: 'So far as Shell is concerned, it has always had a very ethical approach to the way in which it does business. We introduced our business principles decades ago: honesty, integrity and respect for people are the core guiding business principles of Shell. We have a code of conduct and business principles that feed off those [...], and so far as I am concerned – having come in as an outsider and therefore not, if you like, imbued with the years of work within Shell that may make you less than objective – the Shell approach is entirely in line with the Ruggie Principles [...]. So I don't see there is a problem for making multinationals accountable. Where I think there is an issue is that there is such a wide scope within those sorts of words or within those Principles, that whilst you have companies like Shell at one end, you will have other companies towards the other end, and there is no real way of ensuring that everybody is achieving the higher end of those Principles.'

Remedy: 'I think what does need to be done is to have a more global approach rather than a piecemeal approach [...]. I think that means you have to get the governments and states on board, and simply focusing on the companies is actually the wrong target, because we are not in a position to do that. It is the countries that have to do that, and the international organisations, whether it's the OECD or UN or whatever.'

ATS: 'I think fundamentally you have to recognise that the ATS is simply a means for bringing proceedings against companies that either happen to be based in the US or raise capital in the US, and that is not actually addressing the situation that is arising in the world going forward. There are lots and lots of companies that are not within the US and not within the US jurisdiction, and therefore to view the ATS as the remedy for these sorts of issues is, I think, probably out of date.'

To view the full interview with Peter Rees and other CSR-related film by the IBA go to: tinyurl.com/IBAcsrcfilms.

'People in corporate firms may think, "why are human rights relevant?" But making it workable and effective is about crossing those boundaries. It should be a common issue across all legal practice'

Rae Lindsay
Clifford Chance partner

unethical practices in business, highlights the difficulty of finding lawyers to represent clients on a pro bono basis when the defendant is a multinational corporation. 'They are afraid,' she says. 'If you're dealing with large extractive industry companies, it's almost impossible to access those services. The bigger firms with the capacity feel it would damage their interests, as they would be seen as anti-business, and small litigators can only go so far.'

And there's the rub. Firms, and the companies they advise, may talk the talk, but how many will actually meet their commitments? Greenwash is already a commonplace term for companies claiming environmental credentials they haven't earned; now bluwash – signing up to UN agreements such as the Global Compact without actually honouring them – may become the new green. With few effective oversight mechanisms for the Compact and Guiding Principles, such

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Plaintiff Esther Kiobel joins protest against Royal Dutch Shell Petroleum in front of US Supreme Court in Washington DC

'It is said that ethics are a leading indicator of the law, and what is unethical today is illegal tomorrow. I think that kind of trend you can apply to the General Principles'

John Sherman
Adviser to UN

Secretary-General's Special Representative
for Business and Human Rights and
former Chair of the IBA CSR Committee

ethical laundering may not prove too hard.

One way of holding law firms to account, it has been suggested, would be to publish their clients in a transparent database, allowing public scrutiny and accountability. Such information is usually available with a little digging; this would simply make it more accessible. For most lawyers, however, this remains a step too far. Clients would almost certainly object, they say, and potentially move their business elsewhere.

Yet lawyers' ability to shun the spotlight may be on the wane. In the United Kingdom, an impassioned public is now waving its collective pitchfork at the 'big four' international accountancy firms over tax avoidance; it may only be a matter of time before their attention

turns to the legal counsel in the engine room next-door. Indeed, law firms, though shielded, are not immune from the public gaze. Unethical cases, such as those involving vulture funds – which buy debt from poor countries and then sue them for the full amount – and the recent News International phone hacking scandal, have resulted in severe reputational damage for the lawyers involved. Vulture funds are now outlawed in the UK, whereas the phone hacking scandal triggered nationwide reform of press standards. Both are classic examples of John Sherman's point: 'what is unethical today is illegal tomorrow.'

Whatever their stance on the Ruggie issue, it is clear that law firms' input is central to the human rights debate. With the 100 largest firms taking a total revenue of \$74bn in 2010 – a small fraction of the value of the global transactions they helped to shape – their influence cannot be understated. Though the line to be navigated between service provider and public custodian is rarely a straightforward one, getting the balance right is perhaps now more critical than ever.

The hope, says Batliwala, is that ethics and the law can ultimately be viewed as allies, not adversaries. 'Lawyers start to do law because they believe passionately in making a difference. But somewhere along the line, because they are working so hard, they can forget that law is transformational and can do great things. The sooner more lawyers remember that, the more we can achieve.' ☺

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South Africa's *annus horribilis*

A terrible year has brought wide-ranging consequences that could call into question its status among the BRICS.

KAREN MACGREGOR

Last year was *annus horribilis* for South Africa. A textbook fiasco hit schools in Limpopo. Police massacred 34 miners at Marikana platinum mine, sparking unrest across the mining sector and hitting the economy. Corruption riddled government and a \$28m splurge on a rural mansion for President Jacob Zuma using taxpayers' money was exposed. The year ended with Nelson Mandela in hospital.

But most of all, it was Marikana that hurt South Africa. A cocktail of miner desperation over poverty and dangerous working conditions, demands for a hefty pay rise and a strike, rivalry between unions and an uncompromising mining company culminated in the most brutal use of force by the police since the apartheid-era Sharpeville massacre in 1960.

During the sixth week of the strike at the mine near Rustenburg, ten people – including two police and two security guards – were hacked to death. Then on 16 August police shot dead 34 miners, wounded 78 and arrested 278. Public outrage deepened when it emerged that most of the victims were shot in the back while trying to disperse.

Ironically, Cyril Ramaphosa – who sits on the board of the mine's British owner Lonmin and was founder of the big union embroiled in the Marikana drama – was elected deputy president of the African National Congress (ANC) at a party congress in December. He is now in line to succeed Zuma to become South Africa's fourth democratic president.

The mess in mining

The Marikana massacre horrified South Africa and the world and ignited protests across the mining sector. Within two months an estimated 75,000 miners were embroiled in strikes, which made 2012 the most protest-hit since the end of apartheid in 1994.

At Marikana agreement was reached on 18 September on a 22 per cent pay rise, although unrest continued. By then, trouble had spread to other companies including the world's top platinum producer Anglo American Platinum and AngloGold Ashanti, which was forced to halt operations.

Two weeks after the tragedy, 12,000 miners were protesting at Gold Fields mine outside Johannesburg when four people were injured. Workers staged a strike at Anglo American Platinum, which threatened to fire 12,000 people after losing \$82.3m in revenue. Kumba Iron Ore suspended production at South Africa's largest iron ore mine after 300 striking workers blocked access to the pit.

In November, two miners were killed at Harmony Gold Mining's Kusasaletu mine, a result of rivalry between the huge National Union of Mineworkers (NUM) and upstart Association of Mineworkers and Construction Union – the unions that clashed at Marikana. Later, ten miners were injured in a protest following the suspension of 578 employees. These were not the only reported incidents.

In December, the quarterly employment survey by Statistics South Africa revealed that some 15,000 jobs had been lost in the mining sector through labour unrest – bad news for a nation with 25 per cent unemployment.

BRICS status threatened

According to the powerful Congress of South African Trade Unions (Cosatu) – to which NUM is affiliated – the mining industry directly employs around half a million workers and indirectly employs a further 400,000. Its direct and indirect contribution to gross domestic product is 18 per cent and mining accounts for half of South Africa's foreign exchange earnings.

Economic growth slowed to 1.2 per cent in the third quarter of 2012 compared with a 3.4 per cent rise in the second quarter – a decline attributed largely to mining unrest – and the current account deficit sat at

6.4 per cent, leaving South Africa vulnerable to foreign investor sentiment.

Auditing firm PricewaterhouseCoopers said South Africa's top 39 mining companies had shed all gains made since the 2008 financial crisis. Six out of the top ten posted declines. The events at Marikana and widespread labour disputes, said PwC mining analyst Hein Boegman, had 'caused mining companies to rethink risk and the risk landscape they operate in.'

The UK's *Financial Times* reported that foreign companies were revisiting plans to invest in the country. 'Pictures of the bloodshed broadcast around the world, and the subsequent fallout, have had a significant effect on South Africa's image and are threatening its drive to market itself as a hub for multinationals seeking to tap into the faster growth of other African nations,' wrote Andrew England.

Standard & Poor's lowered the country's long-term foreign currency sovereign credit rating, and Moody's downgraded the government bond rating. UK financial services firm JPMorgan Cazenove warned that factionalism within the ruling tripartite alliance – ANC, Cosatu and Communist Party – was eroding the state's

ability to suppress strike and protest activity.

'The impacts of Marikana have thus spread far and wide. There are implications for the rule of law, labour relations and governance'

Marikana's major implications

The impacts of Marikana have thus spread far and wide. There are implications for the rule of law, labour relations and governance. South Africa is no stranger to protests, but the violence of the strikes and rejection by workers of a strong union has sparked concerns over the future of the collective bargaining system.

Business leaders have stressed the critical need to maintain law and order and restore labour relations. Already shaken by talk of nationalisation of the mines – although this is now off the agenda – they have also warned against responding with damaging regulatory changes.

Zwelinzima Vavi, president of Cosatu, blamed Marikana on the 'worsening triple crisis of mass poverty, widespread unemployment and extreme inequalities,' a labour market based on the super-exploitation of black labour and the industry's 'killing face' reflected in high fatalities, diseases, environmental degradation and squalid living conditions.

'While it is a time for deep analysis and introspection, we should caution against

resorting in a knee jerk fashion to singular and simplistic instruments that masquerade as panacea to what is essentially extremely complex social problem,' said Vavi.

George Parker, editor of the e-publication *Legalbrief Africa*, said one implication of Marikana for labour law could be improved rights for smaller unions in the bargaining process. 'The fact that workers disenchanted with NUM weren't listened to was a major part of the problem,' he told *IBA Global Insight*. 'The biggest change, though, should be to the way mines are run. The mining giants are seen by many, rightly or wrongly, as being populated by greedy, couldn't-care-less businessmen.'

Key role for the commission of inquiry

Against this backdrop, and with a desperate need for closure on Marikana, South Africans welcomed the announcement by Zuma in August of a judicial commission of inquiry led by retired judge Ian Farlam. The commission's task is to probe events on the day of the massacre as well as the roles played by Lonmin, the unions and the government.

Its work began on 1 October with site visits followed by hearings in the Rustenburg Civil Centre. 'Our country weeps because of the tragic loss, and this commission will work expeditiously to ensure the truth is revealed,' said Farlam.

Concerns about the commission have been expressed. Amnesty International called for clarification of its powers, sufficient resources to support all those who wished to provide evidence and a 'public commitment by the government to publish the commission's report and act on its recommendations within a specified time.'

University of Cape Town constitutional lawyer Pierre de Vos wrote in the *Daily Maverick* that he was impressed by the commission's terms of

reference and choice of respected retired judge Farlam. But he had concerns about the lack of explicit mention of the need to look into the 'broader culture of violence and impunity' within the police force. The 'big unanswered question' was how Zuma – and the police and National Prosecuting Authority – would deal with the commission's findings and recommendations.

One problem for the commission has been a lack of top legal minds, said *Legalbrief's* George Parker, with the exception of George Bizos for the Legal Resources Centre. It was possible that the 'obvious police attempts to cover up what actually happened immediately prior to the massacre could succeed in masking the truth.'

However, so far the Farlam Commission process – though marred by early reports of intimidation and arrests of witnesses – has asked tough questions and the process has been robust, exhaustive, exhausting and confrontational at times. As *Mail & Guardian* journalist Kwanele Sosibo wrote, the commission 'has already helped to clarify the epochal puzzle that is the Lonmin strike' and the dubious actions of the police.

It will be crucial for the commission to continue this work transparently and fearlessly – and for its findings to be made public and be acted upon – if South Africa is to lay its worst post-apartheid tragedy to rest and mend the damage in 2013. ☒

Karen MacGregor is a freelance journalist. She can be contacted at editors@africa.com



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