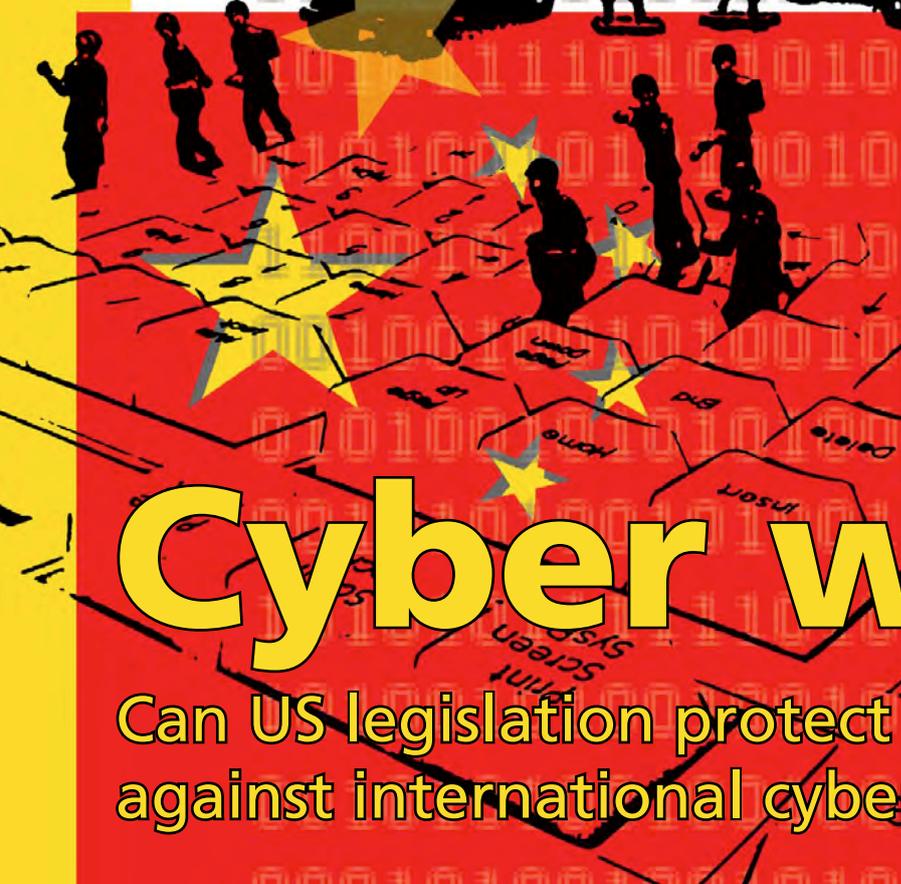


# IBA GLOBAL INSIGHT

June/July 2013



**Global leaders: Cyril Shroff on India's dramatic transformation and its current challenges**

**Tensions in Bangladesh: coverage of Dhaka's controversial International Crimes Tribunal**

**Russia: engagement with the OECD and WTO means rule of law reform should be imminent**

## Cyber wars

Can US legislation protect companies against international cybercrime?



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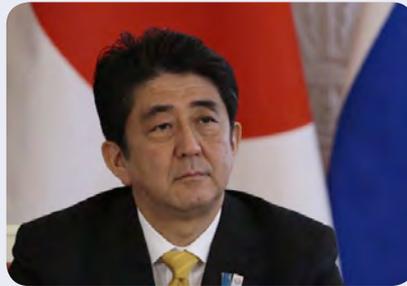
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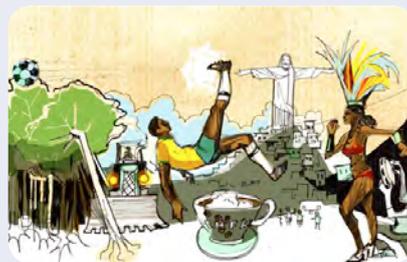
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The content of *IBA Global Insight* magazine is written by independent journalists and does not represent the views of the International Bar Association.

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# From the Editor

Welcome to the June and July edition of the International Bar Association's flagship magazine, *IBA Global Insight*. Throughout the news section, the three columns and our five features, we aim to bring you the highest quality reporting, analysis and comment from our writers and award-winning contributors around the world: in Dhaka, Hong Kong, London, New York, Rio; and an in-depth interview, conducted by former CNN anchor Todd Benjamin, with one of India's leading business lawyers, Cyril Shroff. As ever, this edition covers a remarkably diverse and wide-ranging set of major issues across law, business and human rights. However, the IBA is not a political organisation and it is important that the content of *IBA Global Insight* reflects that stance (see apology below).

The News section of this edition covers the major legal and business issues currently high on the agenda – tax evasion and Europe's sovereign debt crisis – as well as updates on the IBA's involvement at the St Petersburg International Legal Forum, and the IBA's forthcoming Annual Conference in Boston. Our Human Rights News section tackles the issue of rule of law in Sri Lanka and efforts on the part of the International Bar Association's Human Rights Institute to put pressure on the Commonwealth to effect change. We also have coverage of the situation in Kenya, where the newly-elected President, Uhuru Kenyatta, is due to stand trial at the International Criminal Court (ICC). This features expert input from exclusive *IBA Global Insight* interviews with the current and former Chief Prosecutors of the ICC, Fatou Bensouda and Luis Moreno Ocampo.

This month we have a new Asia-based columnist analysing the impact of Prime Minister Shinzō Abe's new economic model on Japanese business and international law firms. Our Pulitzer Prize-winning USA columnist, meanwhile, tackles the fraught issue of America's efforts to rebuild Afghanistan while the rule of law remains almost entirely absent.

Our features section is no less diverse. The cover feature provides a comprehensive assessment of the risks and legislative responses to the growing global threat of cybercrime confronting individuals, companies and states. We also have an assessment of rule of law in Russia one year on from WTO accession, and an excellent piece of reportage from Mary Kozlovski in Dhaka, which puts the focus on Bangladesh's controversial International Crimes Tribunal. We hope you enjoy this edition of *IBA Global Insight*.

James Lewis

## Apology

You may have seen an article and associated illustration about Italy in the previous edition of *IBA Global Insight*. The article has caused offence to the Rome Bar and to some other of our Italian members, and for this we wish to apologise. We had of course no intention of causing such offence. The ensuing discussion has been extremely helpful, and we intend to undertake a review of our editorial policy. The article was written by a freelance journalist who also writes for *The Times*. The London office will be conducting a review during the weeks ahead, with a view to amending our current editorial policy.

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# News

## G8 calls for collective action on tax evasion, but avoidance remains

ARTHUR PIPER

The UK's presidency of the G7 and G8 countries is gathering steam with a series of initiatives that aim to clamp down on tax evasion. At the end of a two-day retreat in Buckinghamshire on 10–11 May, the UK chancellor George Osborne announced that the G7 ministers had agreed on the 'importance of collective action' on cracking down on tax cheats. 'It's incredibly important that companies and individuals pay the tax that is due,' Osborne said.

In practice, their deal means Britain, Germany, France, Italy and Spain (the countries of the G5) are to pilot a scheme to automatically share tax information on individuals if there is any suspicion of illegality. Formerly, such information had to be requested.

The trial is based on a model for improving tax compliance developed under the US Foreign Account Tax Compliance Act (FATCA), which was agreed by the G5 countries last year. The US and Canada (the other G7 countries) will not take part, although the model could be rolled out elsewhere.

A week earlier, the chancellor announced that British Overseas Territories that have become tax havens for the rich are to share information with the British tax authorities (HMRC) on a similar basis. Anguilla, Bermuda, the British Virgin Islands, Montserrat and the Turks and Caicos Islands are to sign agreements.

Bank accounts held by their taxpayers could be open to scrutiny at the suggestion of wrongdoing. 'This [data] includes names, addresses, dates of birth, account numbers, account balances and details of payments made into those accounts,' the Treasury said.

The level of loss to the Treasury from tax evasion is by definition unknowable, because it is undisclosed income. The charity Oxfam has recently estimated that evasion costs the UK Exchequer £5.2bn a year; the Tax Justice Network puts the figure at almost £70bn a year; HMRC puts it closer to £26bn.



To read extended coverage of the issue from our Apr/May edition go to [tinyurl.com/IBAwakeup](http://tinyurl.com/IBAwakeup)

The Prime Minister David Cameron has written to Herman Van Rompuy, President of the European Council, setting out the case for global action on tax evasion and aggressive tax avoidance. He wants the European Council to move on four key areas

*'The issue of corporations paying tax does not revolve around tax havens'*

Stuart Chessman  
Director of International Tax at  
Vivendi, Co-Chair of the IBA's Taxes  
Committee.

when it meets later this month, including: a new global standard for multilateral information exchange, action to increase transparency in beneficial ownership, reform of global tax rules through the G20 and OECD, and improving the ability of developing countries to collect tax.

'There should be room for a serious debate about what further steps can be taken to address continued attempts at aggressive tax avoidance,' he said. 'For example, we should consider how the steps taken by some firms to undertake country-by-country reporting on the tax paid in their

countries of operation can be further encouraged on a voluntary basis.'

But lawyers emphasise that illegal tax evasion is not the same as legal tax avoidance. 'The issue of corporations paying tax does not revolve around tax havens,' says Stuart Chessman, Director of International Tax at Vivendi and Co-Chair of the IBA's Taxes Committee. 'Most multinationals, because they have to report publicly, do structure their affairs within the law to reduce their taxes.'

He says that it is important that any changes – to take account of the emerging digital economies, for example – would need to be done in 'a clear reasoned way' to avoid confusion.

Judith Freeman, Professor of Taxation Law at the University of Oxford, also refuses to accept the argument that corporations should be paying more tax if they are following the law. Making tax contributions on a voluntary basis does not make sense to her. 'I don't accept the distinction between following the letter and following the spirit of the law,' she says. 'If the law is wrong, government needs to change it.'

Tax reform campaigners say that the difference between evasion and avoidance is merely semantic. John Christensen, Director of the international reform lobby the Tax Justice Network, says: 'Both activities amount to the same because public revenues are eroded. If a corporation can use its tax status to move revenues and save money when another cannot that amounts to unfair and harmful tax competition.'

Despite differences, Christensen and Freeman both want radical reform of the corporate tax regime. But they doubt whether there is enough political will to see sweeping changes at the G8 meeting in June this year. 'Politicians have not progressed that far,' says Christensen.

Read the full story at [tinyurl.com/TaxEvasionG8](http://tinyurl.com/TaxEvasionG8).

## Registration now open for IBA Annual Conference, Boston, 6–11 October 2013

The IBA Annual Conference continues to be the premier opportunity for legal professionals the world over to meet, share experience, develop business and learn from one another. The conference has been bringing together practitioners of every level, from virtually every jurisdiction in the world, for over 60 years. This year's event will again feature over 180 substantive sessions, workshops and panels, addressing issues ranging from arbitration to M&A law, from human rights to the ethics of the legal profession.

This year's keynote speakers include:

### **Madeleine K Albright**

Former United States Secretary of State, Madeleine K Albright, will be

the Keynote Speaker at the Opening Ceremony. Albright was the 64th US Secretary of State. In 1997, she was named the first female Secretary of State and became, at that time, the highest ranking woman in the history of the US government.

### **Justice Stephen Breyer**

2015 will mark the 800th anniversary of the Magna Carta. Justice Breyer of the US Supreme Court will deliver a keynote address at the Rule of Law Symposium, looking ahead to the anniversary of a document that has inspired democracy and the rule of law in many countries.

### **Paul Volcker**

American Economist, former Chairman of the Federal Reserve and the force behind the 'Volcker Rule', Paul Volcker



Madeleine K Albright

will provide a keynote address giving unique insight into the role state officials play in safeguarding the rule of law.

Visit the 2013 Annual Conference website at [tinyurl.com/IBABoston](http://tinyurl.com/IBABoston).

## IBA to collaborate with International Organisation of Employers

The IBA Global Employment Institute (IBA GEI) will be collaborating on a joint project with the International Organisation of Employers (IOE) in the development of a report on how the supervisory system of the International Labour Organization (ILO) Conventions affect individual companies around the world. The work on the report is expected to commence after the ILO Conference in June 2013 and will continue for a year.

To extend this collaboration and formalise the commitment, both organisations have decided to engage in further possible activities such as undertaking research studies and organising specific workshops, consultations, seminars and brainstorming exercises on current issues of global interest. This will also open up the horizon for mutual exchange of knowledge and experience on issues affecting the normative development of labour relations at the level of both ILO standards and within the different areas of discussion at national level.

For further information about the IBA GEI see [tinyurl.com/IBAGEI](http://tinyurl.com/IBAGEI).



## IBA presents sessions at St Petersburg International Legal Forum

IBA President Michael Reynolds presented opening remarks at the commencement of the III St Petersburg International Legal Forum, 15–18 May 2013 in Russia. The international audience of 2,000 included Russia's Prime Minister Dmitry Medvedev, the President of the International Court of Justice and the Minister of Justice of the Netherlands.

The Forum is recognised as a platform for dialogue between politicians, lawyers, economists, and scientists from many major economic and legal systems. At the plenary session, 'Competition and Cooperation between Legal Systems: the Role of Law in Ensuring the Development of Society, the State, and the Economy', Mr Reynolds spoke about the correlation between international investment and a well regulated and competitive legal environment. Other sessions involving the IBA included: 'Quiet revolution – How the law firm business model is evolving'; 'Uniting the Russian legal profession – the challenges for integration to enable the lawyers to work within a regulated structure'; 'Challenges posed by the growing internationalisation of cartel investigations and Business accountability and human rights'.

For more details about the conference see [tinyurl.com/SPILF2013](http://tinyurl.com/SPILF2013).

# Bailout or down and out?

## Portugal and Cyprus wrestle with EU rescue conditions

JONATHAN WATSON

In April, Portugal's constitutional court decided to strike down four out of nine contested austerity measures approved in the government's budget for 2013. It rejected cuts of about seven per cent in pensioners' and civil servants' holiday bonuses, along with reductions in sick leave and unemployment benefits.

However, the court upheld other measures, such as a reduction in the number of tax brackets. Portugal has to make significant cuts under the terms of a bailout deal agreed with the European Union and the International Monetary Fund (IMF) in 2011.

According to Lino Torgal, Executive Partner at Portuguese law firm *Sérvulo & Associados*, both decisions came as a surprise. 'In an austerity environment, cuts for public servants and pensioners were expected as unavoidable,' he says. 'Similar measures were approved in other countries under an adjustment programme.'

The court removed a similar measure last year that would have introduced a cut of 14 per cent for pensioners and civil servants, and the perception was that the court would accept a reduction of seven per cent.

'There is an increasingly strong idea that austerity will not bring back the path to growth and the European institutions and partners, chief among which are Germany and other Northern European countries, must change policy to help southern countries grow,' Torgal says.

Luis Pais Antunes, a partner at Portuguese law firm *PLMJ* and former Secretary of State for Labour, says the immediate practical consequence of the ruling will be to place further limits on the government's freedom to manoeuvre. Lisbon will now be forced to bring forward austerity measures that had been planned for 2014.

Antunes argues that the EU's current strategy is too focused on finance at the expense of employment and investment. 'The financial problem has been brought under control in countries like Portugal and Ireland – our budgets are now much more balanced,' he says. 'However, the price being paid for this in terms of

the economy, growth and employment are unsustainable for Portugal, as well as for the eurozone and for Europe as a whole.'

Antunes hopes for some reorientation in the EU's macroeconomic policy after the German elections. 'It does not have to be a complete U-turn, just an adjustment to boost growth and employment,' he adds.

### Cyprus 'singled out'

While the Portuguese were busy debating their ability to meet the terms of their bailout, Cypriots were struggling to come to terms with their own rescue package. The Cypriot bailout, agreed at a meeting of eurozone finance ministers in April, comes with a novel twist; of the €23bn needed, only €10bn will come from the EU and the IMF. The rest will come from Cyprus itself.

Much of this will come from savers at its ailing banks. Some individuals and organisations with more than €100,000 in their accounts could end up losing as much as 60 per cent of their savings.

Andreas Neocleous, Founder and Managing Partner of Cyprus's largest law firm, *Andreas Neocleous & Co*, believes northern European countries have singled Cyprus out for special treatment. 'There's been no question of a "solidarity levy" like this in any other bailout,' he says. 'It's not too strong to describe this expropriation of deposits as Orwellian.'

One of the arguments advanced for forcing Cyprus to partially fund its own bailout is the widespread belief that many account holders are Russian depositors engaged in money laundering. Neocleous believes that national interests are at play here, as Cyprus is not the only major EU portal for investment to and from Russia. There are several others, such as the Netherlands.

Institutions in that country, along with others in Germany, Malta and Switzerland, are now advertising themselves as a 'safe haven' for Russian funds, Neocleous says.



'The argument seems to be that all the money is dirty, therefore we are fair game,' he adds. 'Cyprus is a very small economy, and it didn't get the support it expected from the EU. This bailout is an extremely blunt instrument that tars every credit holder with the same brush.'

Leaving aside the rights and wrongs of the bailout deal, forcing a country of 850,000 people to come up with €13bn is going to be a major challenge. Rough estimates suggest this could amount to about €40,000 per household.

Lode van der Hende, a partner in the Brussels office of *Herbert Smith Freehills*, emphasises that EU problem-solving processes have always been 'unhappy' and 'clumsy'. The financial crisis has exposed the EU's 'less than ideal' institutional arrangements in recent years, he says.

One can't help wondering what the founding fathers of the European Union would have made of it all. The 1951 Treaty of Paris, which created the European Coal and Steel Community, spoke of 'the development of employment and the improvement of the standard of living in the participating countries' and 'avoiding the creation of fundamental and persistent disturbances in the economies of the Member States'. Many Europeans must feel this is the exact opposite of what the EU is doing right now.

# Microsoft fined €561m for failing to offer browser choice

SAM CHADDERTON

**M**icrosoft's failure to adhere to the European Commission's ruling on its promotion of rival web browsers will not cause Commissioner for Competition Joaquín Almunia to backtrack on his preference for 'commitments' over litigation.

That's according to international competition lawyers who have been watching the case – in which Microsoft had to offer alternatives to Internet Explorer for its EU customers to avoid a fine for stifling competition.

Despite introducing a browser choice pop-up screen in March 2010, a 'technical error' resulted in this being dropped from the Windows 7 update in February 2011 – for a further 14 months until anyone noticed.

The unprecedented breach by Microsoft led to a \$731m fine and raised pertinent questions about the effectiveness of the EC's monitoring. Even commissioner Almunia admitted naivety in the watchdog's enforcement of commitments in IT.

Yet industry experts believe Almunia will continue to avoid lengthy and costly litigation in similar abuse of market dominance cases, especially in fast-moving sectors that demand prompt resolutions. He recently



stated that these decisions are the 'favoured mechanism' to close abuse of dominance proceedings, saving resources and bringing a quick conclusion.

That stance is likely to be tested by the current Google investigation. The EC is investigating whether the search giant has unfairly promoted its own services, following complaints made by rivals, including Microsoft.

Simmons & Simmons antitrust partner Tony Woodgate believes that the lesson to be learnt from the Microsoft case is that it is a company's responsibility to ensure it is adhering to any agreement.

He said: 'The European Commission

is sending a firm signal in this first case of its type that it will not tolerate failure by a company to comply with the commitments it gave to settle an antitrust infringement procedure. It is the company's responsibility and it will cost them a lot of money if they fail.'

Adrian Magnus, competition partner at Berwin Leighton Paisner, underlined the challenge for the EC of imposing and monitoring compliance with commitments, and suggested that in future, it will require an independent person or body with technical ability.

'The commitments process is essentially forward-looking. It enables the authorities to close the file and it doesn't take up endless resources. For the parties under investigation, it is also beneficial in avoiding a finding of infringement and a huge fine. It also means there is no decision on which to base a claim for follow-on damages.'

The rise in follow-on damages claims is one of the boom areas in the competition sector and Google's lawyers will be keen to avoid an EC infringement ruling – which would open up the search engine giant to claims from major rivals.

Read the full story at [tinyurl.com/IBANewsMicrosoft](http://tinyurl.com/IBANewsMicrosoft).

## IBA webcast series 2013

The IBA invites you to register for the following events in its 2013 live webcast series. The in-depth interviews, conducted by award-winning CNN broadcaster Todd Benjamin, involve an interactive Q&A with viewers.



**Jim O'Neill**, 20 June 2013, 1430 BST: the former Chairman of Goldman Sachs Asset Management is best known for coining the term 'BRICs' as the acronym now universally applied to the world's four key emerging economies – Brazil, Russia, India and China – symbolising the current shift in global economic power. O'Neill also led the attempted Red Knights takeover of Manchester United in 2010.



**Sir Nicolas Bratza**, 23 July 2013, 1430 BST: as President of the European Court of Human Rights – which oversees justice for more than 800 million people – Sir Nicolas Bratza grappled with a backlog of 138,000 cases, growing anti-ECHR sentiment in the UK and elsewhere, and stagnating funding streams. He will discuss these issues and his views on what hope there may be for the future of the ECHR.



**Ángel Gurría**, date TBC: Secretary-General of the OECD since June 2006, Gurría has reinforced the organisation's influential role as a focal point for global debate on economic policy, also ensuring it pursues modernisation and reform. As Mexican Secretary of Foreign Affairs (1994–1997) and Secretary of Finance and Public Credit (1998–2000), he negotiated the North American Free Trade Agreement (NAFTA) and helped stabilise the economy.

To see details on how to register go to [tinyurl.com/ibawebcasts2013](http://tinyurl.com/ibawebcasts2013).

# Human Rights News

## Commonwealth's reputation at risk if Sri Lanka assumes leadership

REBECCA LOWE

**T**he Commonwealth risks serious reputational damage if it allows Sri Lanka to assume chairmanship of the organisation in November, leading lawyers have warned.

The Sri Lankan government has been severely criticised for its impeachment of Chief Justice Shirani Bandaranayake, which many believe was politically motivated. The dismissal was the culmination of a decade of expanding executive power at the expense of judicial independence, according to lawyers and NGOs.

Sri Lanka is due to hold the Commonwealth Heads of Government Meeting (CHOGM) in Colombo in November, after which it will assume the chairmanship.

Sunil Coorey, a member of the Bar Association of Sri Lanka, urges the Commonwealth to address the situation without delay. 'If the Commonwealth thinks its image, its credibility, will be enhanced by making Sri Lanka the chair, it should go ahead,' he tells *IBA Global Insight*. 'But I believe it should think the other way.'

Former Chief Justice of Nigeria Muhammad Uwais contends the impeachment is incompatible with the Commonwealth's Latimer House Principles, which include respect for the separation of powers and due process. 'The object of the Latimer House Principles is to provide [...] an effective framework for the implementation by governments, parliaments and judiciaries of Commonwealth fundamental values,' he says. 'The removal of Chief Justice Bandaranayake was done by the Parliament and Executive of Sri Lanka in bad taste and in contravention of the rule of law.'

The International Bar Association's Human Rights Institute (IBAHRI) launched a highly critical report of the impeachment process on 30 April entitled *A Crisis of Legitimacy: The Impeachment of Chief Justice Bandaranayake and the Erosion of the Rule of Law in Sri Lanka*. The report describes the procedure as 'hurried, secret and contrary to the principles of natural justice'. It calls on the Commonwealth to reassess Sri Lanka's pending leadership

[read more about the IBAHRI report on page 10].

When approached by *IBA Global Insight* at the end of April for comment on the IBAHRI report, the Sri Lanka High Commission in London declined to do so, suggesting it may do so at a later date, but said claims that the delegates' visas were 'denied' was 'palpably false'. As *IBA Global Insight* went to press at the end of May, after further requests for comment on the IBAHRI report, none was forthcoming.

Speaking in response to the panellists at the IBAHRI launch, Sri Lankan barrister Nigel Hatch, former legal adviser to Chandrika Kumaratunga, Sri Lanka's President from 1994 to 2005, claimed the report's findings were flawed and partisan. The power of impeachment of a senior judge is 'expressly vested in Parliament by the Constitution', he said, emphasising that a motion to remove Bandaranayake had been put to Parliament in October 2012. He also stressed there had been no mass public protests against the impeachment.

The October motion gained 117 signatures – all members of the ruling party. In January, the Court of Appeal ruled that the impeachment procedures were flawed, but the Parliamentary Select Committee ignored the judgment.

Bandaranayake was impeached in January following a closed hearing by seven members of the ruling party, after four opposition members walked out. Charges against her included failing to disclose over 20 bank accounts and maintaining a supervisory role over the courts while her husband was being investigated for corruption.

The IBAHRI report criticises the 2010 18th Amendment to the Constitution, which gave President Mahinda Rajapaksa unprecedented power to appoint Sri Lanka's most senior officials. It also claims that in recent years, 22 journalists and activists have been murdered and 'countless' others have disappeared, most without investigation.

'If the Commonwealth is serious about its values, I don't believe the chairmanship could be assumed by Sri Lanka,' says human rights lawyer JC Weliamuna, former Executive



Director of Transparency International Sri Lanka. 'If it does, the message is clear: it permits all members to violate the core values with impunity.'

In November 2012, Gabriela Knaul, UN Special Rapporteur on the Independence of Judges and Lawyers, requested that Sri Lanka 'reconsider' the impeachment and called for an end to attacks against the legal profession.

The Commonwealth Lawyers Association, Commonwealth Legal Education Association and Commonwealth Magistrates' and Judges' Association have gone further than the IBAHRI and called for Sri Lanka to be suspended from the Commonwealth.

However, the Commonwealth Ministerial Action Group will only address violations once other 'efforts at engagement' have been exhausted – and such avenues are still being explored, according to Richard Uke, Director of Communications for the Commonwealth Secretariat. 'The Secretary-General is confident that his "good offices" engagement is producing practical outcomes,' he tells *IBA Global Insight*, highlighting that Kamalesh Sharma, the current Secretary-General, has publicly criticised the impeachment and is engaging constructively with the Human Rights Commission of Sri Lanka.

For barrister Sadakat Kadri, IBAHRI rapporteur, such 'engagement' is unsatisfactory. 'If the Commonwealth merely delivers words of advice, that is liable to be construed by the regime as a licence to continue along its present course.'

## IBA to host London premiere of Beatrice Mtetwa and the Rule of Law film



The IBA will host the London premiere of the documentary film *Beatrice Mtetwa and the Rule of Law* on Tuesday 18 June at the New Theatre of the London School of Economics.

It is the first time that the IBA will be involved in the broadcasting of a full-length documentary film and demonstrates the IBA's support of the intrepid lawyer Beatrice Mtetwa in Zimbabwe where, despite unlawful detentions, and beatings by the police, she courageously continues to defend imprisoned human rights advocates, journalists, opposition candidates, and ordinary citizens courageous enough to speak out against President Mugabe's regime.

Through filmed interviews Ms Mtetwa and some of her defendants tell the story of what happens when rulers place themselves above the law. It could not be more timely as elections in Zimbabwe are scheduled for late June.

*Beatrice Mtetwa and the Rule of Law* is a Boston Film and Video Productions film directed by Lorie Conway and co-produced with Hopewell Chin'ono. It has been shown in Washington DC, Johannesburg, and will be shown in The Hague in July.

The film's trailer can be viewed at [tinyurl.com/MtetwaFilm](http://tinyurl.com/MtetwaFilm).



## Sri Lanka facing a constitutional crisis concludes IBAHRI fact-finding report

The International Bar Association's Human Rights Institute (IBAHRI) fact-finding report on Sri Lanka (April 2013) found that the removal from office in Sri Lanka of Chief Justice Bandaranayake was unlawful, is undermining public confidence in the rule of law, and threatening to eviscerate the country's judiciary as an independent guarantor of constitutional rights. The report, which also found the legal profession in Sri Lanka to be in a perilous state, was launched at a high-profile event at the House of Lords, London, on 22 April 2013. During the launch, Sadakat Kadri, mission rapporteur, urged the Commonwealth to reassess Sri Lanka's suitability to host the forthcoming Commonwealth Heads of Government Meeting (CHOGM) and to assume Chair.

The IBAHRI was forced to conduct the mission remotely, speaking, by telephone and via the internet, with a range of key players in Sri Lanka because authorities would not permit an investigation to take place within Sri Lanka. However, on 30 April 2013, during a live interview broadcast on the BBC Radio 4's Today programme, in response to a direct question asking whether the IBAHRI would be let in to Sri Lanka, the Sri Lankan High Commissioner to the UK stated that IBAHRI representatives will be granted visas. The IBA has welcomed this announcement and has been in contact with the Sri Lankan High Commission to discuss a visit this year.

The IBA has also released a short film on the current situation in Sri Lanka, summarising the situation in the country, providing some background to the IBAHRI report and discussing the findings and recommendations of the report.

Read the full story and download the report at [tinyurl.com/SriLankaIBAHRIReport](http://tinyurl.com/SriLankaIBAHRIReport).

Read about the report's launch event and watch the short film at [tinyurl.com/SriLankaIBAHRIReportLaunch](http://tinyurl.com/SriLankaIBAHRIReportLaunch).

## Combating torture in Mexico

At the end of March 2013, the IBAHRI implemented further torture prevention training for judges and public defenders in Monterrey, Mexico. Working in collaboration with the Federal Supreme Court, the Federal Public Defenders and the United Nations Sub-Committee on the Prevention of Torture, the IBAHRI trained a total of 45 judges from four northern Mexican states. The IBAHRI is also co-producing a Protocol on Torture Prevention for Judges with the Federal Supreme Court.

# Kenya: Africans conflicted over President Kenyatta's ICC trial

REBECCA LOWE

The election to the Kenyan presidency of Uhuru Kenyatta – wanted by the International Criminal Court (ICC) for crimes against humanity – has inspired ‘hope’ and ‘optimism’ in the region, and created profound dilemmas for both the country and international community, leading African lawyers have told *IBA Global Insight*.

Kenyatta, the son of the country's founding President, was sworn into office on 9 April, having beaten Prime Minister Raila Odinga with 50.07 per cent of the vote. However, both Kenyatta and his running mate, William Ruto, are due to stand trial at the ICC in July.

The men, along with Joshua Sang, former Head of Operations at radio station Kass FM, are accused of leading the ethnic violence that followed the 2007 election, which resulted in over 1,000 deaths and nearly 700,000 displacements.

In 2007, Odinga – from the Luo tribe – narrowly lost to former President Mwai Kibaki – from the Kikuyu tribe – prompting bloody battles on the streets. Kenyatta, also Kikuyu, backed Kibaki, while Ruto, from the rival Kalenjin community, at that time supported Odinga.

Both Kenyatta and Ruto have declared that they intend to appear before the Court. Yet Kenyatta, 51, has inspired a sense of optimism across the country, and many Kenyans seem keen to put the past behind them. The hope is that the Kikuyu-Kalenjin alliance between the former rivals will help to repair past hostilities.

Evans Monari, advocate of the Kenyan High Court and Vice-Chair of the IBA African Regional Forum, believes the ICC may drop the case due to lack of evidence. ‘Most people feel the election was a referendum against the ICC process,’ he says. ‘They feel that Kenyans have been given their voice and they don't believe their President has committed any of the crimes he has been charged with.’

Many Kenyans feel the ICC is little more than a relic of colonialism, Monari says, because all eight cases on

its docket are African. Indeed, part of Kenyatta's appeal was his denunciation of Odinga as a stooge of the West.

‘One feels that Africa is being treated unfairly, and that is why the African Union is rooting for an African Court of Human Rights and will perhaps move away from the ICC in future,’ Monari says.

Ikeazor Akaraiwe, first Vice-President of the Nigerian Bar Association and former Chair of its Human Rights Institute, believes Kenyatta should submit himself to the Court. However, he concedes the dilemma is a difficult one.

*‘Most people feel the election was a referendum against the ICC process’*

Evans Monari

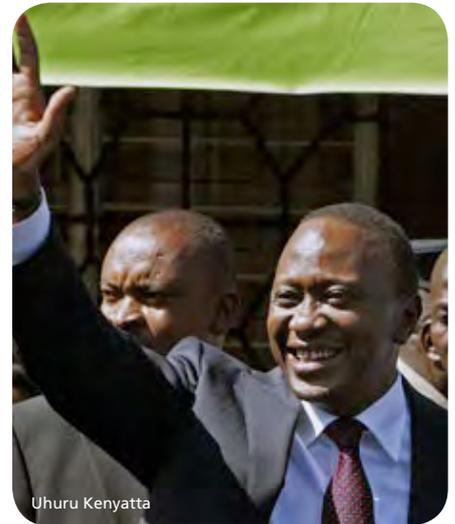
*Advocate of the Kenyan High Court and Vice-Chair of the IBA African Regional Forum*

‘Many Africans feel the arrests were a step in the right direction; to undermine the culture of impunity,’ he says. ‘But on the other hand, there is also the feeling that the ICC should issue warrants of arrest against George W Bush and Tony Blair with respect to Iraq. There is a feeling of double standard.’

ICC Chief Prosecutor Fatou Bensouda, from The Gambia, has repeatedly stressed that the Court takes each case on its merits, and that four cases were referred by the states themselves. In an interview with *IBA Global Insight* in 2012, she said:

‘I think it's not fair to say the ICC is focusing on any particular region [...] If crimes are committed in a particular country and that country is not genuinely investigating, we will go there.’

Former Chief Prosecutor Luis Moreno Ocampo blamed the ‘colonialist’ idea on President Omar al-



Uhuru Kenyatta

Bashir of Sudan. ‘He's abusing this idea of the colonial past, pretending that he can kill African people and because he's African nothing will happen to him,’ he told *IBA Global Insight* last November.

‘It's crazy... When the Western world did not react to Rwanda, the discussion was, how are you ignoring crimes in Rwanda?’

The ICC is a court of last resort and only hears cases if countries are unable or unwilling to do so. Member States can be referred by the Chief Prosecutor or the states themselves, while the UN Security Council has the power to refer non-members. Neither the US nor China are members.

Despite Kenyatta's alleged crimes – which include being an ‘indirect co-perpetrator’ to murder, deportation, rape and persecution – Akaraiwe concedes he may be exactly what Kenya needs to tackle entrenched poverty, corruption and crime.

‘The feeling is that he will bring in more modern ideas of governance, especially because he is educated. The feeling is that he will bring in the Midas touch, which helped him become successful in business. So there is hope. There is optimism in Kenya and the rest of Africa.’

Kenyatta has requested to be tried by video link, but the ICC rules state that the accused must be present. The judges are currently making a decision on the matter.

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# IBA GLOBAL INSIGHT

## in print

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

The IBA continues to build on its wealth of film content, including interactive webcasts and interviews with leading figures in international business, law and human rights; as well as film packages relating to IBA projects and conference sessions.

See the full list of IBA films at [tinyurl.com/ibafilms](http://tinyurl.com/ibafilms)



**The rule of law in Sri Lanka:** This film gives some useful background to the IBAHRI's fact-finding mission to investigate the impeachment proceedings against Chief Justice Bandaranayake and the state of the rule of law in Sri Lanka, before discussing the resulting report's recommendations.



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.com/dublinfilms](http://www.tinyurl.com/dublinfilms)



**Cyril Shroff**, Managing Partner at one of India's leading law firms, participated in a live webcast and Q&A session in 2013 in which he discussed such topics as business, the economy, competition and M&A law in India. The interview was conducted by award-winning former CNN journalist Todd Benjamin

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# Afghanistan: governance vacuum presents major challenges

**America is the biggest aid donor to Afghanistan, having committed \$100bn to reconstruction since 2002. But because rule of law is almost completely absent, much of it's been wasted.**

**JOEL BRINKLEY**

**A**n inviolable rule governs the lives of responsible foreign correspondents. A journalist working abroad should never take the lifestyle and culture of his own country and impose that on another nation – and then judge it accordingly.

Well, looking at the American programmes to provide development aid to Afghanistan, it's really too bad donors haven't kept that principle in mind. They work as if they were developing sophisticated regions in the US or Europe – not a nation failing to find its feet, with virtually no government presence or legal oversight outside the capital, Kabul, meaning that nearly all of Afghanistan is a lawless land.

One typical example: last year, the United States tried to install anaesthesia, X-ray, ventilator, and defibrillator devices worth \$1.75bn in several Afghan military hospitals. But the US Special Inspector General for Afghan Reconstruction found that Afghan staffers were unable to maintain the equipment because they did not have 'the requisite technical expertise.' Of course the government said nothing, and US officials issued a 'stop work' order. And so it goes – over and over again.

Then, in late April, the same inspector general found that electrical-generation equipment worth \$10.2m, supplied by the US, is sitting unused, untouched, in Helmand Province without any plan for installation. Nonetheless, the US is continuing to buy additional equipment, worth \$12.8m so far, even with no installation plans.

That's hardly the only problem. Working in Iraq early in that war, US aid officials took me to see a new school they'd just built, a showplace with every modern convenience not usually found in Iraqi schools, such as bathrooms with flush toilets and internet connections. A week later, insurgents blew it up.

### **Iraq and déjà vu**

Stuart Bowen just stepped down as US Special Inspector General for Iraq reconstruction, just after he published his final report in March. Bowen filled it with recommendations for proper conduct in future wars. High among them: 'Begin rebuilding only after establishing sufficient security.'

That didn't happen in Iraq, and it hasn't happened in Afghanistan – as evidenced by the United Nations finding that, last year, insurgents attacked or destroyed more than 100 schools international aid agencies had built. Razia Jan, who founded a girl's school just outside Kabul, told CNN: 'The day we opened the school' extremists 'threw hand grenades in the girls school, and 100 girls were killed.' No one was arrested. Without rule of law, aid to Afghanistan will continue to be wasted, and Afghans, children among them, will continue to die.

And still there's more. In a new report to the US Congress, published in mid-April, the Inspector General for Afghanistan, John F Sopko, warned that 'the possibility that taxpayer money could be supporting the insurgency is alarming and demands immediate action. Every effort should be made to implement stronger controls that protect our troops and ensure the success of our reconstruction efforts.'

The report found that of the 8,634 contracts awarded in recent years, 'about 89 per cent of the total contract value' went 'to Afghan contractors' who usually work as sub-contractors, with weak background checks and little or no oversight from Americans or the Afghan government. Who's to say they aren't allied with the Taliban? the report asked.

### **Copious aid, negligible oversight**

'Several prior audit and research reports discuss the numerous and unique challenges of contracting in Afghanistan, particularly with non-US contractors,' the report added. 'These challenges include the limited availability of oversight staff for contracts, the small pool of qualified local contractors, and an environment of insecurity and corruption that increases the risk of US funds being misused to finance terrorist or insurgent groups.'

A stunning example of 'limited availability of oversight' found by the US Government Accountability Office is this: 'An entire compound of five buildings was built in the wrong location.' It was supposed to be located within a military base's security walls, but the Afghan contractor inexplicably built the compound just outside – for \$2.4m. No one noticed until the project was

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fully completed, and the contractor showed up to be paid.

'The buildings could not be used.' Wouldn't the Taliban find that useful?

The US has obligated or spent more than \$100bn on Afghan reconstruction since 2002. The OECD classifies Britain as 'the third largest development aid donor to Afghanistan, with just over £100m per year since 2004/5.'

### Sowing seed on barren ground

But to make any of this investment worthwhile, the donors must be working with a population and government in a position to make use of the structures and equipment being built and installed on their behalf. Afghanistan's leaders and population are not in this position.

The truth is, across the country the Afghan people, and western workers who are trying to help them, face a near-total governance vacuum. When General John R Allen left his post as commander of US forces in Afghanistan this year, he lamented: 'In some ways it feels like I'm leaving family behind to an uncertain future' because 'now what they face is an absence of governance.'

'We're trying to jump-start them from the 15th century into the 21st,' Marc Sageman, a former CIA officer who served in Pakistan during the Soviet-Afghan war, said in an interview. 'This is at least a one or two-generation project.'

Just look at the literacy rate. More than two years ago, just after US Lieutenant General William B Caldwell IV took command of the NATO training mission, he noted that 'overall literacy' among Afghan military and police stood at about 14 per cent.

Why is that important? he asked rhetorically. 'How can an illiterate policeman read a license plate? How can a soldier fill out a form, read an equipment manual or calculate trajectory for field artillery?' So NATO began operating numerous elementary schools for recruits since the government had not provided schooling for most of these recruits.

Two years later, however, the special inspector general for Afghan reconstruction reported that 'the literacy rate of Afghan security forces 'as a whole is 11 per cent.'

### The deepest of dilemmas

A few additional statistics illustrate the

depth of this dilemma. Central Intelligence Agency figures show that Afghanistan has the world's second-highest infant mortality rate: 149 of every 1,000 children die before they reach their first birthday; by age five, 26 per cent of them are dead. Diplomats and aid organisations consider infant mortality a primary indicator of a failed state.

For children who survive childhood, six of every ten will grow up stunted, meaning they will be short and mentally challenged because of malnutrition during the first years of life. That is the world's worst rate. Average life expectancy – 'a measure of the quality of life in a country,' the CIA says – stands at 45 years. Only Angola's is lower.

Electricity usage is another commonly used measure of development, and Afghanistan is near the bottom. On average, Afghans use

*'In some ways it feels like I'm leaving family behind to an uncertain future... now what they face is an absence of governance'*

General John R Allen  
Former commander of US forces in  
Afghanistan

about three watt-hours of electricity a year, the equivalent of burning a three-watt light bulb for one hour.

Karl Eikenberry was US military commander in Iraq and then the American ambassador there. Looking back on it now, more than 12 years into the war, he grimaced slightly as he said, 'This is one of the poorest countries in the world. We underestimated the challenges of helping Afghanistan build a state.'

Thor Halvorssen is president of the Human Rights Foundation. And the way he sees it, trying to spend aid money in Afghanistan 'is like giving booze and car keys to a teenager.' And yet, all Hamid Karzai and other officials manage to do is bite the hands that feed them. ☒

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



For information on the IBA's work in Afghanistan go to [tinyurl.com/IBAAfghan](http://tinyurl.com/IBAAfghan)



# Financial crisis:



# the moral of the story

The crash of 2008 triggered a wave of bailouts, making 'moral hazard' a key phrase among commentators. As Cyprus is made to fund its own rescue *IBA Global Insight* assesses whether the term has finally found purchase in the financial system.

TOM BANGAY

**I** never once considered it appropriate to put taxpayer money on the line in resolving Lehman Brothers.' In 2008 Hank Paulson, then US Secretary of the Treasury, faced the prospect of making the average American pay for Lehman's reckless mismanagement and reimburse the doomed investment bank as it stood at the brink of insolvency. Paulson deemed the 'moral hazard' too great. Why should taxpayers continually foot the bill for the finance industry's risk-taking? The dominoes fell, and the decision became fateful as it passed into financial crisis folklore, but with every subsequent bailout, from AIG and Hypo Real Estate through to Greece and most recently Cyprus, the tension between moral hazard and 'too big to fail' looms large in the thinking of those pulling the macroeconomic levers.

The issue is simple: if one party knows that it won't bear the costs of its risky behaviour, what incentive does it have to act prudently?

Put another way, if a gambler knows his debts will be paid, why would he ever stop making wild bets? If a central bank bails out a financial institution, or a sovereign state, they send a message to its contemporaries that risky behaviour won't have consequences for the party itself. 'Big companies will always find a way of externalising the risk,' explains Leif Wenar, Chair of Ethics at King's College London, 'and it's difficult to find the individuals most responsible for externalising that risk'. If companies, or sovereigns, can take risks and have someone else (ie, the taxpayer) pay for them, they have no reason to be prudent. Central banks can't afford, so the logic goes, to set that example. Therefore, to avoid creating moral hazard, every now and then a bank has to fail, to preserve the credibility of the system. In the case of the eurozone, it's countries themselves that face failure.

It's an idea supported by the evidence. In 2011, the International Monetary Fund (IMF)

published a research paper, 'The Dynamic Implications of Debt Relief for Low-Income Countries', which looked at the effects of debt relief on a range of countries, particularly Uganda, and found GDP to be 'on average lower by more than 20 per cent when the country expects a debt write-off as compared to a situation when it does not.' Without a default of some description, countries – like companies – just never learn. Otmar Issing, President of the Centre for Financial Studies and a former member of the European Central Bank's executive board, agrees, urging in the *Financial Times* that 'default must be a credible threat –

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*'How does a society look when it's getting out of a crisis? Do we react with vindictiveness and vengefulness? Or do we accept that there was gullibility and weakness of judgement, and try to improve that'*

Philip Wood QC  
Special Global Counsel, Allen & Overy

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otherwise investors will have a strong incentive to buy bonds offering higher interest rates without taking into account the associated risks'.

So far, so consistent. The problem arrives when 'moral hazard' runs into 'too big to fail'. What if the risk-taking actor is a global insurance giant, so inextricably bound up in the financial system that its collapse would represent a genuine systemic risk to the markets themselves? When the Federal Reserve sanctioned AIG's \$85bn credit facility, just days after deeming any state assistance for Lehman to be too morally hazardous, eyebrows were raised. Morality shouldn't be relative; if such a doctrine is to have any weight at all, shouldn't it be applied consistently?

Consistency hasn't been a watchword for the series of rescue packages delivered to companies and states in recent years. Lehman, Washington Mutual and Wachovia fell. Meanwhile, AIG, Citigroup, Fannie Mae and Freddie Mac found safety in the arms of government stewardship.

Merrill Lynch was forced up the aisle in a shotgun wedding with Bank of America. In Europe, the list of casualties includes major companies and sovereigns; from Hypo Real Estate, Bankia, Northern Rock and Dexia to Portugal, Ireland, Greece (three times) and now Cyprus, bailouts have been deemed unavoidable in an alarming number of cases. Small wonder that the President of the Bundesbank, Jens Weidmann, worries that 'central bank financing can become addictive like a drug'.

### **Too big to fail vs moral hazard**

The post-Lehman world order recognises that some entities are too critical to the global financial system to be allowed to collapse. If AIG fell over it would take much of the stock market with it; similarly if Greece defaulted and left the euro, voluntarily or otherwise, the credibility of the currency itself would be at risk. The resulting situation left taxpayers in an uncomfortable position: 'The unwillingness to allow big banks to fail meant that the public sector was shouldering a substantial amount of risk, whilst a rather small number of individuals were reaping extraordinarily large rewards,' explains Roger McCormick, visiting professor at the London School of Economics (LSE) and a member of the IBA's Task Force on the Financial Crisis. So how do we reconcile 'too big to fail' with moral hazard? As one leading expert puts it, 'how do we protect shareholders from corporations and their managers acting in a way which is motivated by personal greed, to the detriment of shareholders and creditors?'

The term 'moral hazard' itself is borrowed from the insurance industry, as Peter Mann, partner at Clayton Utz and Chair of the IBA's Insurance Law Committee, explains. 'If a client is protected from risk by insurance, then he might act in a risky way. It's the result of an information asymmetry. If the insurers knew what the client did – if they could observe him – they would probably adjust their prices to reflect his risky behaviour.' Moral hazard in insurance can also relate to the subjective aspects of risk that would influence the insurer in its decision whether to enter into the insurance, and on what terms. 'It could involve the honesty or activities of the insured,' Mann explains. 'For instance, the insured might be a dishonest person involved in criminal activities. This elevated risk would be a matter for disclosure and again there is likely to be an information asymmetry.'

Take the average driver. He wants insurance for his car. He presents himself as a careful driver to the insurer who, based on these representations, comes up with a price for the premium. However, once he's insured, he drives differently; less care is taken, and more risk, because the driver

knows that if he has an accident, or leaves the car unlocked, he's covered. The version of himself he presented to the insurer isn't the version that drives the insured car. Only if insurers could perfectly observe how insured parties really behave, once they're covered, would there be symmetry of information on both sides, a fair price, and thus no moral hazard.

Could observation and monitoring be the answer for the financial system? 'If the behaviour could be monitored directly, it would be possible to write complete contracts and the moral hazard problem would not arise,' says

Wendy Carlin, Professor of Economics at University College London.

Observing the conduct, rigour and ultimately the creditworthiness of countless companies, as well as sovereign states, would be extremely useful, but it does seem too

big an undertaking.

Thankfully there are three prominent organisations set up to do just

that. However, the

records of Standard &

Poors, Moodys and Fitch in the

run-up to the crisis do not inspire

confidence. Each of the big three credit

ratings agencies maintained AAA

ratings for various structured

products even as the financial

crisis loomed. Moody's rated

AIG as AAA until minutes

before its collapse.

Philip Wood QC, Special

Global Counsel at Allen &

Overy, describes the credit

ratings agencies in the run-

up to the crisis as guilty of

'catastrophic misjudgements

– but then so was everybody else.'

Besides, given that the ratings agencies are funded by the companies they rate, they seem ill suited to act as arbiters of a system aiming at morality. After the fact, of course, Moody's showed great wisdom in hindsight. 'The risks inherent in mortgage lending became so widely dispersed that no one was forced to worry about the quality of any single loan,' said Mark Zandi, co-founder of Moody's **economy.com**. 'As shaky mortgages were combined, diluting any problems into a larger pool, the incentive for responsibility was undermined.'

If credit ratings agencies can't deal with the information asymmetry, perhaps financial institutions and sovereigns can

police themselves. But again, track records provide scant optimism. Not only did Greece use off-book accounting techniques to mask the true levels of indebtedness it held, but Goldman Sachs accepted hundreds of millions in fees to help them to do it. For some, expecting financial actors to give primacy to moral concerns, and to look past what's best for them, is a futile exercise. 'As with most things with banks, it's all about self interest, and this applies to governments too,' says Stephen Powell, partner with Slaughter and May and Co-Chair of the IBA Banking Law Committee.

Instead, says Powell, 'we think we need to step back and see what we want out of banks. We had,

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*'The unwillingness to allow big banks to fail meant that the public sector was shouldering a substantial amount of risk, whilst a rather small number of individuals were reaping extraordinarily large rewards'*

Roger McCormick

Visiting professor, London School of Economics and member of the IBA's Task Force on the Financial Crisis

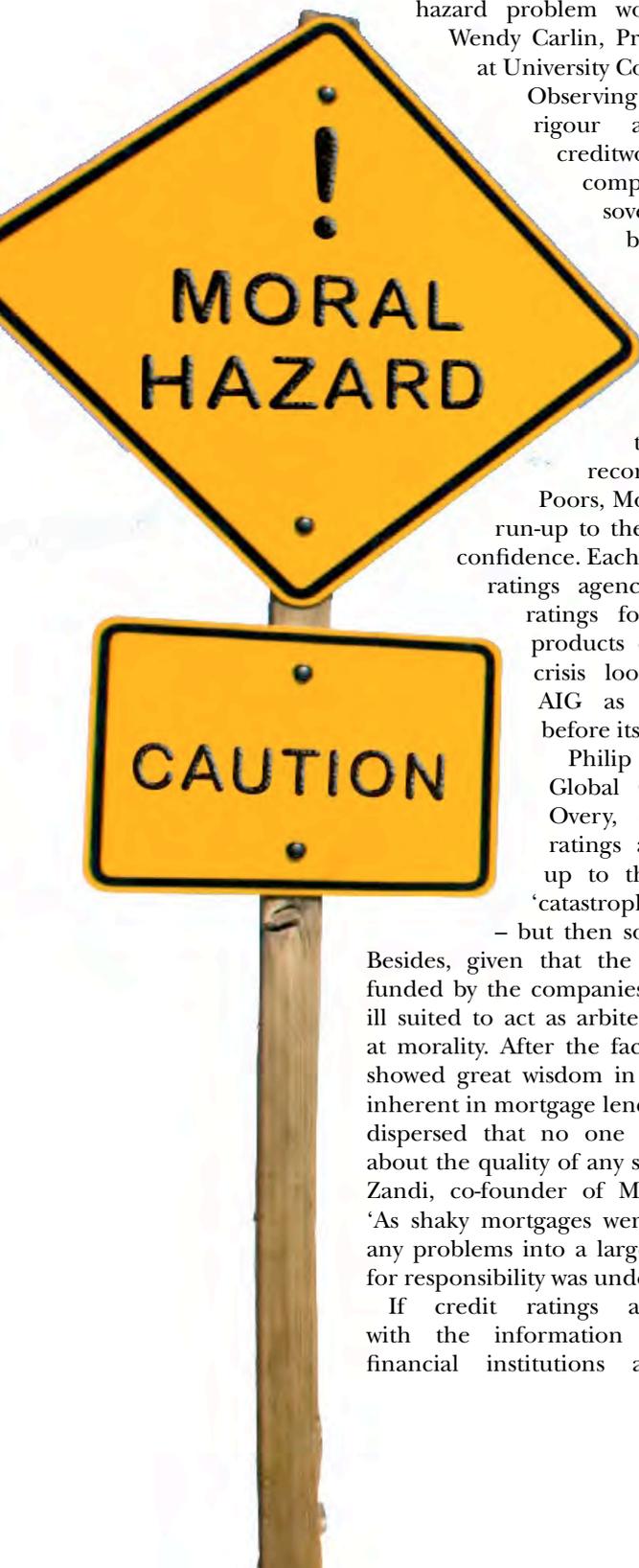
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and in my view we will always have, a system where governments need to stand behind banks. Before 2007 we didn't recognise that, and since then it's become painfully obvious.'

### The painful truth

What's true for banks must surely be true for countries. If 'too big to fail' is now a fact of life, then surely sovereign states represent the biggest systemic risk of all. Several eurozone member states have accepted bailouts and imposed severe austerity as part of the bargain, but taxpayers in northern European countries perceived to be prudent, such as Germany and the Netherlands, have balked at the transfer of money from their robust economies to countries they see as feckless and profligate.

Moral hazard explains the objection in part: if Greeks know that the Germans will bail



them out, why should they start paying taxes, so the well-worn tabloid wisdom goes. There is a further moral objection. Within a currency union, transfers are expected: the South East of England knows that a substantial portion of its revenue will go to support the North East, which contributes comparatively less to the public purse. As citizens of a democracy, Britons are expected to accept that. However without political union across Europe, it's much harder for citizens of one country to see the moral basis for another's claim to their money. 'Within national borders,

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*'Big companies will always find a way of externalising the risk and it's difficult to find the individuals most responsible for externalising that risk'*

Leif Wenar  
Chair of Ethics  
Kings College London

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bailing out entails transfers between citizens and there may be some political basis sustaining that,' Carlin explains. 'Across borders, the question is who is the European citizen/taxpayer? There seems much less political substance to that.'

Now Cyprus has become the latest to need financial life-support from above, and it seems the moral compass is shifting. The European taxpayer is no longer the only one on the hook: depositors with Laiki Bank and Bank of Cyprus face a serious haircut, and their money will only be protected up to €100,000. Above that figure, deposits will be used by the Cypriot government to contribute billions of its own to the bailout.

Commentators are hailing the deal as a template for future rescue packages: by forcing countries themselves to contribute, they are made, in part, to bear the costs of the risky behaviour that drove them to insolvency. Not for Cyprus a second or third bailout: after this, there's no question of it returning to reckless conduct.

The real explanation may be less principled. To be blunt, perhaps it's just that Cyprus is simply not too big to fail. The total bailout cost is a mere €10bn, and a substantial portion of the funds affected are held by Russian depositors. There are losses that European authorities are prepared to live with. However, Cyprus' GDP is forecast to fall by up to 20 per cent over the next couple of years as its oversized banking

sector shrinks back. Was it sensible to choose a nation so reliant on banking as the poster-child for moral hazard? Perhaps, in terms of political expedience – it gives Angela Merkel plenty of scope to talk tough on behalf of the Troika before the German elections later this year. For the people of Cyprus, however, a fifth of GDP is a high price to pay.

But pay somebody must. As Powell puts it, when such a fiscal shortfall appears, it's like 'one of the chairs has been removed from the party game, and it's never going to come back'. The trick is to ensure that it's bankers and not taxpayers left without a seat.

### Reputational risk

One way to bring risk to bear on those who ran it is to make banks pay with their reputations. As Starbucks and Amazon can testify, if reputational damage becomes serious enough, it can force change at the highest levels. To this end, McCormick's team at LSE has launched the Sustainable Finance Project, which is working to develop better indicators of a poor ethical culture, by compiling and totalling the levels of fines, settlements and comparable monetary indicators a given bank is paying out on an annual basis. These are not small amounts: HSBC paid \$4.2bn in fines in 2012, while UBS paid out \$1.5bn for manipulating the LIBOR inter-bank lending rate. With enough time and data, a league table could be produced, which compares financial institutions against each other. If a bank repeatedly finds itself coming bottom, the chair could be invited (or perhaps obliged) to explain why.

'Comparable and accessible information, in a league table format, would add to the armoury of those, including the more responsible bankers, who wish to ensure that banks not only "restore public trust", as they keep telling us they want to do,' McCormick explains, 'but also continue to do what is necessary from now on to retain and deserve it'. If banks can't be made to pay directly through their balance sheets, perhaps they can be made to pay with their reputations.

A step in the right direction, certainly, but bankers already have major reputational problems – it's hard to see how public opinion of them could be lower, and yet record bonuses and salaries abound. Nevertheless, some still counsel against kneejerk, antagonistic sentiment towards the banking industry. The most important question when attempting to exit a crisis, Philip Wood says, is 'how does a society look when it's getting out of it? Do we react with vindictiveness and vengefulness? Or do we accept that there was gullibility and weakness of judgement, and try to improve that?'

Of course, a flood of regulation has attempted

## BAILOUTS – HIGHLIGHTS AND LOWLIGHTS

Recipient	Amount	Who paid?
<b>Companies ...</b>		
Northern Rock, 2007	\$39.3bn (£26bn)	Bank of England
AIG, 2008	\$122bn	US Treasury
Hypo Real Estate, 2008	\$67.3bn (€52bn)	Bundesbank and consortium of German banks
Royal Bank of Scotland, Lloyds	\$55.9bn (£37bn)	UK Treasury
General Motors, 2009	\$50bn	UK Treasury
<b>... and countries</b>		
Greece (I), 2010	\$142.3bn (€110bn)	Bank, International Monetary
Ireland, 2010	\$110bn (€85bn)	Troika (€67.5bn), Irish central reserves and pensions (€17.5bn)
Greece (II), 2011	\$168bn (€130bn)	Troika
Portugal, 2011	\$101bn (€78bn)	Troika
Spain's nationalised banks, 2012	\$51.7bn (€40bn)	European Stability Mechanism (ESM)
Cyprus, 2013	\$22.6bn (€17.5bn)	Troika (€10bn), the remainder coming from shareholder capital and uninsured deposits over €100,000 with the now defunct Laiki Bank

to rebalance the risk and information asymmetries embedded in the financial system. The 360,000-word Dodd-Frank Act has certainly divided opinion. Randall Guynn, Head of the Financial Institutions Group at Davis Polk & Wardwell and a member of the IBA's Task Force on the Financial Crisis, said that 'the regulatory reform in the US is so comprehensive that we have divided it up among ourselves just to survive'.

Lobbying, and consequent amendments, played a huge part in Dodd-Frank's size and complexity. Indeed, pressure from lobbyists ensured that two years after the Act became law, only a third of its rules were in force. Connecticut Senator and act co-sponsor Christopher Dodd famously defended the legislation in the letters page of *The Economist*. Its repeal would lead us back to a world where 'the public absorbs losses because of Wall Street's risky behaviour, and regulators are left in the dark'.

However desirable it may be, most agree that the pursuit of a system that allocates risk fairly is doomed to failure. 'Making a system in which everyone gets the harms and benefits from their own actions is never going to happen,' says Wenar. Powell takes a similar stance: 'By focusing on a point I don't think we can ever change, I worry that we end up stifling banks and

therefore business, which can't be a good thing.' Instead, Wenar argues, 'the important thing is to look at the long-term consequences for individuals.' A bottom-up redesign of the way the global financial system distributes risk may be too ambitious. However the outcomes for individual citizens – taxpayers – are much easier to observe, and can offer clues as to whether the system is laying disproportionate costs at their doors.

So are we doomed to repeat the mistakes of the past? If too big to fail persists, it seems that bailouts of some description will be inevitable, and it's taxpayers who will find themselves footing the bill. Some promising proposals have been made: forcing banks to play with their own money by ringfencing retail operations, for example; or insisting that banks write 'living wills', so there's a plan in place if they find themselves in crisis and they don't have to turn to the central bank for a rescue. However, unless and until the financial system finds a way for its key actors to take responsibility for failure, it looks like moral hazard is here to stay – and the taxpayer is here to pay. ☒

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# Global leaders: Cyril Shroff

**Cyril Shroff has been Mumbai Managing Partner at one of India's foremost law firms, Amarchand & Mangaldas, since 1995. During that time, he's witnessed the transformation of India's economy into an Asian superpower. In this in-depth interview, conducted by former CNN news anchor, Todd Benjamin, he shares his insight into liberalisation, challenges – including governance issues and bureaucracy – and new developments in regulation, tax and competition law.**

**Todd Benjamin:** You took over the firm at a very young age, following the death of your father. You were just 35 years old. Obviously you were grieving at the same time. What was that like?

**Cyril Shroff:** It was tough, but the way we trained in the family was that the firm comes first and at a moment like that you can't let the ball drop. I'd seen both my parents show a lot of passion for the firm and what they created. So we went back to work the next day and my mother, the widow, she went back to the office three days after the death of my father. So that was a great example of motivation for all of us.

**TB:** But to become a managing partner at 35... That is quite young. How did you adjust to that?

**CS:** I think I had actually a great advantage, because I carried almost no baggage. I was already in the firm and working so I knew the ropes in terms of at least the legal business. I travelled a lot internationally at that time and I knew what I wanted to aspire to and the vision for the firm, so I used to come to London and New York a lot during that time, so I'd seen what the potential was in terms of what I could do with this firm. So I think 35 was almost an ideal age to start what I wanted to embark on as a journey.

**TB:** You yourself, of course, have practised all aspects of the law at your firm, which is an advantage. It gives you a perspective. There are two areas that you focus on now. One is M&A and with regard to M&A deals, you've said previously that they encourage 'the full creativity in form'. Expand on that.

**CS:** That's right. Because we were much smaller then, I had the luxury and the great privilege of practising in many areas... so you had to do an M&A deal in the morning and go to court in the afternoon, which was probably the best thing that happened to me. What I like about M&A these days is its complexity in terms of the sheer array of laws that you have to deal with. No two deals are the same. There's a lot of strategy and tactics in terms of how you negotiate and make the aspirations of both contracting parties come together. I think it's the final frontier for creative lawyers.

**TB:** Why the final frontier?

**CS:** Because it tests all your skills. It not only tests your technical skills as a lawyer, but also the kind of person that you are, and your ability to read your own clients and your opponent on the other side and to do something which is meaningful.

**TB:** What you haven't mentioned, though, is the human dimension and you've said in the past that the other reason you like it is you need a good understanding of human psychology.

**CS:** Yes, that's right. Aside from the M&A field, these days I also do a lot of work in the private client space and at least a big part of that, the way it's practised in India, is basically psychotherapy. So I've been dealing with families and helping them with their governance and succession issues. The non-boring part which I like the most is exactly that, it's dealing with human beings and their aspirations and their pain points and pleasures.

**TB:** We tend to focus on what the East can learn from the West, but the sands are shifting to the emerging markets. It's where the growth is. What do you think Western law firms can learn from the East?

**CS:** I think the sands have already shifted and it's now just more the accumulation that's underway. Firstly, the East, I think, has learned a lot from the West. I have learned a lot from the West in terms of how I've been able to lead and build this firm, but there are also a number of things which we do differently. We have to 'tropicalise', if I can use that word, a number of the learnings from the West in terms of how you create a big professional services firm and I think that's what we've done. We're the first big professional service firm in India. But Indian and Asian markets and emerging markets can, and do, do a number of things differently. To give a few examples, I think the way we deal with diversity is very different. More than half our firm is women, including at the partnership level. And the environment that we have been able to create... sometimes not consciously, but it's just happened that way... I think we truly believe it's a meritocracy. I think that is a remarkable thing for a firm like ours, as a big professional firm, to have half your workforce as women; somebody from every religion in India; every state in India; and everybody feels engaged. I think that's something which we do differently. At this point, I don't think we have a choice but to believe in the pyramid model of how most big law firms are composed. I think an Asian and maybe an Indian firm will challenge that model much faster than anyone else will.

**TB:** Why?

**CS:** Just because I think it's completely client driven. It's there, for want of a longer explanation, it's the faster, better, cheaper model. We have more people in India – we have more skilled people in India. We've probably got the second




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*'Private client, the way it's practised in India, is basically psychotherapy... dealing with human beings and their aspirations and their pain points and pleasures'*

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highest number of lawyers in the world after the US, so it's a bigger workforce. It's a more versatile workforce, because it actually works with a system with a lot of adversity, so in a typical law school, there may be 5,000–6,000 students who apply for about 50 to 60 places. Just imagine the kind of competition that goes into that. At better law schools, they take the best and they turn out to be very smart people. They come to the West; to London; to New York and other places, and thrive. So you have a versatile workforce, a bigger workforce and less baggage of history.

**TB:** You said there are several things the West can learn from the East in terms of structure and diversity, but one thing that is still in place is that foreign firms are not allowed to practise in India. Do you agree with that? And do you think liberalisation is coming?

**CS:** They are not allowed to set up offices in India, and this is not only a regulatory debate, but it's now a judicial outcome as well. So that's a state of fact, but I have a quarrel with the concept of liberalisation. Not per se, as I think the real issue is not liberalisation. The real issue is that the modernisation of a market and an economy as big as India needs a modern legal services delivery system, both as a matter of prestige as well as necessity. This means that you need to have a completely fresh look at the regulatory framework that applies to the Indian profession.

Liberalisation for entry of foreign firms is just a subset of that. Sadly, what's happened is that the debate over the last few years has only focused on one aspect of it. Nobody's talking about the broader issue of modernisation of, for instance, the 20-partner limit. Advertising is a problem, law firms in India maybe can't have a website. We don't have the flexibility of alternate business structures, so while the world has moved on a lot, we haven't in terms of regulatory framework. There are a few firms like ours, which are very good firms, the top commercial firms; but they struggle with the same issues of organising themselves in a business-like way. If those same conditions applied in the West, you wouldn't see half the big firms there.

**TB:** How confident are you that some of the issues that you've raised will change in terms of modernisation?

**CS:** If India is truly heading towards becoming the third-largest economy in the world in two decades, I have no doubt in my mind that this will have to change along the way. What I worry about is whether the form and the pace of the change is sensible. It should result in an outcome where there is a place for everyone including domestic firms and international firms practising in India. So it has to be a measured, mature pace, which needs a lot of statesmanship not only from the Indian bar, but I think also from the politicians and equally from the international bar, because it's not enough to just keep moaning all the time that the Indian market is closed. 'How do we commonly find a solution to this for India?' I think is where the debate should head to.

**TB:** And the solution is?

**CS:** I think we look at the entire structure, create a level playing field, give the kind of flexibility that the Indian profession needs to organise itself efficiently and then we compete.

**TB:** Let's move on for a moment and let's talk about a sensitive issue, which is corruption and governance in India. Even the prime minister talks about how corruption is hurting the economy along with inept bureaucracy as well as a coalition government. You worked with the IBA for several years and were instrumental in helping to set up a conference in India in 2009. As you may know, one of the current projects of the IBA's Legal Practice Division concerns anti-corruption and bribery. How would you say it affects the practice of law and business in India and what can be done to improve the situation?

**CS:** Corruption is a big issue in India and in many emerging markets as well, because of

sheer inequality. It's a big country. It's a country that's growing as well, but the level of inequality is so high that it's the right fertile ground for something like that to happen. But the good news I think, particularly for India and our democracy and the role of the media, is that these incidents get exposed as well. I mean, unlike in a few other rapidly growing economies where a lot of it remains under the surface, you will find that through a combination of hyperactive media, the Right to Information Act – a unique feature that we have in India – and judicial activism, these things not only come to the fore, but are dealt with in a fairly severe way. I have a lot of respect for our judiciary and what they do.

The problem's not going to go away, but you test a society on the basis of how it deals with these problems when they come to the fore. And I think we are dealing with it. If you take a long sweep of history, I think we're going through what I call the second stage of the 'three Ps'. That's pain, purgatory and paradise. To get to paradise, you have to go through the purgatory stage as well and that's what society in India is doing. We're exposing this and purging it from our system.

**TB:** Well, I think others might challenge you. Some might say you have a very optimistic view, because it continues throughout several layers of Indian society. So even though it's brought to the forefront, it's not changing the overall behaviour.

**CS:** That will change only when we at least minimise some of our inequalities and we continue to strengthen our rule of law institutions from an efficiency point of view. Compared to the size of the country and its needs, it's always inadequate. To get enforcement on some of these issues is a painful process, but I think the question still remains, are we doing the best that we could



at this stage? I think we're trying very hard.

**TB:** And what about law firms as intermediaries? Are they at risk of corruption in some ways?

**CS:** Well, to be honest, a lot of it is anecdotal, but good firms like ours would not get involved. It's something which we do hear about. We help clients identify the risks involved, especially from one new angle that's emerging, which I call the rise and rise of public law in private law – you're doing an M&A transaction in an



infrastructure space for instance, where the chances of corruption are high. Apart from the normal private law diligence that one would do as a traditional M&A lawyer, we now have to do a lot of public law diligence as well – what are the chances of this concession or that franchise being exposed to public interest litigation of a supreme court striking down the basis of the concession because it's a dirty contract. Very hard to do this diligence, but I think where we come to is a much finer formation of risk allocation, so the public law dimension in the private law space is definitely a new innovation and a new development in the last few years.

**TB:** Are companies becoming more focused on these issues and their due diligence before instructing lawyers?

**CS:** Totally, and I think in that process, the role of the internal general counsel is changing rapidly. The general counsel industry in India is a relatively new development, but now there are many good general counsel who are dealing with these issues and are getting used to the new job, if I can put it like that.

**TB:** I want to move on to competition laws, because you have relatively new competition laws in India. How is it impacting your M&A practice?

**CS:** Hugely. The combination rules were brought into force about two years ago after a long debate. It's a mandatory provision and in a suspensory regime for about 210 days, so what it means is that all M&A transactions which are above a particular threshold, or don't fall within some of the exemptions, require a mandatory notification and approval by the competition authority. About 115 notifications have been done since the regulations came into force. Most, if not all, have been approved, some in different timeframes. The process so far has

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*'The modernisation of a market as big as India needs a modern legal services delivery system. You need to have a fresh look at the regulatory framework that applies to the Indian profession. Liberalisation for entry of foreign firms is just a subset of that'*

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been quite efficient, if you take a step back and see the big picture. Two forms... two filings were involved and we were lucky enough as a firm to have been involved in both of them. Form two is a long form filing where there's a much more detailed analysis. It's one of the biggest developments in the M&A space in India and it's very exciting in terms of how we're seeing the law evolve.

**TB:** Well, this brings up perhaps a sensitive subject, the Indian government's reinterpretation of tax laws concerning offshore companies. Vodafone, of course, has been in the headlines, the big battle they've been having in India over this. Companies going back now 50 years are affected by this. What are your thoughts on this, were the Indians right to do this or did they just go about it incorrectly?

**CS:** This is a big question and India's had a lot of stick for what they did. I see it effectively like a play in two acts. Act One was the Vodafone dispute which ended with a Supreme Court judgment in January of 2012. It was a kind of zigzag journey, and there are two powerful narratives – from the government side as well as from the Vodafone side – but it ended in what one might transactionally think was the right spot, with Vodafone having succeeded. What you're referring to I think is Act Two, which

is the subsequent amendment for retrospectively taxing such transactions all the way back from 1961, which will apply not only to Vodafone, but also to a number of similar companies. I don't think you completely intellectually challenge the ability of a government to tax transactions which have a strong Indian connection, whether onshore or offshore. The controversial bit was the 'retrospectivity' of it, and changing the rules of the game not only halfway through, but trying to retrospectively do it after the game was played. That's where I think we probably did ourselves an injustice as a country by needlessly inviting a lot of stick... I think it's not so much a tax issue. I think it's more a rule of law issue – after having lost in the Supreme Court you go and change the law to not just like two years ago, but with a 50-year-old amendment. I have an intellectual problem with that and this is what I think we're struggling with. The story is still a work in progress.

**TB:** And it seems that India is a country which some have referred to as a 'gasping elephant' in some ways right now. For whatever reason, whether for politics or bureaucracy, they tend to make some decisions which are not in their best interest and this seems to be a decision which is not in their best interest. If you look at business, business can deal with anything, but they don't like uncertainty. Do you think this will lead some very big multinational companies to rethink how large a presence they want in India? Others who may be coming in may think twice, despite the great potential in terms of India's size and rising middle class, if they think that they're going to have this type of taxation issue and possibly other similar issues?

**CS:** My perception again, not only from my practice, but from talking to people, is that

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*'Indian and Asian markets and emerging markets can, and do, do a number of things differently. More than half our firm is women, including at the partnership level'*

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despite the frustrations of this tax dispute, no one has called off their India plans in terms of entering the market or building a long-term business in India. There is a powerful

consensus across the world that it's one of the great economies of the future and you have to be there. There's no choice about it. Sadly, what's happened I think is that it has added a lot to the frustration levels in terms of dealing with the opacity and the unpredictability of the Indian system. So you have a lot of moaning and groaning from multinationals. I think it has made our job of advising with certainty very difficult. Consequently, I think the pace of investment and the depth of investment that will come in will vary, but I would be very surprised if anybody who really understands India calls off their investment, despite all of this uncertainty. Every country has its own frustrations.

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*'Corruption is a big issue in India and in many emerging markets as well, because of sheer inequality'*

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**TB:** Now, Jim O'Neill, the man who coined the term 'BRIC', has recently said he would now rank India as bottom of the BRIC nations as far as investment potential is concerned. Do you disagree? Do you think it's a fair assessment and what do you think the advantages and disadvantages of investing in India are? Obviously you have terrific demographics compared to China, but you have also huge infrastructure problems and also the problems we've talked about on governance.

**CS:** I'm not expert enough to do a comparative analysis, but I can give you my perception. I think the strongest factors in India's favour are not only the demographics, but it's fundamentally a private-sector, entrepreneur-led growth story. It's not state-owned enterprises [SOEs]. It's not the public sector. The government is in some ways a bystander to the business growth that takes place and in my view, when you combine it with a basic rule of law, which nobody argues with, and a legal system that finally delivers sensible justice, I would question whether it should be put at the bottom of the BRICs. There's much more hype about China. I think Brazil is probably doing a good job. I would actually put Russia at the bottom of the list. Maybe we are third. China and Brazil have got their act together a bit better, but I actually respond to that with a different saying – it's not that great in China and it's not that bad in India. That's my view, but again I'm a layman. ☒



This is an edited version of the interview. You can view it in full at [ibanet.org](http://ibanet.org). Sign up for the forthcoming Jim O'Neill webcast at [tinyurl.com/ibawebcasts2013](http://tinyurl.com/ibawebcasts2013).

Can you do the right  
thing if you don't  
**know the  
right thing?**



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# Abenomics: a game changer for Japanese business?

**In recent years, a stagnant domestic economy and a strong Yen have driven Japanese outbound investment. Both are being attacked by Prime Minister Shinzō Abe, with his aggressive fiscal stimulus, forcing law firms to re-think their strategies.**

**STEPHEN MULRENAN**

In July 2010, corporate partner Hideo Norikoshi led a Linklaters team advising Nippon Telegraph and Telephone (NTT) on its \$3.24bn acquisition of South African IT firm Dimension Data.

The deal was the largest purchase in sub-Saharan Africa by a Japanese company, and led NTT's president Satoshi Miura to say: 'I want Dimension Data to be the core for NTT's global strategy.'

It was also a career highlight for the experienced Norikoshi, who had been with the firm since 1999 after five years with Slaughter and May in London.

However, just over a year later, Norikoshi left Linklaters, along with fellow partner Jiro Toyokawa and six associates, to join Baker & McKenzie.

Bakers cited its need to respond to increased outbound investment by Japanese companies as the reason for the hires, Linklaters acknowledged

that its Tokyo operation was too heavily geared to inbound mergers and acquisitions (M&A) work. The magic circle firm set about reconfiguring its practice.

## **Outbound boost to stagnant economy**

Linklaters' focus on inbound activity dated back to its full economic merger – the first of its kind – with Mitsui Yasuda Wani & Maeda in 2005, when multinationals such as Tesco and Vodafone gave rise to genuine optimism about increased inbound M&A opportunities.

The strong Yen, which surged 48 per cent against the US Dollar in the four years to 2011 to reach a 15-year high, has been just one of a number of challenges facing foreign companies in Japan, and many – including Tesco and Vodafone – have since departed, with the exchange rate cushioning much of their losses.

With inbound M&A slow, and likely to remain

so for some time, law firms in Japan – both domestic and international – have focused resources on the only area offering significant growth: outbound investment.

The country's large trading houses – Itochu, Marubeni, Mitsubishi, Mitsui and Sumitomo – are hugely experienced and sophisticated overseas shoppers. While they have accelerated their investments in energy, metals and minerals businesses in recent years, buoyed by the strong Yen and robust demand in emerging economies, much of the growth in transactional activity has come at the small- and medium-sized enterprise (SME) level.

Often guided by their trading big brothers as co-investors, and encouraged by the Government of Japan, Japanese SMEs have increasingly sought investments abroad as a rapidly ageing population and a saturated domestic market have restricted growth opportunities at home.

Following two decades of stagnation (also known as 'Japan's lost decades'), which started with the Kobe earthquake in 1995 and which sees gross domestic product (GDP) levels lower today than they were 20 years ago, Japanese corporates are sitting on historically high levels of cash and low levels of debt.

With the Yen at an all-time high against the US dollar, and overseas targets comparatively cheap, SMEs have been taking advantage of more aggressive lending by Japanese financial institutions and a benchmark interest rate close to zero.

Nowhere has this appetite for foreign assets been more prevalent than within the BRIC economies of Brazil, Russia, India and China.

Japanese outbound M&A to these jurisdictions rose steadily from 2007 to 2011, with an average transaction volume of seven deals per quarter and a mean value of approximately ¥19.93bn (\$202m) per deal, according to *Mergermarket*. Total deal count rose from 18 in 2007 to 23 in 2008, 26 in 2009 and 33 in 2010.

The industrials and chemicals sector accounted for around 43 per cent of all BRIC acquisitions, with such deals occurring mostly in China and India.

While transactional activity between Japan and China has been adversely affected by rising manufacturing costs and the recent dispute over the Senkaku islands (known as the Diaoyu in China), India's weak rupee and burgeoning domestic market have provided bountiful opportunities for Japanese corporates.

In 2012, Japan was second only to the US as the largest investor in Indian-based targets, announcing a total of 20 M&A deals with an aggregate value of \$5.6bn.

Nippon Life Insurance's January joint venture with Reliance Capital, for example, was the

largest foreign direct investment (FDI) in an Indian asset manager.

And this trend is expected to continue in 2013, particularly across the automotive, financial services and pharmaceutical sectors.

### The allure of Southeast Asia

While there has also been substantial Japanese interest in European sectors such as consumer goods/retail, food and beverage, manufacturing and renewables – with Suntory's 2009 acquisition of Orangina Schweppes Group and Kirin's proposed acquisition of water brand Volvic from Danone two standout deals – Southeast Asia is

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*In 2012, Japan was second only to the US as the largest investor in Indian-based targets, announcing a total of 20 M&A deals with an aggregate value of \$5.6bn'*

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proving to be the new frontier for many Japanese corporates, and the law firms that service them.

Many Japanese players are considering acquisitions or joint venture (JV) opportunities in order to shift manufacturing to jurisdictions such as Indonesia, Thailand or Vietnam, where there are qualified workers at a competitive cost.

For example, brewer Asahi sealed a \$213m agreement last year with Indonesian conglomerate Indofood to establish two JVs to manufacture and market non-alcoholic beverages in the country.

Japanese and international law firms, meanwhile, have been eager to hold the hands of Japanese SMEs as they venture into the region.

The 'Big 4' domestic firms of Anderson Mori & Tomotsune, Mori Hamada & Matsumoto, Nagashima Ohno & Tsunematsu and Nishimura & Asahi have invested considerable sums in recent times, planting flags on maps in the vain hope of preventing international firms from adding to their market share of Japanese corporate instructions.

Nagashima Ohno opened in Singapore at the start of 2013, taking the extraordinary decision to relocate chairman Hisashi Hara in the process. And, later this year, Anderson Mori will be opening in the Japanese manufacturing heartland of Nagoya as well as in Shanghai and Singapore.

Mori Hamada has a one-year head start in the Lion City, having opened in February 2012. It will be hoping to have more success there than it has had with its Beijing and Shanghai offices,

where new instructions from Japanese clients have been falling.

Finally, Nishimura & Asahi has been the most lavish with its investment, opening in Beijing, Hanoi, Ho Chi Minh City, Nagoya, Osaka and Singapore within the last three years alone. It says that its investment in the potential of Vietnam is an attempt not to repeat the mistakes of its China strategy, where it was a late entrant.

International firms, in contrast, already have the elaborate global office network, and have therefore concentrated on reconfiguring their Japanese practices.

Linklaters has had some success since the loss of the team to Bakers in 2011, advising Japanese advertising agency Dentsu on its £3.2bn acquisition of UK rival Aegis Group. In addition to trying to secure a larger slice of outbound-related work from the major trading houses, the firm is also targeting mandates from mid-market corporates such as online retailer Rakuten, for whom it has advised on three M&A deals in the last 18 months.

Herbert Smith Freehills, meanwhile, is thriving due to arbitration clauses becoming a common feature in outbound investment contracts, while Clifford Chance is aiming to pick up more first-time overseas instructions – like the recent one for Japanese building material manufacturer LIXIL Corporation on its acquisition of Italian curtain wall manufacturer Permasteelisa.

### Potential impact of Abenomics

The re-election of Prime Minister Shinzō Abe in December 2012, following the Liberal Democratic Party's landslide victory (Abe served for one year as PM from September 2006), has provided a timely fillip to the Japanese economy.

The country's stock market has risen by over 40 per cent, with debt markets looking much more positive as companies show increased appetite to raise capital.

*'Key to the improving business sentiment has been Abe's ¥10tn (\$107bn) fiscal stimulus package and monetary easing policy, designed to shock the economy out of two decades of deflation'*

Key to the improving business sentiment among manufacturers, as revealed by a recent Bank of Japan Tankan survey, has been Abe's ¥10tn (\$107bn) fiscal stimulus package and monetary easing policy, which are designed to shock the economy out of two decades of deflation.



With the stated aim of achieving a two per cent inflation target, the Bank of Japan has said it will inject about \$1.4tn into the economy in less than two years.

The flood of new money is likely to be used by Japanese investors, at least in part, to buy higher yielding assets abroad, putting downward pressure on the Yen. A weaker Yen makes exports cheaper, which in turn helps the country's struggling manufacturers.

Abe's policy of arming Japan's central bank with the tools to press down upon the Yen in order to resuscitate the economy has come to be known as 'Abenomics'.

However, faced with the global conundrum of how to achieve growth, Abe has simply followed the example set by the US in lowering its exchange rate through quantitative easing.

The immediate impact of such a policy on outbound M&A activity spells good news for law firms.

A spike in transactional activity is expected in 2013, as acquirers look to complete as many deals as possible before the weaker Yen dilutes their purchasing power.

Once that does happen, however, law firms may have to reconfigure their business models once again.

For Japanese firms, this is likely to result in a swift return of senior rainmakers to the mothership.

For international firms, such as Linklaters, a decline in outbound mandates could be even more significant.

Many international firms have downsized their *bengoshi* (advocate) capability in recent years, having retreated from earlier plans to compete with Japanese firms for purely domestic instructions.

Since the loss of the team to Bakers, Linklaters has focused on better integrating its Tokyo office with its regional and international network.

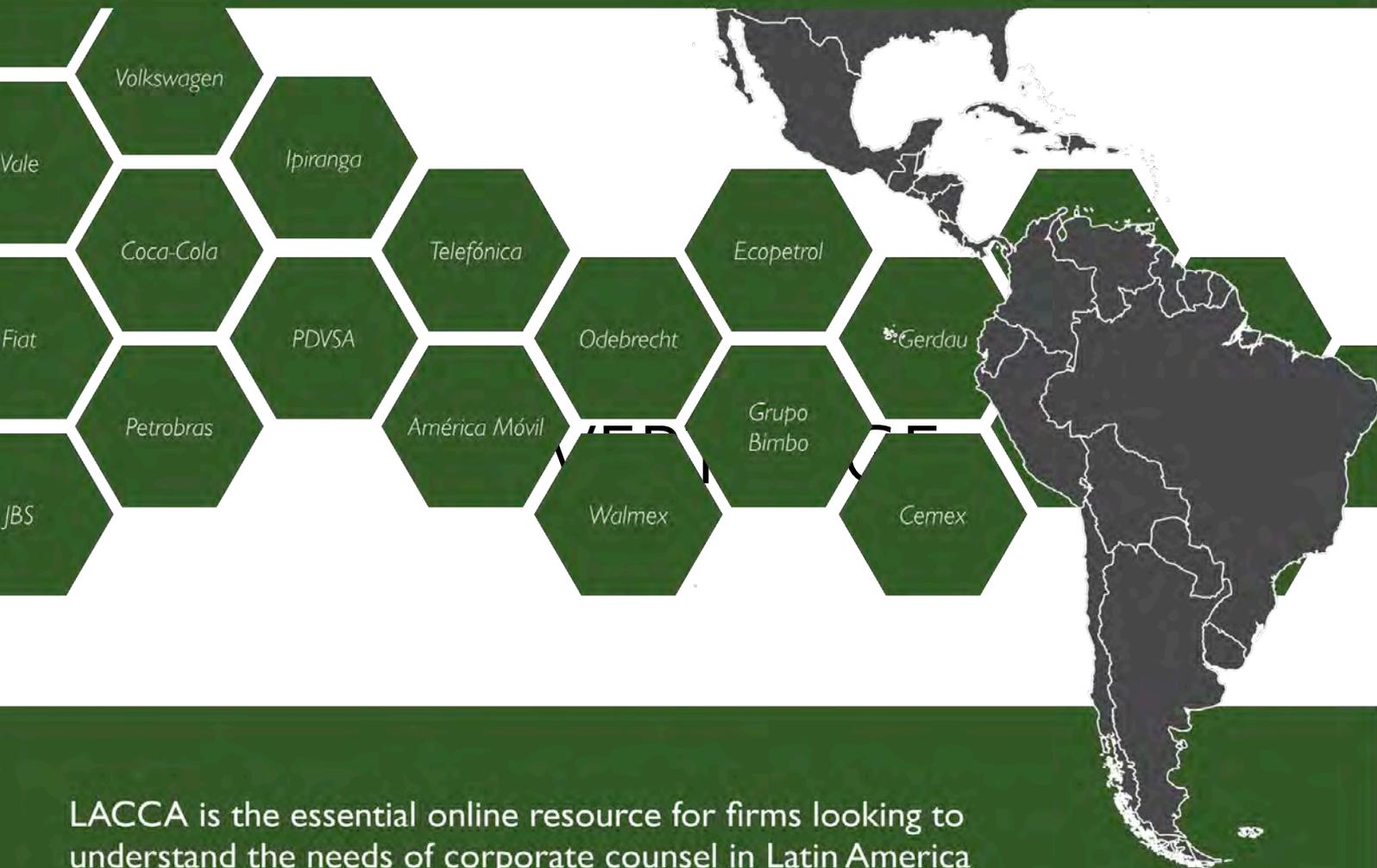
The international firms that will successfully navigate this transition will be those that learned the lessons from the last transition – namely, to focus on doing what they do best, and to make sure that their Tokyo practice is well arbitrated. ☒

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# States of surveillance

It's difficult to overstate the level of cyber security threats presently facing states, companies and individuals. As the United States considers legislation to share classified intelligence with private companies, *IBA Global Insight* assesses the risks and responses.

ARTHUR PIPER

'China is literally attempting to steal our way of life,' US Republican Senator and House Intelligence Committee Chairman Mike Rogers told *The Detroit News* in February. Responding to a spate of increasingly high-profile data security attacks on US companies by Chinese hackers, he added: 'Cyber war is currently being waged on American businesses and the government is unable to deploy defenses on their behalf. Today, we are in a stealthy cyber war in America. And we're losing.'

Rogers and his Republican colleague Dutch Ruppersberger were then seeking support for their 19-page bill, the Cyber Intelligence

Sharing and Protection Act (CISPA), which was passed by the House of Representatives in April. The Intelligence Committee in December had already passed the draft by a vote of 17 to one, although the act has run into late opposition from civil liberties groups who fear it is too broadly cast.

If passed by Congress – and not vetoed by President Barack Obama – the legislation would allow the government to share classified intelligence with private companies to give them the information they need to protect themselves from cyber-attacks. In cases where national security is thought to be at issue, corporations already draw on the expertise of federal agencies.



Rogers and others have been arguing for some time that major US companies lose valuable secrets to competitors in Russia and China because of online espionage. Some have even been upping the rhetoric by talking about the potential for a 'digital Pearl Harbour,' even though that phrase has been bandied around by alarmists since at least 1996, according to the website Tech Dirt.

Behind the words, there is plenty of real support for tougher US action on cyber espionage. US Director of National Intelligence James Clapper recently told a Senate committee that cyber-attacks and cyber espionage had supplanted terrorism as the top security threat facing the country. And Obama said in a TV interview with ABC News that the US is engaging in 'tough talk' with China about its alleged spying on American businesses and institutions.

'What is absolutely true is that we have seen a steady ramping up of cyber security threats. Some are state sponsored. Some are just sponsored by criminals,' Obama said. 'We've made it very clear to China and some other state actors that we expect them to follow international norms and abide by international rules.'

### Enemy without

The most recent furore got underway shortly after the *New York Times* revealed that it had been the victim of hackers. Just after Christmas this year, the paper reported that Chinese hackers had infiltrated its computer systems, stolen the passwords of key reporters and carried out a four-month long spying mission against it. *The Times* linked the incursion to its reporting on the relatives of Wen Jiabao, China's former premier.

Despite detecting the penetration of its defences, the paper's own cyber security experts and those of its telecommunications company AT&T could not eradicate the perpetrators from the system. It had to call in the security company Mandiant. When they had evicted the perpetrators, the firm said that the method used by them to gain access to *The Times* turned out to be relatively unsophisticated. The hackers had probably used a so-called spear-phishing attack to gain initial access, it said. That is an email sent to an employee that contains a link to a 'remote access tool,' or RAT. When the unsuspecting user clicks the link, the program installs itself on the system and it begins monitoring keystrokes, passwords and other information. This enables hackers to syphon sensitive data from the company and can be a bridgehead for further, more serious intrusions.

But was it really possible to trace these violations of data privacy to state-sponsored

espionage? In August 2011, Dmitri Alperovitch, Vice-President of Threat Research at the antivirus company McAfee, published a ground-breaking paper 'Revealed: Operation Shady Rat'. It was an investigation into the hacking of over 70 global corporations and government bodies – 49 of which were based in the US. Alperovitch described how hackers used often simple remote access tools to steal important commercial and government data. He noted that the report dealt only with 'one specific operation conducted by a single actor/group,' but did not specify to which country the group was affiliated.

*'We have seen a steady ramping up of cyber security threats. Some are state sponsored. Some are just sponsored by criminals'*

US President Barack Obama

The second study, by Mandiant, 'APT1: Exposing one of China's Cyber Espionage Units', pointed the finger squarely at state-sponsored Chinese espionage. It called the group described in the report APT1, which refers to the security term 'advanced persistent threat'. It operated, Mandiant said, out of the Pudong New Area of Shanghai and comprised the People's Liberation Army Unit 61398. 'We estimate that Unit 61398 is staffed by hundreds, and perhaps thousands of people based on the size of the Unit 61398's physical infrastructure,' it wrote. Mandiant



calculated that this group had single-handedly been behind 141 successful security penetrations on organisations since 2006 – 87 per cent of these in countries where English is the native language.

Despite the possibility that the hackers could ‘hop’ from servers and cover their physical location, Mandiant was willing to conclude that the group must have been operating with the full knowledge and cooperation of China’s government: ‘Either a secret, resourced organization full of mainland Chinese speakers with direct access to Shanghai-based telecommunications infrastructure is engaged in a multi-year, enterprise scale computer espionage campaign right outside of Unit 61398’s gates, performing tasks similar to Unit 61398’s known mission – or, ATPI is Unit 61398.’

### Fine art

Rob Sloan has been professionally engaged in the Chinese hacking question for ten years – both for government agencies and in his current capacity as Head of Response at Context Information Security. He has little doubt that the activity is state sponsored.

‘They have got this down to a fine art, have been doing it a long time and are getting better and slicker at it,’ he says. ‘To get it that organised, it has to be military – there is a lot of boring work and you wouldn’t be able to get people to do such repetitive tasks over such a long period while keeping their mouths shut without that sort of organisation.’

He says any company engaged with something that China would like to produce, buy or compete against is a potential target. And that it is impossible to prevent security breaches against such levels of well-organised activity. That is because sensitive data may be distributed across many subsidiary companies, suppliers and customers.

‘Someone in the organisation just needs to click on the wrong attachment or website link and security is compromised,’ he says. Once the hackers have breached the system, they go through a series of set procedures to gain a firm foothold, find the data they want and extract it – much of the time undetected.

Joseph Steinberg, Chief Executive of Green Armor Solutions, an online security firm, is more circumspect about tracing the data security

*‘Chinese perspectives on the accusations leveled against China emphasise US cyber espionage and attempts to impose its interests and values on other countries through political and military cyber dominance’*

David Fidler

Professor, Indiana University  
Maurer School of Law

breaches to a specific group, but agrees that the phenomenon is a real problem. ‘If you are an upcoming power, it’s far easier, faster and less expensive to steal information than to reinvent the wheel,’ he says. ‘And if you don’t have security around intelligence, it is going to happen to you.’

What makes it equally attractive, he says, is that tracing either the data breaches or the purpose to which the information may be put is extremely unlikely. ‘If a new product comes onto the market, for example, it is very difficult to identify where the producers got the information from to make it,’ he says. ‘There is not always going to be a simple one-to-one correlation.’ Similarly, he says, the Chinese authorities only need to turn a blind eye to hacking to benefit from it: ‘Indirect support gives the authorities plausible deniability.’

And denying the allegations is what Geng Yansheng, a spokesman with the Chinese Ministry of Defence, did. He told reporters at a media briefing in Beijing in February: ‘US cyber security firm Mandiant’s report is groundless both in facts and legal basis.’ China’s armed forces had never backed any hacking activities, he said, and the report had merely shown that the attacks were linked to internet protocol (IP) addresses based in China. Furthermore, he argued, the report lacked legal basis because it only catalogued routine cybercrimes and did not prove espionage. Geng said cyber-attacks were transnational, anonymous and deceptive with their source often difficult to identify.

President Obama’s careful avoidance of the rhetoric of ‘cyber war’ underlines the US’s own reluctance to break the international practice of refusing to treat online espionage as the violation of state sovereignty, or as a use of force against



a nation under international law. His strategy is to strengthen domestic law – such as the bill proposed by Mike Rogers – security best practices and international cooperation on combating cybercrime.

David Fidler, professor at the Indiana University Maurer School of Law, wrote recently that neither the US's own Economic Espionage Act 1996, nor the World Trade Organization's intellectual property laws were likely to prove effective against state-sponsored espionage. The US's inability categorically to prove state involvement, link infringements to specific intellectual property rights or to bring specific people to trial all counted against it, he argued in the March 2013 issue of *Insights*, a publication of the American Society of International Law.

'Chinese perspectives on the accusations leveled against China emphasize the extent of US cyber espionage and Chinese perceptions of American attempts to impose its interests and values on other countries through political and military cyber dominance,' he concluded.

### Enemy within

Evidence of US cyber espionage is likely to be equally difficult to prove categorically. But the US authorities, such as the National Security Agency, have been accused of prying into the internet activity of its private citizens and those of foreign nationals. As the IBA reported on its website in February this year (see 'US surveillance of cloud data cause for European concern'), provisions contained in the Foreign Intelligence Surveillance Act of 1978, Amendment Act of 2008 (FISAAA) give federal agencies access to any data held on computer servers that fall under US jurisdiction. Congress had made this activity legal in 2008 and again in 2012.

Amnesty International, the American Civil Liberties Union and others have challenged the lawfulness of the extent and use of such warrantless wiretapping. The case, *Clapper v Amnesty International*, No 11-1025, reached the Supreme Court in February, which ruled in a 5-4 decision

that government powers under FISAAA were not subject to challenge. The Court did not make a judgment on the substance of whether the activity was constitutional or not, instead it focused on the legal basis of the plaintiffs' right to stand.

Under FISAAA section 1881a, government agencies can electronically eavesdrop on the phone calls of American citizens and read their emails without a probable cause warrant, provided that one of the parties to the communication is outside the US. The communication may be intercepted 'to acquire foreign intelligence information.' Although the Foreign Intelligence Surveillance Court, which rubber-stamps such secret requests, monitors the process the actual intercepts can take place up to a week before the agency makes its activity known.

Journalists who were party to the action claimed that the surveillance violated their rights under the Fourth Amendment, which bars unreasonable searches.

But Justice Samuel Alito, in handing down the judgment, wrote, 'Respondents have no actual knowledge of the Government's section 1881a targeting practices. Instead, respondents merely speculate and make assumptions about whether their communications with their foreign contacts will be acquired under section 1881a.' He said that the plaintiffs had no right to stand because they could not show that any actual harm had occurred.

'This ruling is the end of the road for litigation on the issue,' says Stephen Vladeck, a professor of law at American University. 'The ball is now in Congress's court, which historically has been the principal actor for protecting privacy.'

Since action from Congress is unlikely, he says, the only way to find out in future if government agencies abuse their powers would be if one 'makes a mistake accidentally, or makes a disclosure'. To date, he said, the government had brought 'zero cases' using evidence collected under FISAAA.

He remains concerned about the unintended consequences of such surveillance. 'The intention of surveillance has to be foreign intelligence – terrorism or espionage – but the problem is there is no constraint about what they sweep up by accident.'



Even without specifically targeting someone, they can sweep up huge amounts of data.'

### Protecting privacy in the cloud

The strategy has caused waves in Europe where the European Parliament is currently redrafting its own data privacy laws, which have remained largely unchanged since 1995. A multi-authored report to the parliament, *Fighting cybercrime and protecting privacy in the cloud*, pointed out that FISAAA effectively 'authorized mass surveillance of foreigners' on popular cloud services, including those offered by Amazon, Apple, Google and Microsoft, because their services came under the jurisdiction of the US authorities.

*'Someone in the organisation just needs to click on the wrong attachment or website link and security is compromised'*

**Rob Sloan**

*Head of Response, Context Information Security*

Given that European Union officials were unaware of the extent of the US's powers under FISAAA until mid-2011, according to the report, it is not certain how the Data Protection Regulation will turn out. At present, data protection in Europe is enshrined in the Data Protection Directive, which forbids organisations to collect, use or store data without the subject's consent. In theory, the laws in all of the European Union's 27 Member States should harmonise around that principle, in practice they do not.

'It's simply a nightmare from a legal perspective,' says Christian Hamann, Counsel at the German law firm Gleiss Lutz. He says that the transfer of employment data between subsidiaries of the same company located in two different European countries can be extremely onerous. He supports the idea that the new law will be enshrined in a Regulation because it will force harmonisation around the principle of protecting an individual data rights while allowing smoother flows of information

– something that is not possible under the existing Directive.

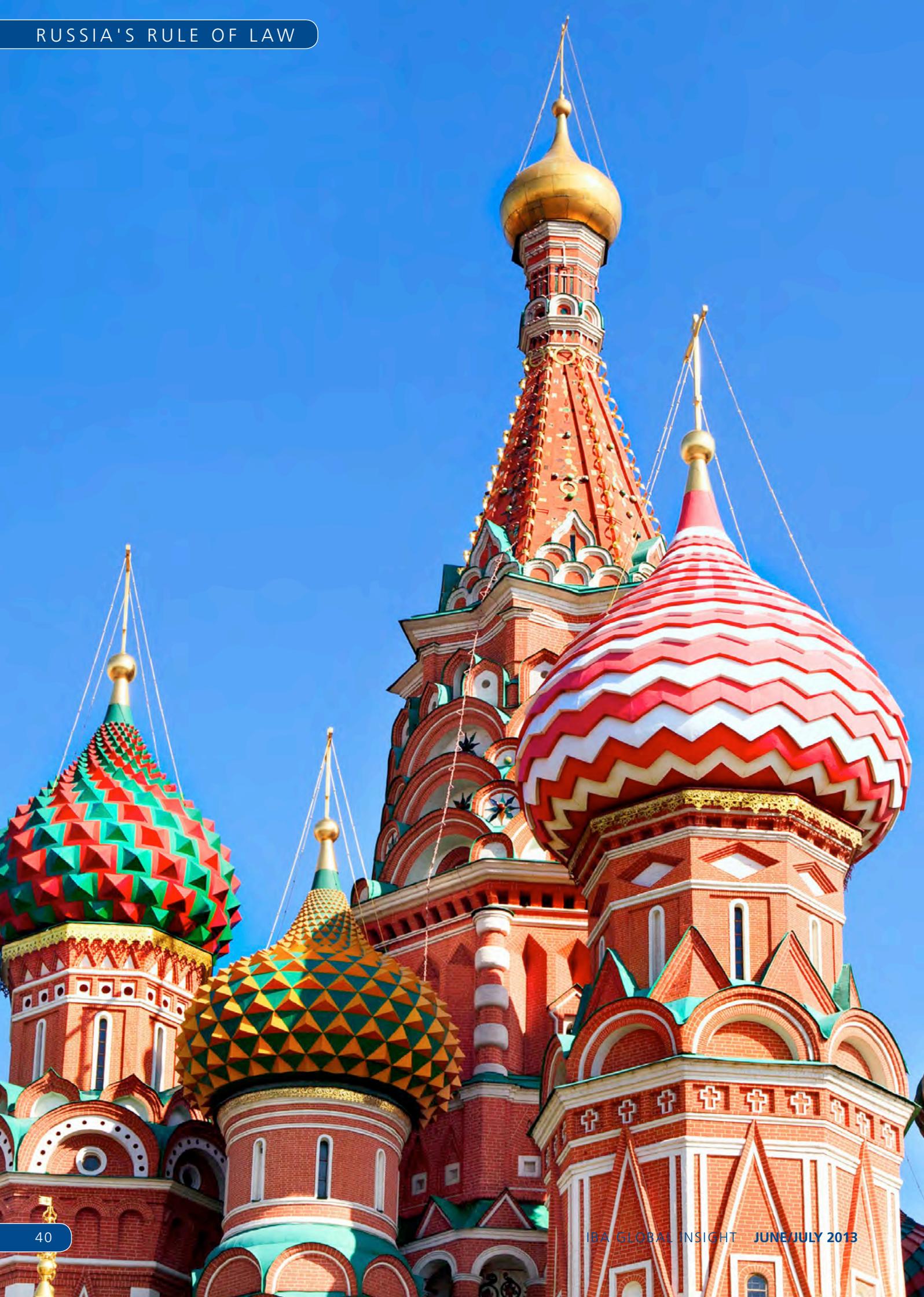
He also believes the new Regulation should protect the data rights of European citizens against excessive government prying within the European Union. However, he says that FISAAA circumvents the usual 'safe harbour' arrangements between the European Commission and the US government. That means that even if there were contractual agreements with US cloud companies, for example, not to divulge the data of European citizens, they would not be effective.

'An American data importer may sign a contract not to give data to the US government,' he says, 'then along comes a federal agency and simply puts a pistol to the temple of the CEO and says, "give me the data". This is not a problem EU regulation can solve unilaterally.'

Given that both Chinese hacking intrusions and the surveillance of private data by US government agencies are not subject to legal challenge, citizens and organisations are turning to alternative technologies. One example is Silent Circle, a company that offers a 'surveillance-proof' smartphone app that enables people to make secure phone calls, and send encrypted texts and data. The software transmits the data then burns it off the device. The company claims that human rights reporters have already road-tested the technology in places such as Afghanistan and Jordan.

Another company, Privax, offers clients a virtual private network and other services so that they can use the internet, transfer data and send emails anonymously. Danvers Baillieu, the company's Chief Operating Officer, says that because the company uses servers distributed around the globe, authorities would have to approach its office in the UK to obtain the information they wanted to access. 'They would have to go through the British justice system to do that,' he says, 'which is not impossible, but difficult and public.' He says the company has a growing number of competitors in Europe and globally, suggesting an increasing awareness that citizens must take more responsibility for the security of their own data. ☒

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# Russia: reforming or unravelling?

Russia's engagement with the OECD and WTO means rule of law reform should be imminent. Yet, the worst excesses of government control and human rights abuses suggest otherwise.

RUTH GREEN

**W**hen Russia finally joined the World Trade Organisation (WTO) on 22 August 2012, after an 18-year-long hard-fought slog, there were many left wondering if the wait had been worth it – and whether membership would bring any significant change. In a year that saw Vladimir Putin embark upon his third term as the country's president, it's unsurprising that few things have changed since last August. Changes that have been implemented appear largely at odds with the new era of transparency promised by WTO membership, instead suggesting some worrying consequences for the rule of law.

One of the most striking incidents to bring Russia's rule of law into focus in recent years has been the highly publicised case of Moscow-based lawyer Sergei Magnitsky, who died in pre-trial custody in November 2009. While it's just one incident,

Magnitsky's plight continues to dominate the headlines worldwide and is as a stark reminder of Russia's track record for human rights violations.

Indeed, as Russia's WTO membership was being secured last August, the US Congress was also on the verge of voting in favour of the Sergei Magnitsky Rule of Law Accountability Act 2012 (the 'Magnitsky Act'), finally passing the law in November. This in itself was an important milestone since part of the law also

required the US government to grant Russia Permanent Normal Trade Relations (PNTR).

The idea behind the PNTR bill was to once and for all revoke the Jackson Vanik amendment to the Trade Act of 1974 – an outdated Cold War era piece of legislation originally implemented by the US as a penalty against the Soviet Union for placing emigration restrictions on its citizens which prevented Russia from enjoying full trading relations with the US.

While the potential for improved trade relations between Russia and the US seemed, on the face of it, a positive step forward and in keeping with WTO rules which stipulate that member states must grant each other unconditional trading rights, a storm was already brewing.

In December last year, the Magnitsky Act was finally signed into law by President Barack Obama. The Russian government reacted strongly to the decision. It announced an outright ban on American adoption of Russian citizens and that it was proceeding with plans to try Magnitsky posthumously and, in absentia, Magnitsky's client at the time of his death, founder of Hermitage Capital, Bill Browder. Once again the wider issues of corruption and human rights abuses in Russia, as well as the underlying flaws inherent in the country's judicial and penitentiary systems, had reared their heads.

Many people, including Martin Šolc, name partner of Czech law firm Kocián Šolc Balaštitk and Secretary-General of the IBA, have voiced strong concerns over the posthumous reopening of the criminal proceedings and what it may mean for the rule of law in Russia. 'The whole case evidences how desperately the system, driven by clan instincts, tries to protect its people, regardless of what they may have committed,' says Šolc. 'If the clan is in danger, law does not seem to matter.'

### Overcrowded prisons and torture

While human rights abuses in Russia are nothing new, a more unusual issue exposed by the Magnitsky case was the dire state of Russia's overcrowded prison system. Magnitsky died in pre-trial custody from pancreatitis and there has been strong evidence to suggest that his condition was not only ignored by prison staff, but that he was also subjected to torture and appalling living conditions.

During an interview at the IBA Annual Conference in October 2012, Elena Borisenko, who is responsible for international relations at Russia's Ministry of Justice, highlighted that prison reform has been one of the main issues on her agenda in recent years. 'You may know that the MoJ started a great reform of the penitentiary system in Russia, which was started before the Magnitsky case, but certainly the Magnitsky case showed that changes were really needed,' she stressed.

'This was the most difficult reform that has ever been done [by the MoJ] as modern Russia has inherited a very bad penitentiary system from the Soviet Union and it takes a lot of time to change the facilities for the prisoners, as well as the principles and the legislation.'

While Borisenko is right to stress that change can take a long time to take effect, Magnitsky's plight was just one example of the thousands of cases each year where prisoners in Russia die before they even have a chance to stand trial. According to a recent article in the Moscow News, 4,121 prisoners died in prison or SIZO pre-trial detention centres in 2012. Butyrka, where Magnitsky died, is one of Russia's most infamous SIZOs.

'I can be absolutely open in saying that we are doing a lot to change the situation,' added Borisenko. 'We as the MoJ are there to help improve the penitentiary system and have changed the rules for punishment and criminal procedure and now have more and more alternative measures.'

Although she insists that the MoJ has looked at ways to try and reduce the sheer number of prisoners waiting for trial – a large reason for the overcrowded, squalid conditions – the statistics are perturbing. Giving that Russia's prisoner population in June 2012 stood at 731,000, this puts the death rate of inmates at 564 out of every 100,000 prisoners, which, even if an improvement on previous years' figures, is still deplorable.

### Putin: no fan of Glasnost

As for other changes, rather than promoting a greater level of transparency, a number of new laws enacted by the Russian government over

the past 12 months have only served to highlight that WTO membership has far from swept in a new era of openness. Barely four months after being back in the presidential driving seat, in September 2012 President Vladimir Putin signed a decree ordering state-owned companies not to disclose information to foreign regulators without prior authorisation from the state. One of the most intriguing aspects of this new law was that it came just a matter of days after the European Commission (EC) announced it was launching an investigation into Russian state-owned energy giant Gazprom for alleged

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*'Modern Russia has inherited a bad penitentiary system... it takes a lot of time to change the facilities for the prisoners, as well as the principles and the legislation'*

Elena Borisenko  
Deputy Minister of Justice, Russian Federation

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anti-competitive practices. The decree suddenly made it necessary for the EC to approach the government first to make a formal request for information – an unmistakable attempt to protect Gazprom if ever there was one.

Although the decree seems at odds with the transparency promised by WTO membership, as Sergey Lapin, a partner at Nadmitov, Ivanov & Partners, notes, the move is, ironically, currently acceptable since Russia has yet to sign the WTO agreement on Government Procurement (GPA), which is the WTO's sole law specifically on the issue.

'Just recently the local press published information that the Russian Ministry of Economic Development has prepared a draft order expanding the number of industries to which preferences must be granted in the framework of government procurement, which goes against the spirit of the WTO rules, but is permissible given that Russia is not yet a party to the GPA,' he says.

### NGO crackdown

While this particular law has drawn criticism from business communities in Europe and beyond, it's not been the only controversial piece of legislation to be brought into force in Russia in recent months. Since July last year bills relating to internet censorship, defamation and NGOs have all been signed into law. According to Jana Kobzova, a policy fellow and

wider Europe programme coordinator at the European Council on Foreign Relations, these developments have been a clear warning sign to certain parts of society.

'The main impact of these laws was not on ordinary Russians, but on NGOs, journalists and media; the aim was to encourage more self-censorship and increase the leverage the state has over these sections of civil society,' she comments.

Although Kobzova admits that it is still early to determine their impact, the very signing of the bills into law has ensured that they are already serving their purpose. 'There haven't been big cases yet, but this is partly because many NGOs are trying to get rid of foreign funding in order not to be labelled as foreign agents and to avoid inspections from the tax authorities,' she adds.

'The main aim is not to use these laws to close down NGOs or media that are uncomfortable for the regime – the main aim is to discourage critical voices, while leaving the option open that if they don't soften their criticism themselves, the state might do it instead.'

'Their wording may be disputable but what is much worse is the broad way in which some authorities read them,' says Šolc. 'For example, an association of parents of children with cystic fibrosis is considered political just because, in its bylaws, there is a sentence on lobbying for improvement of the treatment of those children. In general, those laws have created an atmosphere of suspicion vis-à-vis all NGOs.'

At the end of March, at least 90 NGOs in Russia reported unscheduled visits by state officials, many

wracked the country last year in the run-up to the presidential elections. According to the new law, citizens found to be organising unsanctioned protests will be hit with a hefty fine of RUB1m (£21,000) and participants alone will be subject to a RUB300,000 (£6,340) fine. When you consider that Russian statistics service Rosstat listed the country's average monthly salary in 2011 as RUB23,600 (£498), the value of the fine seems disproportionately high.

The protest that has attracted most publicity internationally involved members of feminist punk rock band Pussy Riot who stormed a cathedral in Moscow last February, calling for the Virgin Mary to 'throw Putin out'. Although three band members were sentenced to two years in prison – a sentencing that outraged human rights groups worldwide – a proportion of Russian society, notes Kobzova, felt the punishment was justified.

'There are two aspects of the Pussy Riot – let's not forget that many Russians found the Pussy Riot performance in the cathedral unacceptable based on social, religious, moral grounds – and the condemnation of the punishment the band members got was much smaller inside Russia than in the West, she notes.

'Many sections of Russian society are more traditional than the West would like to think and many people welcomed the sentence the band received. Unfortunately, the case no longer commands much public attention.'

### Tit-for-tat legislation

Another irony remains that, since joining the WTO, rather than bringing Russia closer to other WTO members, the country has continued to move further apart.

The most striking example has been Russia's increasingly troubled relationship with the US. As aforementioned, following the US's decision to sign the Magnitsky Act into law in December the Russian government reciprocated by imposing an outright ban on Americans from adopting Russian citizens, a practice which has been increasingly common over the past decades.

The law was named the Dima Yakovlev Bill, after the infamous case of a Russian toddler who died in Washington DC in 2008 having been accidentally left in a car for hours by his adoptive father. An estimated 19 adopted Russian children have died in the US over the past 20 years,

Although much of the world has reacted to the ban in consternation, the response has been no more keenly felt than back at home in Russia where thousands lined the streets in January to protest against the new law. 'In fact, many people in Russia have been more upset about the reaction of Moscow than the US,' stresses Kobzova.

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*'Corruption, clan mentality and nepotism are features of the system rather than its bug'*

Martin Šolc  
IBA Secretary-General

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of which were denounced as an 'intimidation' tactic. More than 1,000 NGOs are now thought to have been targeted, including Russian non-governmental research organisation the Levada Center, which was warned by prosecutors at the end of May that it faces closure unless it registers itself as a 'foreign agent'. The warning followed the organisation's release of polls showing a dip in Putin's popularity ratings.

### Clamping down on protests

The law on re-criminalising defamation has also been particularly interesting given the large number of opposition demonstrations that

‘The Magnitsky Act has touched the nerve of the Russian elite and what they did was they used vulnerable and defenceless children to retaliate,’ she adds. ‘The disproportionality of the Moscow response hasn’t escaped many Russians. On the other hand, Moscow’s response was so harsh also because they had to send a signal to the Europeans – some of the EU member states are debating the possible adoption of a similar law.’

‘Indeed, there have been calls for a new ‘re-set’ in the US–Russia relations but it is not clear where it would come from or what issues it could help advance: besides Afghanistan and Iran, there are very few issues where compromise between the US and Russia could be found at the moment.’

The revelation in May that Russia had detained, and subsequently expelled, US diplomat Ryan Fogle over allegations that he was recruiting for the Central Intelligence Agency (CIA) only served to exacerbate the already fraught relations between the two countries. Fogle was reportedly attempting to recruit an Federal Security Services of the Russian Federation (FSB) agent focused on anti-terrorism efforts in the North Caucasus in the wake of the Boston Marathon bombing.

However, Bill Browder also sees the adoption ban as a clear message to Europe. ‘President Putin ordered the adoption ban mostly to send a message to Europe to stop the Magnitsky act spreading here,’ he comments.

While the UK has yet to even come close to signing the Magnitsky Law, foreign secretary William Hague took the opportunity during a recent meeting with Russian foreign minister Sergei Lavrov to criticise Russia’s handling of the Magnitsky case.

Although overall the meeting was lauded as a sign of thawing Anglo-Russia relations, there have been several incidents that have exacerbated Anglo-Russian relations in recent months, most notably the mysterious circumstances surrounding the death of Russian businessman Alexander Perepilichnyy in Surrey in November 2012. Like Magnitsky before him, Perepilichnyy decided to expose corruption and supplied documents to Swiss prosecutors, implicating a number of corrupt Russian state officials and linking them to the very same tax fraud uncovered by Magnitsky.

As the cause of Perepilichnyy death is still to be determined, in mid-May the long-awaited inquest into the death of poisoned KGB agent Alexander Litvinenko, which has been a key bone of contention between UK and Russian governments and legal authorities in recent years, looked to be on the brink of collapse when the coroner controversially upheld an application by UK Foreign Secretary William Hague to keep crucial evidence secret and called instead for a public inquiry to ensure a fair verdict.

While Hans Corell, Vice-Chair of IBAHRI, former Judge of Appeal and former Legal Counsel of the UN, admits that the rule of law is still severely lacking in Russia today, he questions whether the West has engaged enough with Russia to help the country’s evolution into a democratic and law-abiding country. ‘The question is whether there is at present sufficient engagement in a necessary effort to establish democracy and the rule of law in Russia,’ he says.

In spite of the obvious criticisms against Russia, Corell stresses the importance for the West to be open-minded and constructive in their relations with Russia. ‘Not long ago, we heard a presidential candidate in the US refer to Russia as “Our Number One Geopolitical Foe” - I did not believe my ears,’ he says incredulously. ‘The best way we could assist Russia in establishing democracy and the rule of law is to interact in a positive spirit. And, above all, we have to lead by example.’



### Sticking points

Despite 65 per cent of Russians surveyed by the Levada Center in February this year saying that Putin had done more good than bad for the country since his re-election, many are still finding fault with Russia's government.

During a session on Russia at the World Economic Forum in Davos earlier this year, a report entitled *Scenarios for the Russian Federation* cited the global energy landscape, the institutional environment and social cohesion as the three main areas of uncertainty for Russia going forward.

However, more worrying than the problems themselves is the question of whether the Russian government has what it takes and is prepared to overcome them, admits Kobzova. 'The greatest uncertainty is whether the current government realises the scope of challenges that the report mentions. The challenges are huge of course but they are not insurmountable if you have a government keen and eager to tackle them.'

'My worry is that although some elements in the government recognise these challenges, the will to tackle them is painfully missing.'

'A part of the Russian establishment – including on the top floors of politics – understands there is a problem, but does not know how to solve it,' says IBA Secretary-General Martin Šolc. 'Corruption, clan mentality and nepotism are features of the system rather than its bug. How to remove them without the whole system collapsing is going to be the challenge for the Kremlin in the years to come.'

### WTO impact

In terms of progress, while the outlook may look bleak, there have been some positive changes already introduced as a direct result of WTO membership. 'As for other commitments, for example Russia undertook to introduce universal electronic customs declarations, instead of paperwork, by 1 January 2014,' says Lapin. 'According to a recent interview by the Deputy Head of the Russian Federal Customs Service, electronic declarations made 96 per cent of their total number and were used by around 85 per cent of the external trade participants. This is a serious achievement, which may contribute to the reduction of corruption and increase of good governance.'

Edward Borovikov is a partner at Dentons and one of the main lawyers that advised the Russian government on joining the WTO since the early 1990s. He thinks WTO accession will have an impact on rule of law in the country and believes it is up to other WTO members to show Russia how it is done. 'I believe it will do so, yes. I

also believe that certain leading WTO members should lead by example. For example, the EU continues to apply WTO questionable energy adjustments in anti-dumping investigation against Russian energy intensive products.'

'I am aware that many draft laws, including on domestic support, are scrutinised in terms of compatibility with the WTO – albeit sometimes lobbyists are stronger than WTO lawyers – [but] some WTO questionable measures are being removed or at least softened and the quality

*'The best way we could assist Russia in establishing democracy and the rule of law is to interact in a positive spirit'*

Hans Corell

*Vice-Chair of IBAHRI, former Judge of Appeal and former Legal Counsel of the UN*

of Russian/Customs Union trade defence investigations increased dramatically.'

Lapin cites other signs of progress, such as the WTO Technical Barriers to Trade Committee's recent meeting to discuss concerns relating to certain proposed measures by Russia, including the country's draft regulation on the safety of alcoholic beverages.

Although the WTO is evidently concerned by some of these proposals, Lapin highlights that Russia's efforts to disclose such information is progress in itself. 'This means that Russia has started to notify these proposals to the WTO and that they are being discussed at the relevant committee, thus progress in the transparency field is already being felt.'

And as Borovikov notes, thanks to the WTO, Russia is also starting to move in the right direction to achieve one of its primary accession goals: creating a business climate attractive to domestic and foreign investors. 'I understand the criticism, but I still think that Russia is at least one step closer to that goal. There are clear positive developments.' ☒

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To view interviews with Deputy Ministers of Justice of the Russian Federation, Yuri Lyubimov and Elena Borisenko, go to [tinyurl.com/IBAFilms](http://tinyurl.com/IBAFilms)



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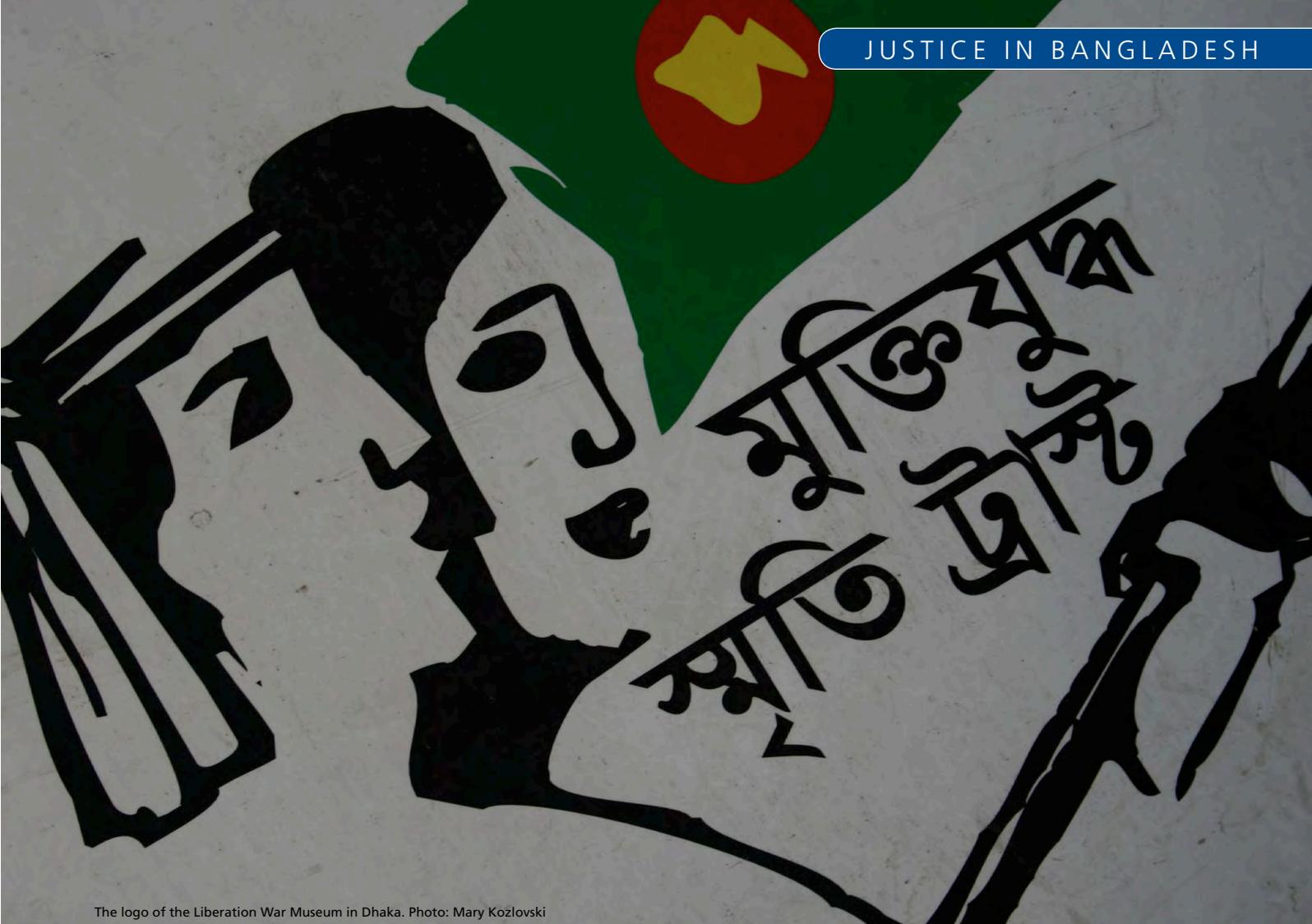
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The logo of the Liberation War Museum in Dhaka. Photo: Mary Kozlovski

# Bangladesh's way: Dhaka's controversial International Crimes Tribunal

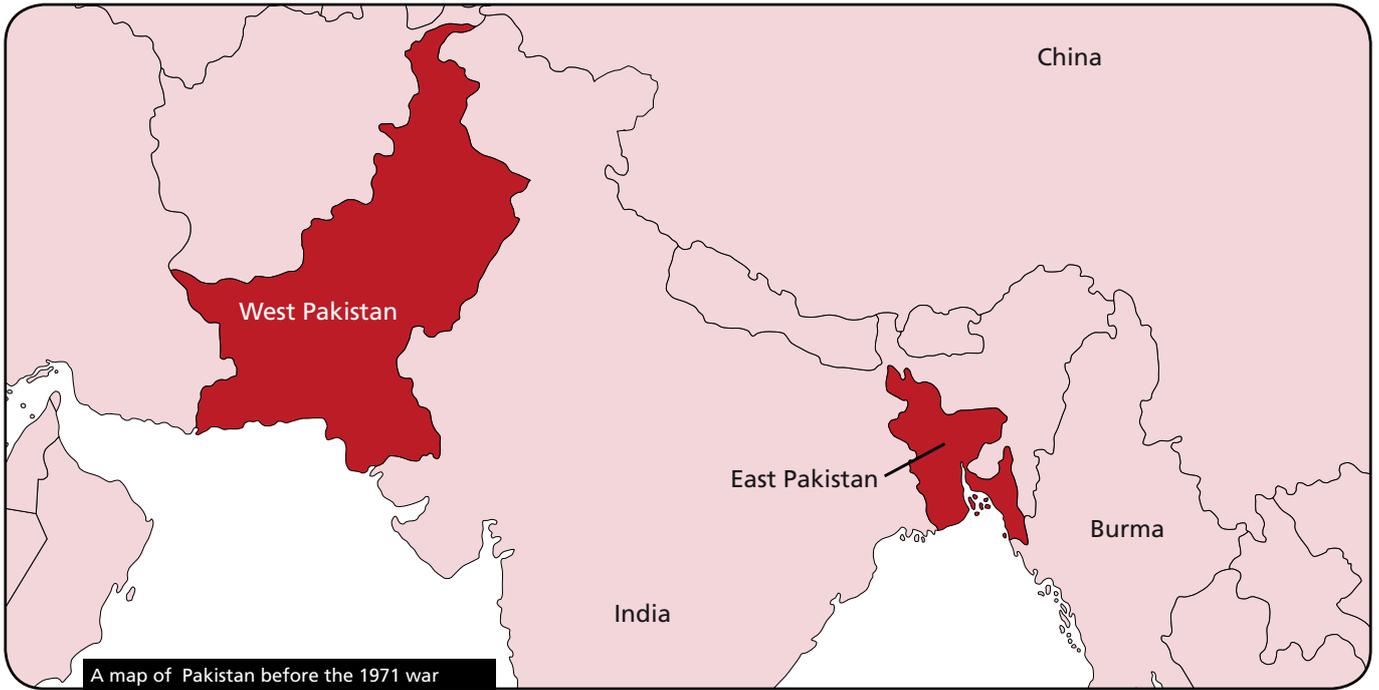
Over 40 years after Bangladesh seceded from Pakistan, a court in Dhaka trying alleged perpetrators of atrocities during the 1971 independence war has been accused of playing politics, as the country hurtles towards another national election.

MARY KOZLOVSKI, IN DHAKA

Outside the entrance to Dhaka University's Faculty of Fine Arts is a cartoon-style portrait of Abdul Qader Molla, eyes and tongue bulging over a noose, swung from a rope tied to a tree branch. The animalistic image was one in a series displayed around the building near Dhaka's Shahbag Square in March this year,

depicting defendants at the International Crimes Tribunal (ICT) failing to evade the hangman's rope.

Qader Molla, 64, is an assistant secretary-general of Jamaat-e-Islami, Bangladesh's largest Islamic political party. He was recently convicted of crimes against humanity at the ICT, a domestic



court in Dhaka trying alleged perpetrators of atrocities during the country’s 1971 war of independence from Pakistan. During the war, Jamaat opposed independence for East Pakistan, as Bangladesh was then called.

In the tribunal’s maiden verdict in January, former Jamaat member Abul Kalam Azad, 63, was convicted in absentia of crimes against humanity and genocide, and sentenced to death. After Qader Molla was sentenced to life imprisonment on 5 February 2013, demonstrators amassed at Shahbag Square to demand that he receive the death penalty, with some calling for a ban on Jamaat and its student wing, Islami Chhatra Shibir.

Shishir, a 25-year-old student collecting signatures from people supporting the death penalty for the accused, told *IBA Global Insight* the protestors did not want the tribunal to compromise politically – with government or opposition – to save the defendants. He says they want fair trials, but if the accused did not receive the maximum punishment it would indicate that the tribunal was flawed. ‘The level of killing, the level of rape these people have committed during the war – there is no second option,’ says Shishir, whose parents fought for independence in 1971. ‘The people who stood against the nation during the war, now, as a Bangladeshi citizen, I don’t want these people to live in this country.’

Though the protests had thinned out by mid-March, traces of the unrest were visible. Posters demanding justice for the crimes of 1971 peeled on fences and the remaining Shahbag faithful manned roadside booths in the rain.

Imtiaz Ahmed, a professor of international relations at Dhaka University, says initially the Shahbag protests were neither pro-ruling party

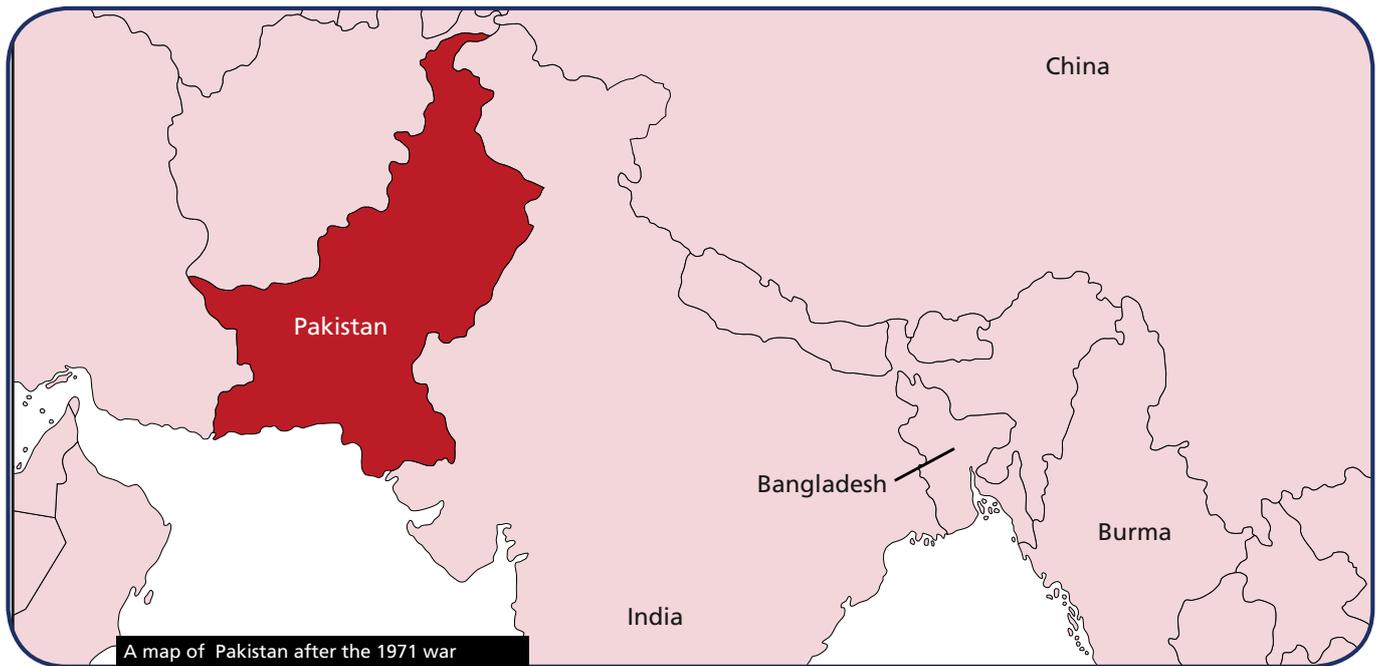


A portrait of Abdul Qader Molla dangles from a tree outside Dhaka University’s Faculty of Fine Arts. The ICT sentenced Qader Molla to life imprisonment for crimes against humanity in February 2013. Photo: Mary Kozlovski

nor pro-opposition, but the Awami League eventually co-opted them. ‘The more control they took of the movement, the less effective it became,’ he says.

### Young generation demands justice

For years prior to the ICT’s inception in March 2010, civil society groups insisted on an accountability process to address crimes



### The 1971 war in East Pakistan (Bangladesh)

East Pakistan and West Pakistan were two non-contiguous regions that formed the predominantly Muslim state of Pakistan, created after the end of British colonial rule in India in 1947. East and West Pakistan were separated by over a thousand miles of Indian territory. The Awami League party, led by prominent Bengali nationalist Sheikh Mujibur Rahman, won a majority of seats in the 1970 election. All of the seats were located in East Pakistan.

Following months of political negotiations after the election, the Awami League was prevented from taking power when, on 25 March 1971, Pakistani forces launched the military 'Operation Searchlight' in East Pakistan to quell stirrings for independence led by Bengali nationalists. Countless people were killed, raped or disappeared during the ensuing civil war, in which India intervened militarily on behalf of East Pakistan. The war ended on December 16, 1971, resulting in the creation of the independent state of Bangladesh. The principle of secularism was enshrined in the 1972 constitution.

Among other political parties, Jamaat-e-Islami opposed independence from Pakistan in 1971. Defendants at the International Crimes Tribunal (ICT), including Jamaat figures, have been accused of membership in or responsibility over Pakistani auxiliary forces – such as Al-Badr and Al-Shams – and of having committed atrocities during the war. Jamaat denies these accusations.

Jamaat re-established itself in the late 1970s, when religious parties were permitted to reform. It has since been allied with various parties at different times – including the ruling Awami League – and is presently in coalition with the opposition Bangladesh Nationalist Party (BNP). Imtiaz Ahmed, a professor of international relations at Dhaka University, says Jamaat aimed to survive politically by participating in elections, and gaining key positions through party alliances.

committed during the war, after several constrained government attempts in the early 1970s. Then in the lead-up to national elections in 2008, the now ruling Awami League – led by Prime Minister Sheikh Hasina, daughter of former party leader and independence figure Sheikh Mujibur Rahman – promised, if elected, to hold war crimes trials.

Professor Ahmed says that when a caretaker government took over before the 2008 election young voters in particular pressed for trials, perhaps partly because the ruling party at the time, the Bangladesh Nationalist Party (BNP) was allied with Jamaat. 'There were several ministers who were from Jamaat so young generations started asking: "How can people who were against the very birth of Bangladesh now raise Bangladesh flags and become ministers?" Probably the victims and a lot of people felt humiliated.'

'Awami League very prudently thought that since the young generation is demanding this, let us put this in our election manifesto,' he adds. 'I'm not really sure whether Awami League by itself wanted the trial.'

The ICT is now split into two courts – Tribunal I and Tribunal II – each with a three-judge bench. It is convened and run under Bangladesh's International Crimes (Tribunal) Act 1973 (ICTA), which provides for the prosecution of people for 'genocide, crimes against humanity, war crimes and other crimes under international law' committed in the country, including during the 1971 war. Contrary to its name, the ICT has no backing from the United Nations or other international bodies.

When this edition of *IBA Global Insight* went to press, ten defendants had been formally



Passersby scrutinise a banner hanging outside Dhaka University, featuring images of defendants at the ICT. The face of Delwar Hossain Sayedee, who was sentenced to death by the ICT in February 2013, is crossed out. Photo: Mary Kozlovski

*‘There were several ministers who were from Jamaat so young generations started asking: “How can people who were against the very birth of Bangladesh now raise Bangladesh flags and become ministers?”’*

**Imtiaz Ahmed**  
Professor of International Relations  
Dhaka University

indicted by the ICT. Six of the accused are Jamaat members, one is a former Jamaat member and two are members of the opposition BNP, presently allied with Jamaat. The tribunal also recently charged Awami League member Mubarak Hossain. Kalam Azad and two Jamaat defendants have been convicted. Three further Jamaat members have been arrested and are under investigation.

Tensions spilled over after verdicts were issued for Qader Molla and 73-year-old Jamaat Vice-President Delwar Hossain Sayedee, a prominent preacher sentenced to death for crimes against humanity on 28 February. After the Sayedee judgment, clashes between Jamaat supporters

and police rippled across the country. The streets have become gauntlets for competing histories and visions of Bangladesh.

In a statement issued on 1 March 2013 in response to the violence, Human Rights Watch reported that while Awami League supporters had engaged in violence and vandalism, most deaths seemed to have been caused by police responding to attacks by Jamaat members and supporters that killed officials and civilians. Media reports indicate that over 100 people have been killed so far in clashes between protestors and police linked to the trials.

Residences, shops and temples belonging to the Hindu minority in Bangladesh – a Muslim-majority country – were attacked, in circumstances that remain unclear. According to Amnesty International, some survivors alleged that the perpetrators participated in protests led by Jamaat and Shibir. Jamaat has denied involvement in the assaults.

Recently, the government banned several websites and police arrested four bloggers in April on accusations that they had hurt Islamic religious sentiments. That month, scores of demonstrators descended on Dhaka demanding the execution of ‘atheist’ bloggers they claimed had ‘defamed’ Islam, while thousands of secularists attempted to counter the rally. One blogger was murdered in February after reportedly demanding that Jamaat be banned and its leaders executed; Jamaat condemned his murder and denied any involvement.

For months opposition-led strikes have disrupted the country and dented its economy, as confrontations between backers of various

political factions continued. BNP has called for its detained politicians and activists to be freed, voicing concern at the Awami League's intention to retain power until the national election – expected in late 2013 or early 2014 – rather than handing over to an interim caretaker administration.

Jamaat has denied that its members belonged to armed, defence or auxiliary forces or committed atrocities during the war, arguing that they do not fall under the ICT's jurisdiction. They claim the government is using the court to cripple the party and mislead the public. Jamaat and its lawyers have also argued that the ICTA was promulgated to prosecute specific Pakistani military officials after the war. 'After 40 years, this chapter has been opened, so we say that this 1973 Act is being used now by the party in power to suppress and oppress the party in opposition,' says Abdur Razzaq, chief counsel for the Jamaat defendants.

Razzaq, an assistant secretary-general of Jamaat, says the ICTA should be amended to comply with the recommendations of the international community – which declared it to be below international and Bangladeshi standards – and any trials should be held under international supervision because of political interference.

'Either the trial process should be according to the international standard, or according to the national standard,' he says, adding that the investigation of an Awami League member was an attempt to give the court the appearance of balance.

ICT prosecutor Tureen Afroz says the tribunal is trying accused war criminals, not political leaders. 'Any political group in Bangladesh would like to capitalise [on] war crime trials – let them do it,' she says. 'But don't take out the whole issue of this, the plight of these victims – 40 years, this nation, the people waited for justice.'

Skulls recovered from two sites in Mirpur, Dhaka, on display at the Liberation War Museum in Dhaka. Photo: Mary Kozlovski



Imtiaz Ahmed says people had begun to suspect that Awami League was using the ICT for political purposes in the lead-up to the election. 'Since Jamaat is in alliance with BNP, a lot of people were thinking that maybe the ruling party is trying to divide or break the opposition,' he says. [1971] would be a good card to use because it's an emotional card.'

### War stories

The 1971 war is a deeply sensitive topic in Bangladesh. At a small colonial building in the Dhaka suburb of Segunbagicha, the Liberation War Museum chronicles the lives and deaths of Bengali 'freedom fighters', as they are called locally. Mofidul Hoque, a trustee and member secretary of the museum, says it is currently able to exhibit only about a tenth of its archival material.

Behind glass cases in an upstairs room are bones exhumed from two sites in the capital 'to bear witness to inhuman atrocities of Pakistan army and their collaborators'; in another, the shirts and trousers of slain rebels are carefully folded next to pictures of their owners. The museum's walls are crowded with old photographs, press clippings and famous speeches. Evidence presented at the ICT leans heavily on such contemporaneous material, and on witness testimony – both of which are curled at the edges after the passage of over 40 years.

Though estimates diverge considerably, government officials claim that three million people died during the 1971 war, a number cited in ICT documents. This figure has been disputed as heavily exaggerated. Thousands of people were killed or disappeared in Bangladesh during the war and many women were raped, but without further research more accurate figures are likely to remain elusive.

In their 1990 book *War and Secession: Pakistan, India and the Creation of Bangladesh*, Richard Sisson and Leo E Rose wrote that it remained impossible to obtain reliable estimates of how many 'liberation fighters' were killed in combat, how many Bihari (non-Bengali) Muslims and supporters of Pakistan were killed by Bengali Muslims, and how many people were killed by Pakistani, Indian or Liberation Army fire and bombing during the war. 'One thing is clear,' Sisson and Rose say, 'the atrocities did not go just one way, though Bengali Muslims and Hindus were certainly the main victims.'

Many civil society groups, victims and their descendants have steadfastly backed the war crimes trials, which they feel are a crucial process denied them for over 40 years.

Shaheen Reza Noor, Executive Editor at Bengali-language newspaper *The Daily Ittefaq*, says he was 15 years old when his father

Sirajuddin Hosain – then executive editor of *Ittefaq* – was abducted from their house in Dhaka in December 1971, by armed Bengali men whom he says belonged to Pakistani auxiliary forces.

Noor, a member of Generation 71 – an organisation formed by the children of those who fought for independence – says people were not demanding trials for revenge. ‘We are asking for civilisation. Because this country was created through blood and the people who got killed, their killers must be brought to book,’ he says.

He adds that the ICT was dealing with crimes different from those adjudicated by an ordinary court, and those calling for ‘international standards’ had failed to properly define them. ‘[The accused] are getting opportunities to appeal and they are getting all sorts of cooperation that a normal court is supposed to offer,’ Noor says. ‘It’s a court which is dealing with the crimes committed some 42 years back, so it must have some sort of flexibility. Otherwise how can they prove the crimes?’

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*‘After 40 years, this chapter has been opened, so we say that this 1973 Act is being used now by the party in power to suppress and oppress the party in opposition’*

**Abdur Razzaq**

*Chief counsel for the Jamaat defendants*

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While trials, appeals, and investigations are ongoing, a comprehensive assessment of the ICT’s operations is difficult. In recent months, however, rights groups, UN representatives and foreign officials have criticised the tribunal, expressing concerns about its independence, adherence to fair trial standards and imposition of the death penalty. Bangladeshi government officials have repeatedly stated that the ICT meets international fair trial standards and that the trials are being conducted transparently.

Concluding his third visit to Dhaka in November 2011, US Ambassador-at-Large for War Crimes Issues Stephen Rapp stated that while some of his recommendations for amending the ICT’s rules to ‘ensure fair and transparent proceedings’ had been implemented, many had not. Rapp suggested that ‘crimes against humanity’ be properly defined, that the accused be accorded the same rights as citizens charged

with other violent crimes, and that prosecution and defence witnesses be protected. He also says the trials should be more accessible to the public.

Abbas Faiz, South Asia researcher at Amnesty International, says the organisation was concerned that the defence could not challenge the ICT’s jurisdiction. He adds that the tribunal was currently addressing peoples’ involvement in human rights violations against those who supported the creation of Bangladesh. ‘Some of the victims were people who opposed the creation of Bangladesh,’ Faiz says. ‘They also deserve justice.’

Additionally, Abdur Razzaq claimed the defence did not have sufficient time to investigate cases, had been intimidated by police when attempting to collect evidence and had not been permitted to call as many witnesses as the prosecution.

Shortly after Qader Molla’s sentence was announced the Bangladeshi parliament amended the ICTA to, among other things, permit the trial of ‘organisations’ for their roles during the 1971 war and allow the prosecution to appeal sentencing, where previously it could appeal only an acquittal. The Bangladesh Trial Observer, a trial observation program of the Asian International Justice Initiative, wrote that as the 2013 amendments have retrospective effect from July 2009, the Qader Molla judgment and sentence are within their purview.

According to the Trial Observer, under the amendment Jamaat could be tried for its alleged role in the crimes of the 1971 war as it is listed as a ‘political organisation’ on the electoral roll. In February Human Rights Watch stated that such retroactive legislation violated fair trial standards and undermined the ICT’s legitimacy.

Tureen Afroz says the amendment allowing the prosecution to appeal a sentence simply gave the prosecution and defence equal standing under the law, there were numerous instances where the defence was given extra time to prepare, and defence attorneys were receiving support from experienced foreign lawyers.

In August 2011 Toby Cadman, a member of the IBA’s war crimes committee and one of three British lawyers representing Jamaat defendants, was refused entry into Bangladesh.

### **Tense atmosphere**

In the charged atmosphere after the ICT’s first convictions, journalists have come under fire for critical coverage of the tribunal, in some cases by media in Bangladesh. Meanwhile, local media reported that authorities shuttered the printing press of pro-opposition daily *Amar Desh* in April, barred it from using the printing facilities of the pro-opposition *Daily Sangram* and arrested *Amar Desh*’s editor on allegations of sedition and



A group of men examine images of ICT defendants attached to a fence outside Dhaka University's Faculty of Fine Arts. Photo: Mary Kozlovski

*'Any political group in Bangladesh would like to capitalise [on] war crime trials – let them do it, but don't take out the whole issue of this, the plight of these victims – 40 years, this nation, the people waited for justice'*

**Tureen Afroz**

*Prosecutor, International Crimes Tribunal, Dhaka*

publishing information that incited religious tension. Other *Amar Desh* staff were reportedly arrested and the *Daily Sangram* editor was charged.

In December, *Amar Desh* and other media published leaked conversations between former Tribunal I chairman Mohammed Nizamul Huq – who has since resigned from the ICT – and Brussels-based Bangladeshi lawyer Ahmed Ziauddin. *The Economist* reported that month that it had obtained recorded phone and email communications between the two men, which suggested that the government pressured the tribunal to hasten proceedings and that Ziauddin assisted in preparing court documents and simultaneously communicated with the judge and the prosecution on the same issues.

Asked about the conversations, Tureen Afroz says disclosure of private communications could only be justified where there was public benefit and the discussions should not be considered grounds for not holding trials. 'We only get to see those parts of the communication which would apparently help the accused,' she says.

'We have seen with the Qader Molla decision how even government [ministers]... were very shocked, why there was no death penalty.'

Afroz says the government is a party to the tribunal and provided the prosecution with necessary support. 'It's a tribunal which decides, depending upon... the evidence before it, depending upon the argument placed before it, and the witnesses placed before it,' she adds.

Meanwhile, various accounts have emerged of the alleged abduction of a man named Shukharanjan Bali. He was originally listed as a prosecution witness but disappeared in November 2012, on the day he was purportedly set to testify for the defence in the Sayedee case. According to defence lawyers, plain-clothes police officials apprehended Bali outside the tribunal, took him to a nearby vehicle and drove him away.

Tureen Afroz says Bali was a key prosecution witness who had been 'somehow managed' and became a defence witness, and neither the tribunal nor the prosecution knew he would be at court that day. She says that the government was investigating the incident.

Bali's current whereabouts are unknown.

While emphasising the significance of a judicial process to attend to crimes committed in 1971, observers expressed concern that potential interference in the ICT could damage its legacy in Bangladesh.

Imtiaz Ahmed of Dhaka University says the question of fair trials had arisen from suspicions that the ICT was being manipulated. 'The next few months are very critical,' he says. 'We don't want somebody [to] get hanged for partisan reasons.'

Amnesty International's Abbas Faiz says that if fair trial issues are not addressed, the ICT is likely to engender fresh human rights violations. 'We feel that some people may be shielding themselves against prosecution by being members, or linked to, the governing party,' he adds.

With multiple verdicts still to be handed down, it is uncertain how the country will react in the coming months and how the ICT itself will ultimately be judged, but the hopes of many Bangladeshis – and perhaps their votes in the forthcoming election – are riding on the tribunal's decisions.

'Before the formation of the tribunal, we actually don't know where to go, whom to ask,' says Shahbag supporter Shishir. 'Now we have a tribunal and we can demand to the tribunal: please [provide] justice and please make those who are criminals accountable.' ❌

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# Bread and circuses, but precious few aqueducts

**BRIAN NICHOLSON**

**Brazil's President is undeniably popular, but she and her country face considerable challenges. *IBA Global Insight* finds out why.**

In Brazil's northeast, affected by drought and archaic land ownership, many miles of huge new irrigation canals lie empty, the naked concrete cracking under a relentless sun. Once the promise of prosperity, and clean, reliable drinking water for 12 million people in an area the size of Great Britain, the \$4bn project is now over budget and behind schedule. Meanwhile lawyers argue, crops wither and cattle die.

The muddled São Francisco River scheme is symbolic of the difficulties Brazil faces as it tries to speed up much-needed infrastructure development. And it's just one more example of how President Dilma Rousseff is struggling to confront her country's challenges. Now more than half way through her landmark tenure as Brazil's first female chief executive, Rousseff faces a growing sensation that, once again, Brazil may be failing to live up to its promise.

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*'Today lawyers waste lots of time with red tape and the judiciary is very slow, so maybe you can charge fees for ten or 12 years, but it's not the best way to do things'*

**Alexandre Bertoldi**

*Managing partner, Pinheiro Neto Advogados*

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'Brazil wasted a fantastic opportunity for development after 2008, when the international crisis did not impact Brazil,' said Antonio Corrêa Meyer, a former São Paulo State Justice Secretary and a founding partner of Machado, Meyer, Sendacz e Opice Advogados, a major business law firm. 'Necessary reforms to labour laws [and] the tax system...were not made.'

First things first, though: Rousseff is popular. Around 65 per cent of adults describe her government as good or excellent. Unemployment remains low, in the five to six per cent range, and most workers have won real wage rises. New car sales set a record last year in what is now the world's fourth largest market.

Newspapers are still packed with ads for new apartment blocks. Brazilians last year spent a record \$22bn on foreign travel. And some 14 million families receive grants of up to \$150 a month provided they keep their kids in school and vaccinated. There are also subsidised housing programmes, free university programmes and a host of other redistributive measures to temper what remains one of the world's most unequal countries.

Not surprisingly, such programmes give Rousseff strong support from the poor. It's similar to the political bounty that late Venezuelan President Hugo Chavez enjoyed amongst his country's lowest-rung citizens, although Rousseff is no *Chavista*.

## **The show goes on**

So much for the bread. As for circuses, popular attention is increasingly focused on football. The 32-nation final of the FIFA World Cup will take place next year in Brazil, itself a five-times tournament winner. Spectacular new or refurbished stadiums are taking shape in 12 cities nationwide. Some were scheduled for use in this year's FIFA Confederations Cup in June, a trial run for the big event.

With so much apparently going right, what's not to like? Well, economic growth was just 0.9 per cent last year, down from 2.7 per cent in 2011. Fair enough by European standards, perhaps, but when judged against its peers

the country's 3.6 per cent aggregate growth in 2011 and 2012 compares with an International Monetary Fund two-year average of 11.8 per cent for all emerging market and developing economies. Inflation is edging up, the trade balance is falling, the public-sector deficit is worsening and the country's overall investment rate remains lower than might be hoped, despite bold government promises.

Of course, this may be manna for economic analysts but it's unlikely to shift the opinion polls unless it impacts unemployment and spending power. And not all businessmen are gloomy: foreign direct investment into Brazil hit a record in 2012, in particular targeting offshore petroleum exploration and service sectors like insurance, health plans, commerce and real estate, all of which benefit from rising wages.

Trade with China was \$85bn last year. In 2003, it was just \$6bn. This is truly transformational stuff. The IMF has forecast its GDP will increase considerably from \$2.2tn last year to over \$3.1tn over the next five years.

Nevertheless, there's a growing realisation that Brazil is failing to attack the underlying problems that may hold back such growth.

The São Francisco River debacle is symptomatic. Diverting water to drought regions had been debated since the 19th century, until the then-President Luiz Inácio Lula da Silva banged the gavel and started work in 2007, promising two-stage delivery in 2010 and 2012. '[Emperor] Dom Pedro tried to divert the river in 1847 but they wouldn't let him,' Lula said. 'I'm not an emperor or a prince, I'm just a poor refugee from the drought who became President, but I know the reality of the Northeast and I'll get it done.'

Sadly, it wasn't so simple. Much of the vast undertaking was put out tender with inadequate planning. Some land expropriation had been overlooked, as had canal passage through a planned Indian reservation. Construction crews hit unforeseen geological snags, cash ran out and work stopped. It's a common tale but not the only problem slowing up infrastructure investment; companies also complain of slow environmental licensing, repeated legal challenges and unreliable payment schedules. All this generates more work for lawyers; less for engineers. And poor infrastructure is one of the main reasons for Brazil's economic sluggishness – it placed 48th overall on the World Economic Forum's latest Global Competitiveness Ranking but 70th or worse for health, infrastructure, institutions and primary education.

Compounding the embarrassment, the minister responsible for overseeing major investments during much of Lula's government

was none other than Rousseff. Indeed, Lula touted her managerial competence when choosing her as his successor, although she had never before run for elective office.

### Delayed reforms

Unfortunately, Rousseff's reported predilection for spreadsheets, micro-management and banging heads could not prevent the federal highways programme being slammed into slow gear for a year. Now she has proposed major plans to transfer thousands of miles of highways and railways, plus dozens of ports and airports, to private concessionary operators in exchange for investments.

With the October 2014 presidential election already dominating the political scene, Rousseff appears resigned to pragmatism. She has

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*'Long-discussed structural reforms to the tax system, for example – described by Brazilian Bar Association President Marcus Vinícius Furtado Coelho as having "unanimous support, but always being postponed" are totally off the radar'*

Alexandre Bertoldi

Managing partner, Pinheiro Neto Advogados

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outsourced much of the back-room negotiation to her predecessor. Lula's private office in São Paulo has become a go-to place for cutting deals. But long-discussed structural reforms to the tax system, for example – described by Brazilian Bar Association President Marcus Vinícius Furtado Coelho as having 'unanimous support, but always being postponed' are totally off the radar.

'Brazil has many good mid-sized and family companies, and business lawyers will always have plenty of work,' Meyer said, 'but the lack of reform means we focus more on the middle market than major deals and major greenfield investments.'

For Alexandre Bertoldi, managing partner at Pinheiro Neto Advogados, a large and long-established office, more reform could lead to more gratifying work: 'Today lawyers waste lots of time with red tape and the judiciary is very slow, so maybe you can charge fees for ten or 12 years, but it's not the best way to do things.' ☒

Brian Nicholson is a freelance journalist. He can be contacted at [brian@minimaxeditora.com.br](mailto:brian@minimaxeditora.com.br)



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- **The legal processes of energy and resources work:** A look at principal forms of business organisation available in three selected jurisdictions, the common legal processes involved in resources and energy work, and the differences.
- **Model Form Documents:** a review of the valuable resources available to energy and resources lawyers in the model form documents produced by the IBA, AMPLA and the AIPN.
- **The human face of project finance:** strategies to manage the social and cultural impact of financing resources projects in developing nations.
- **Unconventional gas and Asian gas markets** – the rapid development of unconventional gas projects globally has found its way to Asia. What does this mean both as a producer and consumer?
- **Indonesia – changing the resources rules?** What impact will changing rules in Indonesia have on mining and resources investment by current and potential investors in that country?
- **Indian Infrastructure/resources projects and their financing:** A review of issues for lawyers advising international developers, contractors and bankers seeking to undertake/finance infrastructure/resources projects in India.
- **The use of arbitration and expert determination in South East Asia:** A look at their application and use in the region.

## Who should attend?

Private practitioners, in-house counsel and regulators of all levels of experience involved in resources and energy law.

## Contact:

If you have any queries or are interested in attending or sponsoring the Conference please contact Susan Timbs on +613 9670 2544 or [s.timbs@ampla.org](mailto:s.timbs@ampla.org).

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