Chapter 14

The IBA Global Financial Crisis Project Dublin Conference: The Presidential Priority Sessions

John Claydon, Mary Gold and Luz Nagle

The President of the IBA and the Task Force on the GFC, Poverty and Law identified a series of programmes offered at the IBA Annual Conference in Dublin in October 2012 called the 'Presidential Priority Sessions'. These sessions either specifically addressed the effects of the GFC on poor people and poor countries and the role of law in mitigating or exacerbating poverty or explored examples of both hard and soft law regimes that have been created to protect, either directly or indirectly, the interests of the poor. While the latter sessions did not specifically address the effect of the GFC on poverty, they did provide some guidance on how governments, businesses and the law could be more responsive to the legitimate interests and economic concerns of the public in times of economic stress. In addition to the keynote address, the Presidential Priority Sessions included the PPID Showcase on Lawyers Against Poverty and selected other sessions that addressed the human rights and economic protection of the public at large and specifically of the poor, as well as anti-corruption initiatives, AML and CSR regimes. In the following pages we will review these various sessions. This is the work of three rapporteurs: John Claydon, Mary Gold and Luz Nagle.

Keynote address by Joseph Stiglitz

Professor Joseph E Stiglitz, a Nobel Prize Laureate in Economics and University Professor at Columbia University in New York, addressed the negative effect of the GFC on the already growing income inequality between the rich and the poor and outlined the almost insurmountable challenges the poor face in trying to improve their economic condition. Supporting the need for significant government financial stimuli, he advocated the abandonment of the currently popular economic austerity programmes that have been implemented by the US and many European and other governments to reduce debt. An edited version of Professor Stiglitz's address follows.[1]

Conventional approaches to solving the GFC

It has been five years since the beginning of the GFC and the downturn continues with no imminent and sustained recovery in sight. The question that arises is how long can the downturn be expected to last? It must, first, be stressed that economies do not recover without intervention.

The diagnosis relating to the GFC is fairly simple: the financial sector caused the problem, abetted by government supervisory failures – poor banking policies and lax regulations allowed a host of bad practices and their consequences to occur. To treat the problem it was agreed that time was needed

1 Prepared by Mary Gold.

to give the banks an opportunity to heal, something that was initially predicted to take about one-and-a-half to two years. A mild stimulus was introduced to keep the economy going. Then it was posited that with the financial sector healed, the country could resume its pre-crisis position. However, both the diagnosis and the prescription were wrong. In fact, four years have lapsed since the stimulus and the economies in the US and Europe have not recovered. Even if the GFC played a critical role in the recession it was caused by much more than a financial crisis.

In addition, conventional wisdom maintained that the absence of effective banking would impede investment. But once the banks were restored to reasonable viability, it was believed that investments would be restored. And indeed, outside real estate, investment has largely returned to normal in the US. Large firms are sitting on an estimated $2tn of cash. It is, therefore, not the lack of finance that is holding back the US economy; it is the failure to use these funds to stimulate growth. Instead the upshot is that the GFC has made the underlying problems worse in two ways: by leaving excessive household leverage in its wake and an overhang of real estate. This has important implications, especially for countries like Ireland and Spain, which outdid the US in the seriousness of the bursting of their bubble. As a result, it will be hard to restore these economies to full employment because of the gap in aggregate demand and the debt load of individuals.

Growth in income inequality

Prior to the GFC, wealth inequality was growing in most countries. The consequence of the crisis, particularly in Europe and the US, was an exacerbation of this trend. Today, the median US household income has reverted to what it was in 1996. The median real income for full-time male workers is back to what it was in 1968. The median wealth is back to what it was in the early 1990s. In 2010, the year of the recovery, 93 per cent of growth went to the upper one per cent.

Before the crisis, real estate in the US represented 40 per cent of all investment. Today it is less than half of that. Similarly, before the crisis, the savings rate in the US was near zero. In fact, the bottom 80 per cent of the population was consuming 110 per cent of their income. The personal savings rate now has gone up from near zero to a little over four per cent – still far below the traditional average and below what it ought to be. Thus, even after deleveraging, consumption will not be anywhere near what it was before the crisis. In terms of demand, housing construction and consumption, the very activities that give an economy its energy, are going to be markedly weaker than they were in the years before the crisis.

Addressing the structural transformation of work

In the US and Europe, the main economic structural transformation occurring today is the movement away from manufacturing. This shift parallels what happened before the Great Depression. At that time, there was an increase in productivity in the agricultural sector with the result that fewer farmers were needed to grow the necessary food for the population. At the end of the 19th and beginning of the 20th centuries, 70 per cent of the population worked directly or indirectly in agriculture; it is now only three per cent. However, those working in the agricultural sector moved to manufacturing jobs. Today we face an analogous problem. Now because of increased productivity in manufacturing, workers have to move out of manufacturing to other types of employment – mostly in the service sector. In the US and Europe, these problems are compounded by globalisation: a larger share of the shrinking global employment in manufacturing will be centred in emerging markets, and a smaller share in the US and Europe. Even China has had a marked decrease in employment in manufacturing. In the US, manufacturing represented 21 per cent of employment in 1980 and by 2012 it was under nine per cent. We are victims of our own success. When this kind of productivity increases, employment shrinks.

Europe faces similar structural transformation problems. Spain and Greece are in depression – they have 25 per cent unemployment, the same rate as in the Great Depression. In addition, more than 50 per cent of their young people are unemployed. This is the period of their lives in which they should be building their skills; instead their human capital is weakening and they are becoming alienated. The future of these countries is in jeopardy – their stability, democracy, etc, are affected. The diagnosis of

what went wrong in Europe was incorrect and as a result the prescription was miscalculated. We were told that the problem was excessive debt but Europe's debt-to-GDP ratio was better than that in the US. Before the crisis, Ireland and Spain had a surplus, not a deficit. They fulfilled all the conditions of the Maastricht Convergence Criteria. Unlike Greece, they were not profligate. If Greece were the only problem, a small country of 10 million people, it would be easily solved. Because the problem was misdiagnosed as overspending, the prescription has been harmful austerity programmes.

Markets do not often make these structural transformations easily because those who have to move from the old sector to the new have low wages and losses in asset values and thus cannot make the necessary investments. For these reasons, government needs to take a major role. In facilitating the shift from agriculture to manufacturing, governmental Keynesian industrial policies were crucial. The GI Bill and the Second World War were important to the post-depression transformation. Today, an even larger government role is needed. Unfortunately government is not doing what it should and is backing away from this role. A major problem in the US is that the government is pursuing contractionary policies.

The adverse effects of austerity measures

Austerity policies have been tried many times and have almost never worked – they were tried unsuccessfully by Hoover in 1929 and more recently by the IMF in East Asia and Latin America. These austerity policies have converted downturns into recessions and recessions into depressions. The only examples in which austerity has worked are in cases in which exports have replaced government spending – something that is easiest for small counties where there are flexible exchange rates. It is impossible for large economies that have weak trading partners to depend on exports for recovery.

In Europe, austerity measures are being pursued. In the US, they have also been used to fight the GFC. Employment in government today is 600,000 lower than before the crisis and if there had been a normal increase to reflect the increase in the labour force, some 1.2 million employees would have been added to the government sector. Thus the decline in government employment is one of the major factors contributing to the weakness in the economy. At the same time, these cutbacks are hurting the ability of the US to make the structural transformations that are needed.

Europe's flawed banking and currency arrangements

Europe has the additional problem of a flawed currency arrangement: the euro is untenable. The establishment of the eurozone was based on politics and not economics. The economic conditions necessary for a common currency were not present. The EU leaders knew this but hoped that, in the ensuing years, there would be sufficient changes to make the system work and make the eurozone viable. During good times, there was no impetus to address the issue. Nothing was really done until after the crisis in Greece, when a succession of misguided measures was implemented. Having a common currency takes away two critical adjustment mechanisms for dealing with a disturbance: exchange rate and interest rate adjustment mechanisms. It does not appear that internal devaluation, the lowering of wages and prices, can work on their own. What is needed in Europe is a structural change of the euro arrangement.

Emerging markets

Emerging markets have weathered the 2008 storm much better than expected. The reason was the decoupling of the emerging markets' economies from those of the advanced industrialised countries. This was surprising because we believed that the emerging markets were dependent on exports to the industrialised world. China and India did well for a time, but are now experiencing a slowdown from nine per cent to seven per cent growth. China is supportive of slower but higher quality growth and has the knowledge and ability to ensure that growth does not dip too low. The slowdown is affecting Latin America and Africa because, while they benefit from high resource and commodity prices in a challenged economic environment, demand reduces. However, overall, growth in the emerging markets will not be strong enough to pull the US and Europe out of the doldrums.

Recommended fiscal responses to the GFC

- In the US, the foreclosure crisis has to be dealt with first. Today, 20 per cent of homes are underwater; seven million people have lost their homes and several million more will also lose them. There have to be mechanisms introduced for members of the public to restructure their debt, such as, a homeowners' version of the US bankruptcy regulation Chapter 11, which allows businesses to seek protection while they restructure.
- There needs to be a fiscal stimulus. It constitutes the best way to address the looming deficit and debt. The first stimulus worked: unemployment in the US would have peaked at 12.5 per cent without it – it peaked at ten per cent. But the stimulus was too small. A further stimulus could bring down unemployment even more. It must be remembered that the recession caused the deficit, not the other way around. Right now the US can borrow at a negative real interest rate and can invest in the public sector, and in infrastructure, technology and education, all of which have suffered from underinvestment. These investments would allow the US to solve some of the structural transformation problems, address the problem of inequality and promote economic growth.
- If the economic framework were to change in Europe, it too could have access to credit, at the same negative real interest rate as the US could.
- Europe also needs a common banking system with common deposit insurance and common resolution. The mutualisation of debt is also necessary. At present, indebted countries can only borrow at high interest rates; this weakens their economies and is bad for an economic turnaround.
- The choice should be made between more Europe (a mutualisation of debt in a common banking framework) or less Europe (a break-up of the eurozone as it currently exists).

Recommended legal responses to the GFC

- Corporate governance needs to be improved in order to correct an incentive system that distorts behaviour and encourages the financial sector to engage in excessive risk taking. The primary role of this sector, rather than engaging in speculation, should be to provide loans for small and medium businesses that cannot raise money in capital markets. It is also important for stockholders to have a 'say in pay'.
- Banking regulation has to be introduced that prevents banks from doing harm to others by engaging in speculation that can hurt customers, shareholders, employees, etc. Individual members of society possess an important freedom, that is, the freedom not to be harmed by others.
- Lawyers have to be mindful of the fact that because of the GFC, legal aid has been reduced for those who cannot afford legal services. The legal profession has to insist that there is access to justice for all.

The PPID Showcase: Lawyers against poverty

Joint Session of the PPID Division and Pro Bono/Access to Justice Committee[2]

The purposes of this session, moderated by Joss Saunders of Oxfam, were to survey the current extent of poverty globally, discuss its causes and recommend how lawyers can facilitate change

Professor Thomas Pogge of Yale University quoted a wealth of statistics dealing with the current state of poverty. He noted, for example, that nearly a third of all deaths in any year are due to poverty-related causes, and that nearly a billion people are chronically undernourished and lack safe drinking water and adequate shelter. Two billion people lack essential medicines and even more lack adequate sanitation. The income disparity between the world's rich and poor is grossly disproportionate, and increasing. Regulatory systems encourage those with resources to augment them: strong protection of intellectual property rights favours the rich countries at the expense of the poor ones, undermining

2 Moderator: Joss Saunders, Oxfam, Oxford, England. Speakers: Sr Stanislaus Kennedy, The Sanctuary, Dublin, Ireland; Thomas Pogge, Yale University, New Haven, Connecticut, USA; Muhammad Yunus, Yunus Centre, Dhaka, Bangladesh. Prepared by John Claydon.

developing country exports. Pollution affecting areas of basic needs, such as water and land use, harms the poor. As rule-making moves to the global level, where there is little transparency and accountability for implementation, those with resources are well placed to lobby governments to protect their interests.

The prevalence of poverty globally inspired the establishment of the UN Millennium Development Goals, eight international development goals that have been adopted by all UN Member States and a number of international organisations for achievement by 2015. Each goal has specific targets. The first goal is 'eradicating extreme poverty and hunger'. In 2005, the G8 countries agreed to provide funds to cancel US$40–55bn in debt owed by poor countries to enable them to channel the saved resources into programmes for alleviating poverty, and the 2012 UN Millennium Goals Report stated that the target of reducing extreme poverty by half by 2015 has already been met. It also projected, however, that by 2015 nearly one billion people will be living on incomes below the US$1.25 per day poverty line. Of the US$120bn of yearly official development assistance, only US$15bn, amounting to 0.04 per cent of global household income, goes to basic food security, health, education, water and sanitation services. It is clear from this report that progress in achieving these poverty-related goals has been uneven, with much more necessary.

Global norms establishing social and economic rights are often viewed as voluntary or 'programmatic' rights, subject to gradual rather than immediate achievement. Some scholars argue, however, that the entitlement of everyone to an adequate standard of living enshrined in the 1948 Universal Declaration of Human Rights may have achieved the status of customary international law, binding all states. Whatever the merits of this jurisprudential debate, more progress is essential. In Professor Pogge's view, it can be achieved only when the Millennium Development Goals move from detached goals to agreed responsibilities for meeting them.

Professor Pogge also addressed the issue of what a post-2015 anti-poverty agenda might contain. His suggestions include:

- a tax on countries providing subsidies or export credits that constitute trade barriers;
- a tax on pollution emissions;
- payment of a share of arms exports profits;
- a tax on multinational corporations to redress the effects of lost tax revenue on poor populations;
- sanctioning banks and countries that maintain secret bank accounts with anonymous owners;
- forbidding only minimally representative rulers to undertake debt burdens for their countries;
- taxing national resource purchases from unrepresentative rulers; and
- an option to reward new medicines according to their health impact, if sold at cost.

Muhammad Yunus, Nobel Peace Prize recipient and founder of the Grameen Bank in Bangladesh,[3] discussed his experience with microfinance and spoke eloquently about the causes of, and solutions to, poverty. The Grameen Bank, which is owned by borrowers, was set up because traditional banks will not lend to most of the world's population as not 'credit-worthy', a characterisation with which Professor Yunus disagrees. The Grameen Bank provides banking services to the very poor, especially in rural areas, and makes many small loans to encourage entrepreneurship, overwhelmingly (98 per cent) to women. There has been a 97 per cent repayment rate on the US$11.5bn in loans that have been made. The loans are based on trust and accountability rather than on collateral and legal documentation. In this model, credit is seen as essential for achieving the economic emancipation of the poor.

For Professor Yunus, poverty is created by the current financial system, and existing laws and institutions can be an impediment to alleviating poverty in a number of ways. The 'charity' nature of government social programmes, for example, serves to perpetuate poverty over generations. What is needed, in his view, is social entrepreneurship, in the form of non-profit and joint ventures, that empowers the young to innovate and breaks the cycle of dependence.

Sister Stanislaus (Stan) Kennedy discussed the state of homelessness in Ireland. She noted that one person in six lives below the poverty line in Ireland and that there are currently an estimated 5,000 homeless people and 93,000 households on the list for affordable housing. Homelessness greatly impairs the enjoyment of other rights, including privacy, employment, education and participation in the political process through voting. Children and young people are particularly vulnerable when

3 See Chapter 2 on page 19.

homeless people are often denied adequate healthcare, especially aftercare. One member of the audience argued that homelessness would continue unless there are systemic changes, including a greater role for government in job creation, and agreed with Professor Yunus that handouts will not solve poverty problems. Another member of the audience noted that constitutional protection of the right to housing exists in some countries, such as South Africa, and should be recognised elsewhere.

Each of these speakers, as well as some questioners from the audience, considered the impact of the global recession on meeting the poverty challenge. In many countries, including Ireland and Japan, the number of people on welfare has increased during the recession, placing greater pressure on scarcer government resources and heightening social tensions between welfare recipients and those who believe the claimants for enhanced need are to blame for their situations. Sister Stan remarked that benefits such as food and housing that are considered to be 'commodities' during boom periods become 'rights' during a recession, when budget cutbacks limit their distribution. Other recession casualties that affect poverty include official development assistance funds, incentives for job creation and the willingness of banks to make loans to stimulate business and of corporations to invest in schemes for enhancing development. Finally, as noted by Professor Yunus, access to justice suffers: without the availability of robust pro bono activities by lawyers, poor people will not have a real opportunity to have their rights vindicated.

The final speaker picked up the pro bono theme and discussed the role of lawyers in eradicating poverty. Yasmin Batliwala, Chief Executive of A4ID, explained her organisation's role in ensuring 'that legal support is available to those involved in the fight against poverty and that lawyers and development organisations have the skills and knowledge to use the law as an effective development tool'. With an explicit emphasis on the Millennium Development Goals, A4ID helps development organisations to understand what their legal needs are and, through a brokered matching programme, puts them in touch with thousands of lawyers worldwide who can provide free legal services to these groups as well as to bar associations, social enterprises and developing country governments. A4ID also runs training programmes on a variety of topics, including sessions for lawyers and law students on how to use their legal skills to promote development. Since 2006, A4ID has sponsored more than 1,000 legal projects that have provided approximately US$40m worth of free advice and services.

Apart from raising awareness about the accountability of lawyers and law firms for alleviating poverty, the A4ID model has advantages for law firm pro bono programmes. In some parts of the world where the legal profession has embraced pro bono, particularly North America, the emphasis has been on litigation opportunities, with transactional lawyers often remaining aloof. The social entrepreneurship model of A4ID broadens the range of work to encompass such transactional activities as drafting contracts, conducting due diligence and transferring intellectual property rights, offering to lawyers and firms not only a development focus but also a more comprehensive pro bono agenda with related training benefits.

Some IBA lawyers are in firms that work with A4ID, others whose firms are part of the Lex Mundi network have access to multinational social entrepreneurship activities through the matching programme of the Lex Mundi Pro Bono Foundation, and yet others may contribute to development and poverty alleviation through their firms' CSR enterprises. There is a role for the IBA to seek to extend these opportunities to the entire IBA membership.

Recommendations for reducing global poverty

- Lawyers could ensure that an adequate range of norms is in place to support development.
- They could monitor and assess the effectiveness of rule-making initiatives.
- They could evaluate the social impact of routine practice activities that may advance the interests of clients but harm the poor (for example, certain forms of intellectual property protection).
- They could help prevent predatory elites from embezzling resources that should be used for development, by examining the circumstances surrounding the award of contracts (eg, whether tendered, taxes paid and due diligence completed) and by challenging suspect transactions.
- Although specific rules of professional conduct vary from jurisdiction to jurisdiction, lawyers everywhere share the professional value of responsibility for implementing the rule of law. This responsibility transcends providing client service and preventing clients from engaging

in illegal conduct to encompass a commitment to ensuring that the law contains robust rights, including those that alleviate poverty and secure economic development.
- Another key component is providing the disadvantaged with means to redress rights violations. Activities such as participating in rule-making, assessing the effectiveness and social impact of laws, and engaging in pro bono work are essential to the wellbeing of a legal system and inherent in the role of lawyers.
- The IBA's Pro Bono and Access to Justice Committee might consider exploring ways of collaborating with A4ID, other like organisations, and bar associations to expand both the totality of anti-poverty legal projects and access to them by IBA members.

The dispossessed: an examination of groups on the edge of society, their legal rights, legal challenges, successes and failures

Joint Session of the Human Rights Law and Indigenous Peoples Committees[4]

This session, presented jointly by the Human Rights Law and Indigenous Peoples Committees, focused on the legal challenges facing peoples who live on the fringes of mainstream society. Specifically, it explored the situation of the Irish Travellers and, through case studies, initiatives involving an indigenous group in Canada and an ethnic group in Colombia that aim to improve their social and economic wellbeing.

Case Study: Irish Travellers

The Irish Travellers (ITs) are an ethnic minority numbering at least 29,573 in Ireland.[5] Their religion is the same as the Irish majority, Roman Catholicism. Although most ITs speak English, they do have a traditional language, Shelta. They also have a distinctive culture mainly related to a nomadic way of life that parallels that of the roughly 12 million Roma who live throughout Europe and has existed for at least 1,000 years. Typically self-employed, they make their living by selling portable consumer goods and recycling scrap metal. Many are on government assistance, due in part to employment discrimination. Often viewed by the general population as thieves, idlers and drunkards, they are subject to widespread prejudice, discrimination and ostracism.

Social problems within the IT community are serious, and discrimination is rife. At three times the national rate, infant mortality is high, with approximately ten per cent of children dying before their second birthday. Life expectancy is low: for men, it is around 15 years less than that of the general population. The suicide rate is estimated to be six times the national rate. Although many ITs live in social housing, at least temporarily, sub-standard housing with poor sanitation is a feature of nomadic life. Homelessness is also encouraged by the refusal of landlords to rent to ITs, of estate agents to sell to them, and of insurance companies to insure them. There is a high rate of illiteracy among ITs, and only about 15 per cent of children proceed to secondary education. ITs are often relegated to segregated education, though a 2010 ruling of the Irish Equality Tribunal in favour of an IT child may open the door to greater access to mainstream education.

Much of the discrimination against ITs is indirect, such as planning provisions that prohibit caravans except for 'indigenous' people. Access to justice exists, but many ITs cannot afford the cost of going to court (and some lawyers are reluctant to take their cases). Legal aid is available for some matters, but may not cover areas of particular concern to ITs, such as eviction from land. Although Ireland is a

4 Moderator: Steven Cooper, Ahlstrom Wright Oliver & Cooper, Sherwood Park, Alberta, Canada. Speakers: Susan Fay, Irish Traveller Movement, Dublin, Ireland; David Joyce, The Law Library, Dublin, Ireland; Victor Rodriguez-Rescia, international expert and consultant on human rights, San José, Costa Rica; Garth Wallbridge, Yellowknife, Northwest Territories, Canada. Prepared by John Claydon.

5 Figures at April 2011, compiled and presented by the Central Statistics Office: see 'Profile 7 Religion, Ethnicity and Irish Travellers – Ethnic and Cultural Background in Ireland', *Census 2011 Results*, (Government of Ireland 2012) available at www.cso.ie/en/media/csoie/census/documents/census2011profile7/Profile,7,Education,Ethnicity,and,Irish,Traveller,Commentary.pdf.

party to international human rights treaties and has anti-discrimination legislation in place, the official status of the ITs as merely a 'social' group, rather than an ethnic group, impedes protection and has been noted as a matter of concern by The UN General Assembly's Third Committee.

The GFC has not only had a negative impact on traditional IT occupations due to overall lower spending levels, but has also stimulated reductions in the legal protection and social programmes available to ITs. Access to justice has been further eroded by legal aid cutbacks. Special programmes designed to alleviate the accommodation and education problems of ITs have been undermined significantly by major budget cutbacks. In times of economic crisis, marginalised groups may be viewed as scapegoats and potentially subjected to collective violence, as reflected in recent attacks on nomadic communities in France.

The Irish Traveller Movement is a network of organisations devoted to securing the human rights of ITs and improving their economic condition. Its Law Centre, consisting of one lawyer and a few interns, engages in strategic litigation on behalf of ITs, typically about ten cases a year. It recently won two cases challenging planning and social housing regulations as indirect discrimination and has a case on education discrimination before the Supreme Court. The Irish Traveller Movement has also been active in trying to get lawyers more involved in helping ITs.

Case study: the Tlicho Investment Corporation

The Tlicho Nation is an indigenous population numbering 4,000 in Canada's Northwest Territories. In 2003 it signed the Tlicho Land Claims and Self-Government Agreement with the governments of Canada and of the Northwest Territories. This Agreement, which entered into force in 2005, created the Tlicho government and gave the Tlicho title to 39,000 square kilometres of land, including subsurface rights, as well as a share in the royalties from developing that land.

The Tlicho Investment Corporation is owned by the Tlicho Nation and operates a number of businesses and joint ventures with other groups and companies. Aided by the opening of three diamond mines on Tlicho land that provide significant employment for members of the Nation, the Corporation provides support services in a variety of sectors, including transport, construction, food services and property management. These enterprises have improved the life of all members of the Nation by supporting training and education, healthcare, a seniors' centre and other social programmes, as well as creating a sense of pride in a group moving to a more central position from the fringe. Although problems of drug and alcohol abuse still exist, this example demonstrates the value of entrepreneurial partnerships in a context where marketable natural resources can finance business activity.

Case study: joint development of natural resources in Colombia

Another example of corporate interaction with a minority group in the resource sector is a recently launched partnership in the Choco region of northwest Colombia involving an Australian mining company. The population of this region is mainly of African descent, having originally arrived in the 16th century slave trade to work in gold mines and on sugar plantations and cattle ranches. It has been generally poor, with a high illiteracy rate and inferior nutrition and healthcare. The region is, however, rich in natural resources, notably gold, silver, platinum and copper.

In 1991 the Government of Colombia recognised the Afro-Colombians' collective ownership of ancestral lands as well as cultural rights similar to those of indigenous people. Special mining zones were established on these lands in 2007, including the right to carry out mining activities. The local population subsequently negotiated a joint exploitation project with an international corporation that contains high labour and environmental standards, ensures transfer of technology and provides the people with health insurance and social security. The first of its kind in Colombia, this new project has the potential to improve the economic condition of local inhabitants while preserving the environment.

Beyond the tipping point: is mankind populating itself into extinction?

Public Law Committee[6]

The panel discussion addressed overpopulation and its impact on the developing world and on dwindling resources. Population issues are not a new problem. One view proffered in the panel discussion asserts that population growth and concerns about population are ancient themes. A Babylonian saying goes, 'The noise of humankind has become too much for me / With their noise I am deprived of sleep / Let there be a pestilence upon mankind' (Enlil, Babylonian Tablet, 1600 BC).

It's not that people everywhere are having more children, because in many parts of the world birth rates are decreasing. The concern is that the poor populations are having more children and this is putting great stress on resources, particularly resources in weak and failing states where population growth is unchecked.

We know that most of the world's population lives in India and China, and that the highest population growth is occurring in these two countries and elsewhere throughout the developing world. So what we have are superpowers, albeit each a developing nation, with strong centralised governments, on a collision course with how to deal with the rapid growth of mostly poor and disaffected citizens. How can these states deal with the demand burgeoning populations (particularly among the poor) place on services and resources while trying to sit at the table of First World nations?

The debate over population growth and control is between optimist and pessimist viewpoints. For the optimist, the population challenges will pass and may be a problem of government systems and policy-making. The pessimists see population growth as catastrophic, as resources continue to become limited and depleted and government is either unable to adjust to critical conditions, or resorts to draconian measures to deal with them.

The optimist view with regard to overpopulation is that:

- the environment is adaptable and resilient;
- technological progress allows increasing agriculture production and the efficient implementation of environmentally friendly measures;
- the prices of energy, resources and food are at historically low levels;
- markets have and will always 'regulate themselves' by adapting prices in case of scarcity;
- the material and economical wellbeing of world population has reached unprecedented levels and all fears that this might change are unfounded or, at best, exaggerated; and
- internalisation of pollution costs is a solution to environmental large-scale deterioration: the 'polluter pays' principle.

The optimists feel that negative population growth should be achieved through de-growth and a voluntary reduction of our standards of living to achieve 'sustainability in a changing world'.

The pessimist view sees the rise of an Orwellian omnipresence that takes drastic measures to control population growth. Eugenics and forced sterilisation come to mind, as well as the renunciation of international treaties and agreements that provides protection for individual rights and resources. Failing to address population growth now before it gets completely out of control could lead to the rise of a police state in which the government is in complete control of human destiny, human reproduction and all human rights.

The GFC affects growing vulnerable populations; there are more disadvantages to population growth than advantages. Among the disadvantages are: global warming; lack of food; lack of jobs; lack of minimum standards of living; increased political instability; and crime. The more population figures grow, the more is expected of the ecosystem to sustain that growth.

The pessimist view asserts that: current patterns of production and consumption are not sustainable; extinction is now on tomorrow's agenda; the indifference of most of the G20 governments, multinationals and large corporations is particularly alarming; and apocalyptic scenarios are like waiting for barbarians to come.

6 Chair: Bernard Bekink, University of Pretoria, Pretoria, South Africa. Speakers: Christo Botha, University of Pretoria, Pretoria, South Africa; Hachem El Husseini, Abou Jaoude & Associates, Beirut, Lebanon; and Tatiana Falcão, IBFD, Rio de Janeiro, Brazil. Prepared by Luz Nagle.

How is overpopulation and excessive population growth addressed by the state? Population can, to a significant extent, be controlled by legislation and implementation of public law. One of the questions asked in the context of population growth is, 'What if public law puts public policy (based on a public opinion of primal fears, racism, xenophobia and desperate interpretations of self-interest) into effect?'

Public law is the legal arm that puts government policies into place and controls government power. This good aspect of public law addresses socio-economic issues, health, public welfare and sociology, among others. When population growth cannot be stopped, those laws that regulate the structure and administration of the government, the conduct of the government in its relations with its citizens, the responsibilities of government employees and the relationships with foreign governments will be applied. Public law also addresses the protection of human rights, civil liberties, the weak and dispossessed and downtrodden.

Public laws are used to control certain crises and often those regulations have the most impact on the poor and disaffected. Public laws address present issues like global warming (shifting weather patterns, massive floods, prolonged droughts), severe economic instability, the demise of the welfare state, massive unemployment, famine, lack of food security, the scramble for scarce resources, water shortages and mass displacements and immigration issues.

The bad aspect of public law-making with regard to overpopulation raises uncomfortable and unpopular issues that government world forums would prefer not to address, such as compulsory birth control, one-child policies, immigration curbs and even forced population displacements and resettlement. These issues then raise fears, particularly among those most vulnerable (the poor and politically under-represented) that can lead to attitudes of ultra-nationalism and neo-fascism (eg, Eastern Europe), racism and xenophobia – and then violence and mayhem.

There was a question raised to the panel as to whether we ought to be looking at what is in the interest of one country, or should we be looking at what is in the interest of humankind?

Some suggest that as a society we have failed to pay attention to what has been happening in relation to population growth and now we have a global problem on our hands. For instance, if markets fail to address structural inequalities because investors are preoccupied with short-term gains and profit-taking, such as knowing that deforestation leads to climate deregulation but doing nothing about it. The instability and conflicts that arise due to lack of attention paid to the consequences of thoughtless natural devastation can lead to problems that may end up as all-out wars.

Some developing nations address the notion of demographic fatigue – the inability to cope with problems like poverty, food supplies, access to basic resources, limited access to education, employment and housing.

The third speaker took an interesting tax policy approach to address population growth, offering a plan for incentives and disincentives to regulate it. Using taxation proposals as a deterrent to population growth is possible, for instance, considering whether a government might introduce a family tax. How much should that state pay for family planning and population controls? Who should pay for what and how much should be spent on healthcare to cover abortions, birth control mechanisms and vasectomies?

The long view is that we need international law instruments (treaties) to reverse the steep slope of degradation of the planet (like carbon emissions and pollution).

Pillage: the corporate war crime?

War Crimes Committee[7]

Much of this summary is based on Professor Linda Malone's presentation, together with the rapporteur's views and knowledge of the topic.

7 Chair: Stuart Alford, Chambers of Francis Oldham QC, London, England. Speakers: Linda Malone, William & Mary Law School, Williamsburg, Virginia, US; Rupert Skilbeck, Open Society Justice Initiative, New York, US; and Jamie Williamson, International Committee of the Red Cross, Geneva, Switzerland. Prepared by Luz Nagle.

Pillage goes back centuries, but how does it affect poverty? Pillage depletes the resources of the state to have the treasures and resources that can be used for the benefit of the poor. Yet, pillage has yet to be considered a grave breach of conduct, particularly during conflict.

When countries occupy other countries, corporations can become involved in the plundering of those states. Also, when governments are weak or susceptible to corruption, corporations move in to take advantage and under the guise of development conduct a de facto pillaging of natural resources. The case in point discussed on the panel by one speaker is the *Kiobel* case in Nigeria. Plaintiffs sued Dutch Shell and a British firm for allegedly aiding and abetting the Nigerian Government's killing and torture of oil exploration protestors between 1992 and 1995. The case was brought before the US courts under the Alien Tort Claims Act. The outcome of the case when the US Supreme Court rules on *Kiobel* sometime in 2013 is that, according to Professor Malone, 'It portends the possibility of the end of an extremely important domestic enforcement mechanism for civil suits against individuals and corporations that engage in gross human rights abuses,' and that, 'The significance of this case can't be overestimated globally. It's not just a case of US litigation'. The precedents clearly suggest that the Act applies to abuses that occur outside the US, and Malone said it would be 'tragic, historically incorrect and legally incorrect' if the court rules that the Act does not apply extraterritorially.

There are other developments that impact on whether redress for pillage can be used to help poor or indigenous populations. Recently, after a long legal negotiation, Yale University began returning artefacts from Machu Picchu to Peru that had been taken by explorer Hiram Bingham a century ago. Repatriating cultural treasures brings actual value to the nations plundered, although it is up to the government to determine how valuable antiques should be used to help support impoverished communities and indigenous communities. In China, authorities are trying to crack down on the aggressive and well-organised destruction of archeological sites by trying to preserve the estimated five per cent of all archaeological sites on the mainland that have not yet been plundered. By preserving sites and bringing plundered objects back to their place of origin, tourism can be developed to bring people to archeological sites, which in turn helps support communities.

The role of the law to combat corruption and money laundering and to increase effective corporate social responsibility: lessons for improving the plight of the poor

The Presidential Priority Sessions included discussions of various regimes that have been developed to ensure that businesses engaged in both domestic and transnational operations observe both hard-law and soft-law standards of behaviour that have an often indirect effect of protecting the public interest, including economic protection, and the respect for human rights. While these standards were not introduced to deal specifically with the effect of the GFC on the poor, they do offer examples of regimes that have had some success in protecting them from various types of exploitation.

Anti-corruption initiatives[8]

Corruption, in the form of bribery and fraud, has a disproportionate impact on the poor. By adding an estimated minimum of ten per cent to the cost of doing business in many parts of the world, and as much as 25 per cent to the cost of public procurement, it increases the price and decreases the quality of goods and services to those who can least afford them, as companies seek to recoup money paid for illegal purposes. As a result, competition is distorted and economic inefficiencies created. Often the allocation of financial resources by governments to public projects depends more on the potential for illegal gain by unscrupulous rulers, bureaucrats and business facilitators than on considerations of the public interest. Especially in the case of developing countries, those resources may be diverted to the foreign bank accounts of wrongdoers rather than being used to develop local economies. This situation is inevitably compounded during periods of economic downturn, when investment is reduced and public projects and anti-poverty programmes suffer from budget cutbacks.

Recently there has been significant progress in the formulation, strengthening and enforcement of

8 Prepared by John Claydon.

a wide range of anti-corruption norms adopted at the global, regional and national levels. While many countries have introduced anti-corruption legislation, of particular importance nationally are the US Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act, which have broad extraterritorial application that brings many major foreign enterprises within their ambit. The FCPA prohibits companies and individuals from bribing foreign officials, while the UK Act prohibits commercial bribery as well, and holds a corporation liable strictly for failing to prevent bribery committed by an 'associated person', subject to a due diligence defence. The only truly global treaty combating corruption is the UNConvention against Corruption, which entered into force in 2005 and now has more than 150 States Parties; it covers ML as well as bribery and illicit trading. The OECD Anti-Bribery Convention, in force since 1999, requires subscribing states to make the bribing of a foreign official a criminal offence. The Organization of American States, the African Union and Council of Europe have adopted regional conventions, and the EU has anti-corruption instruments in place.

A series of non-binding norms has also provided additional stimuli to the global campaign to defeat corruption. In 2004 a tenth principle, stipulating that 'Businesses should work against corruption in all its forms, including extortion and bribery', was added to the UN Global Compact. Launched in 2000, the Compact is a strategic partnership between the UN and 8,700 corporations to promote human, labour and environmental rights. More recently, the Ruggie Guiding Principles on Business and Human Rights ('Ruggie'), which were adopted by the UN Human Rights Council in 2011, elucidate the corporate responsibility to protect human rights that flows from the first two principles of the Compact. Of particular relevance to fighting corruption is the requirement in Ruggie that businesses should exercise due diligence to prevent or mitigate adverse human rights impacts linked to business partners and the supply chain. Ruggie also stipulates the components of the diligence expected. Ruggie has significant potential in light of European developments: the EU has endorsed the Principles and asked Member States to submit, by the end of 2012, national plans for implementing them.

2012 Global update on anti-corruption legislation and enforcement

Anti-Corruption Committee[9]

One of three Dublin Conference sessions dealing with corruption analysed the implementation of anti-corruption laws and treaties. Over the past few years this issue has achieved prominence due in large part to aggressive enforcement of the FCPA by US authorities. In a number of high-profile cases involving major global corporations (such as Halliburton, Daimler, Baker Hughes and Monsanto), the US Department of Justice and Securities and Exchange Commission have assessed increasingly heavier fines and other financial penalties. The largest was in the 2008 *Siemens* case, where Siemens paid a total of US$800m as well as a similar amount to settle related German charges. In 2010 the overall assessment total was US$1.8bn in 74 enforcement actions, more than double the previous year's total, but the number of enforcement actions has subsequently declined. There has been only one prosecution under the UK Bribery Act, but this is not surprising since that Act only came into force in July 2011 and is not retroactive. There have, however, been prosecutions under predecessor legislation.

A panel of experts discussed the worldwide enforcement of anti-corruption laws, referring to a number of current or recent cases, including *Walmart* (Mexico), *BAE* (Tanzania) and *Safran* (Nigeria). The panel also considered possible amendments to existing instruments, surveyed the industry sectors in which corruption is the most and least prevalent, and discussed new legislative initiatives (eg, in Brazil). The overall consensus was that corruption remains a serious problem, but there is now heightened concern with it, greater corporate compliance and particularly an increase in national enforcement efforts. For example, in 2011, in the first significant action under Canada's 1999

9 Co-Chairs: Nicola Bonucci, OECD, Paris, France; Tim Dickson, Paul Hastings Janofsky and Walker, Washington, DC, USA. Speakers: Leah Ambler, OECD, Paris, France; Nick Benwell, Simmons & Simmons, London, England; Edward H Davis, Jr, Astigarraga Davis, Miami, Florida, USA; Hamidul Haq, Rajah & Tann, Singapore; Roberto Hernández, COMAD, Mexico City, Mexico; Marianne Klausberger, Ethical Risk Appetite, Darmstadt, Germany; Babajide Ogundipe, Sofunde Osakwe Ogundipe & Belgore, Lagos, Nigeria; Leopoldo Pagotto, Zingales & Pagotto Advogados, São Paulo, Brazil; James Tillen, Miller & Chevalier Chartered, Washington, DC, USA. Prepared by John Claydon.

Corruption of Foreign Public Officials Act, a resource company admitted in court that it had bribed a government official in Bangladesh to reduce compensation payments stemming from a natural gas explosion. The company agreed to pay a fine of CAD9.5m.

The presentations and questions addressed three themes relating specifically to the impact of corruption (and anti-corruption initiatives) on poverty.

First, a questioner stated it was important to examine systemic factors encouraging poverty, since in poor countries, bribes provide financial support for entire families. If bribery is eliminated, this support will not be replaced. Bribery will remain as an overwhelming incentive until the underlying causes of poverty are dealt with. Secondly, there was discussion of the topic of recovering assets tainted by fraud, corruption and other forms of illegality, as reflected in the stereotypical case of a dictator embezzling large sums of money and transferring them overseas ('kleptocracy') and the example of huge cost overruns on a building project. Gains such as these are likely to exacerbate poverty by diverting funds from initiatives that could reduce poverty, and have a devastating impact during a recession when funds are much more limited. Although some countries have regimes in place to trace and recover these gains, there is a great deal more to do. Thirdly, it was suggested that when there is recovery of any of these gains they, along with the large fines and penalties that have been levied in anti-corruption proceedings, should be returned to 'victim' countries to fund public development projects.

Reference was made in this session to the importance of the anti-corruption work undertaken by the IBA to raise awareness among lawyers of anti-corruption norms and of the roles lawyers play in fighting international corruption. This work includes the Anti-Corruption Strategy for the Legal Profession (in collaboration with the UN and OECD), the 2010 survey on 'Risks and Threats of Corruption and the Legal Profession', the training programmes that have been initiated and the ongoing work of the IBA's Bar Issues Commission to develop guidelines for law societies and bar associations dealing with anti-corruption measures for the legal profession.

Lawyers around the world are increasingly collaborating with corporate clients to conduct risk assessments and develop effective anti-corruption compliance systems in order to protect their clients' business reputation. The lawyer's task of instilling a level of trust in a client that induces them to accept costly and unwanted procedures is facilitated to some extent by the reputational risks inherent in aggressive enforcement. But ensuring that clients refrain from illegal conduct is, however, for the lawyer more than simply a matter of client protection: it is also required as a component of the shared responsibility of lawyers worldwide to promote respect for the rule of law.

Fair and equitable treatment: the issue of corruption in international investment arbitrations

Anti-Corruption Committee[10]

A second Dublin panel dealing with anti-corruption focused on the relatively narrow topic of what arbitrators, investors and states should do when confronted with corruption in international investment arbitrations. The evidence could relate to the awarding of a contract or to the conduct of the arbitration proceedings. One difficulty is that corruption is rarely admitted and is difficult to prove. Since arbitrators have no subpoena power, they may have to resort to national courts to obtain conclusive evidence. There may, however, be 'indicators' of corruption, such as questionable payments and previous convictions. Should an arbitrator who strongly suspects corruption deny jurisdiction, then report the suspicions to national authorities? Or should the arbitrator assume jurisdiction, investigate the matter (using circumstantial evidence and inferences if necessary) and deny the benefits of corruption to any party involved in it? If so, what standard of proof is required, and should the burden of proof be shifted?

10 Chair: Nicola Bonucci, OECD, Paris, France; Louis Christophe Delanoy, Bredin Pratt, Paris, France; James Crawford, University of Cambridge, Cambridge, England; Vladimir Khvalei, Baker & McKenzie, Moscow, Russian Federation; Khawar Qureshi QC, Serle Court, 6 New Square, London, England; Brigitte Stern, University of Paris, Paris, France. Prepared by John Claydon.

The 2006 World Duty Free arbitral decision found corruption to be illegal because it is contrary to 'transnational public policy'. In view of a plethora of national laws making corruption illegal, a strong argument can be made that, apart from international conventions, declarations and guidelines, corruption is also illegal under international law because its prohibition amounts to one of the 'general principles of law' under Article 38 of the Statute of the International Court of Justice. Though some arbitrators disagree, the general consensus among the panellists was that the current state of international law requires arbitrators to investigate to the extent possible claims of corruption by a state or company and to deny the fruits of corruption to complicit parties. It was suggested that the IBA could assist arbitrators by developing guidelines for the award of state contracts and for evidentiary inferences that could be drawn from the process (for example, relating to tendering and the use of intermediaries).

The role of financial institutions in the fight against corruption: can we bank on them?

Anti-Corruption Committee[11]

The third session dealing with the corruption theme addressed the role of the World Bank, the regional development banks and private sector banks in minimising corruption.

The World Bank has maintained a strong focus on eliminating corruption to alleviate poverty in the aftermath of the 1996 'cancer of corruption' speech by President James Wolfensohn. Since 1999, the Bank has imposed sanctions and generated prosecutions in hundreds of cases involving its funding. It has at its disposal a range of enforcement options, including early voluntary disclosure, suspension and requiring compliance checks before a suspended company is eligible to receive additional contracts. An example of the suspension sanction is the case of a company that received a three-year 'debarment' after being convicted of bribery by the courts of Lesotho. One panellist urged that the debarment sanction should be used sparingly, if at all, and only in the most extreme cases, because it could exacerbate poverty by eliminating direct and collateral jobs.

The regional development banks, including the European Bank for Reconstruction and Development (EBRD) the African Development Bank, the IDB Group and the Asian Development Bank, also exist to combat poverty and operate corruption sanctions regimes. In 2010, the multilateral development banks agreed to automatically reciprocally enforce sanctions for fraud and corruption imposed by any one of them. This cross-debarment agreement applies to sanctions for more than one year and does not cover the actions of government officials. As with the World Bank (a party to this agreement), suspensions are normally for three years, with reinstatement contingent on demonstrating improvement in corporate governance and compliance. The EBRD has found that voluntary disclosures and settlements have increased since the conclusion of this agreement because companies are concerned about the wide-ranging consequences now resulting from a single suspension.

Many private sector banks (currently 75), in addition to being subject to general anti-corruption norms, have also adopted the Equator Principles (2006), a set of voluntary standards for managing risk in financing projects exceeding US$10m. Based on the environmental standards of the World Bank and the social policies of the International Finance Corporation, the Principles require adopting banks to make loans only to borrowers able and willing to comply with them. Risks are identified and agreements made to manage them. There is independent review of assessment plans and a monitoring obligation. Lenders must report annually on implementation of the Principles, which cover such matters as protection of human rights, health, cultural property, land use, indigenous peoples, the environment, employment standards and 'disadvantaged or vulnerable groups'. While banks have a reasonable governance structure for dealing with ML, their record on corruption is mixed, but more attention is now being paid to the problem. These Principles offer the banks an opportunity to

11 Chair: Tim Dickson, Paul Hastings Janofsky & Walker, Washington, DC, US. Speakers: Raja Chaterjee, Morgan Stanley, New York, US; Pascale Dubois, World Bank, Washington, DC, US; Enery Quinones, European Bank for Reconstruction and Development, London, England; Frederic Raffray, Law Offices of the Crown, St Peter Port, Guernsey. Prepared by John Claydon.

intensify collaboration in this area.

The IBA, through its Human Rights Institute (IBAHRI), has recently convened a Task Force on Illicit Financial Flows, Poverty and Human Rights to explore how illicit financial flows affect poverty and the enjoyment of economic and social rights. In addition to including whether poverty is a violation of international human rights law, as well as the impact of tax evasion on poverty, the Task Force's ambitious mandate encompasses corruption and embezzlement of public funds, asset recovery and the role of lawyers in combating poverty. The study will be published in book form and include recommendations for states, corporations and lawyers. The IBAHRI has emphasised the importance of undertaking the study at this time because of the economic crisis that the global financial system is undergoing.

Should professional ethics regulate money laundering by lawyers?

Joint session of the Anti-Money Laundering Legislation Implementation Group and the Professional Ethics Committee[12]

Adverse societal effects of money laundering

In its January 2011 submission to the Financial Action Taskforce (FATF) Secretariat, the IBA's Anti-Money Laundering Legislation Implementation Group noted World Bank research suggesting that 'between US$20 billion and US$40 billion is taken from developing countries by corrupt leaders and applied for their own personal use, outside their own country'. In addition, in 2006, the IMF, using 1996 statistics, 'estimated that between US$590 billion and US$1.5 trillion' have been laundered. This amount could well represent 'between two and five per cent of the world's gross domestic product'.[13] Given these statistics, ML exacerbates the existence of poverty and further compromises the already precarious lives of the poor.

The FATF defines the term 'money laundering' as 'the processing of… criminal proceeds to disguise their illegal origin' in order to '"legitimize" the ill-gotten gains of crime'.[14]

Purpose and scope of the FATF Recommendations

The IBA session, 'Should professional ethics regulate money laundering by lawyers?' addressed the scope of the lawyer's ethical and legal obligations to report on a client's suspected ML activities. Central to the discussion were the revised 2012 FATF Recommendations that sought to establish an international standard, 'a comprehensive and consistent framework of measures,' that countries should implement in order to combat ML. The revised Recommendations are meant to 'address the new and emerging threats' posed by ML and 'clarify and strengthen' the obligations outlined in earlier FATF recommendations. They continue to use a 'risk based approach' that allows countries 'to adopt a more flexible set of [preventative AML] measures', so that they can concentrate on the higher risk areas in which ML can occur. (FATF Recommendation, 8). These higher risk areas would be 'subject to enhanced procedures such as enhanced client due diligence and enhanced transaction monitoring'.[15] Thus lawyers, in monitoring and preventing ML activities, are seen as the gatekeepers to the international financial system. Most are not aware that they are expected to fill this role.

12 Co-chairs: Nicole Bigby, Berwin Leighton Paisner, London, England; Stephen Revell, Freshfields Bruckhaus Deringer, Singapore. Speakers: Anne Birgitte Gammeljord, Council of Bars and Law Societies of Europe, Brussels, Belgium; Adrian Evans, Monash University, Melbourne, Australia; Eva Massa, Law Society of Ireland, Dublin, Ireland; Kevin Shepherd, Venable, Baltimore, US; Valentina Zoghbi, SJ Berwin, London, England. Prepared by Mary Gold.

13 Paul Allan Schott, *Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism, Second Edition and Supplement on Special Recommendation IX,* (Washington, DC, The International Bank for Reconstruction and Development/ The World Bank/The IMF 2006) 6.

14 FATF, 'What is money laundering?' www.fatf-gafi.org/pages/faq/moneylaundering last accessed 27 March 2013 quoted in Schott (see above n 12) 3.

15 Kevin L Shepherd, 'The Gatekeeper Initiative and The Risk-Based Approach to Client Due Diligence' (April 2012) The Review of Banking and Financial Services, 33.

Preserving client confidentiality versus being a FATF gatekeeper

The interplay of these Recommendations with the confidentiality provisions to which lawyers are bound pursuant to their professional code of conduct, as well as other obligations imposed by law, place members of the legal profession in a precarious position. The Recommendations identify lawyers as members of 'designated non-financial businesses and professions' and place specific obligations upon them. When they 'prepare for or carry out' certain types of financial transactions for their clients, for example, real estate transactions (Recommendation 22), they are subject to the same recording and reporting requirements that are placed on financial institutions. Some of these reporting requirements may conflict with the principle of client confidentiality. Although the revised Recommendations acknowledge the importance of solicitor–client privilege in certain circumstances, it appears that a lawyer will not generally be able to raise privilege with respect to a client's suspected ML activity.

FATF's risk-based approach

The revised FATF standards result in more regulation. The requirement for increased clarity in the risk-based approach has led to specific reporting and monitoring requirements for both jurisdictions and regulated entities. Further guidance is needed on the types of clients, countries and transactions that can be classified as either higher or lower risk. A range of measures that can be applied to either type of risk needs to be identified. To further this end, in June 2012, the FATF initiated a typology research project to compile data on various matters such as: the types of transactions for which lawyers might unwittingly facilitate ML; examples of ML activities in which lawyers have been complicit; and the types of suspected ML transactions reported by lawyers. The hope is that 'red flag indicators' can be established. In addition, information will be collected that can, in the end, offer good-practice guidelines to lawyers on how to monitor and report on suspicious transactions.

The FATF standards also require lawyers to engage in client due diligence in order to know both the corporate client and the beneficial owner of the corporate client, that is, to know who is controlling corporate ownership. Authorities may want to see the record of the due diligence investigation of clients and make a determination on the adequacy of the background checks.

In circumstances in which lawyers have either domestic or foreign politically exposed persons (PEP) as clients, they have to engage in enhanced due diligence. These PEPs may hold positions at all levels of government. Because the FATF does not include a list of PEPs, as requested by the IBA, lawyers are left to decide which of their clients fall into this category. Thus they bear the risk of correctly assessing, identifying and reporting on, when necessary, such clients. It was noted that the CIA in the US does publish a PEP list of non-nationals. It constitutes an invaluable tool for name screening. The US Treasury also maintains a PEPs list.

Many EU countries have accepted the most recent version of the Recommendations. Although the EU continues to discuss the need to improve harmonisation among its Member States, nothing yet has been accomplished. As a result, different reporting regimes exist in different countries. For example, because UK law has made the non-reporting of suspicious circumstances a criminal offence, there is extensive reporting of suspected ML. Other countries that have weak requirements have few or no reports.

Are professional codes of ethics sufficient to curb money laundering?

The session raised the question of whether existing regulatory regimes and the criminal law might be sufficient to cover the obligation of lawyers to deal with client ML activities. Because the legal profession is regulated and members are subject to professional codes of conduct that impose disciplinary sanctions for breaches of the code, lawyers already have an obligation to serve the interest of justice and advise clients against engaging in criminal activity, such as ML. Furthermore, if lawyers assist in ML, they too become involved in a criminal activity and can be struck off or disbarred. There was, however, a view expressed that, because of the failure of law societies to enforce the rules at their disposal, AML laws/regimes became necessary. It was also recognised that because AML regimes have forced lawyers into having to report their clients' suspicious activities and not 'tip off' their clients

as to the reporting, they might, in fact, be acting as agents of the state and thus compromising their professional independence. The view was expressed that few instances exist of lawyers unwittingly facilitating ML. The examples of lawyers' involvement in such activities are in circumstances in which they have generally been engaged in criminal behaviour. Despite these apparent shortcomings and contradictions, some saw this use of 'whistleblowing' to authorities as a way of addressing corruption, particularly in poor countries.

Increasing awareness of a client's possible money laundering activities

One of the benefits of AML regimes is the fact that they help increase a lawyer's awareness of suspicious behaviour and provide guidance on how to handle suspected client ML activities. Also, in the absence of such regimes, lawyers have no protection from misconduct complaints if they breach confidentiality in order to report such behaviour. Furthermore the FATF has encouraged lawyers and others to develop practice directions as a means of implementing the Guidelines. For example, the ABA has provided voluntary practice guidelines, including practical examples on how to meet the FATF requirements. They focus on the risk factors that should be taken into account when engaging in client due diligence, and identify the 'red flags' that should be of concern to lawyers. The danger in implementing any regime is that compliance can descend to little more that a mechanical adherence to the requirements.

AML regimes are meant to expand a lawyer's obligations beyond the representation of a client; they emphasise the lawyer's duty to society as a whole by according some protection to the indirect victims of this type of criminal activity, who are frequently the poor.

Recommendations

- Advocate for clearer clarification on the intersection of FATF Guidelines and the lawyer's professional conduct code regarding the confidentiality of client matters so that lawyers are better apprised of their obligations.
- Distinguish between what is required of lawyers under AML regimes and under professional conduct rules.
- Support the FATF's initiative to create a clearly described typology of transactions that lawyers can access so that lawyers have more precise guidelines for identifying suspicious transactions.
- Support the creation of model practice guidelines on AML by professional bodies that can be adopted by lawyers and law firms to facilitate the necessary investigation of clients, PEPs, beneficial owners and transactions.

CSR, the financial industry and project financing

Joint Session of the Banking Law and Corporate Social Responsibility Committees[16]

Background

Developments in the area of CSR such as the Ruggie Principles (Guiding Principles on Business and Human Rights: Implementing the UN 'Protect, Respect and Remedy' Framework), the Equator Principles (A financial industry benchmark for determining, assessing and managing social and environmental risk in project financing), along with more traditional sources of human rights such as the Universal Declaration of Human Rights and the ILO Conventions, are having a profound influence on the demands placed on transnational corporations seeking financing for large projects around the world. These companies are facing more stringent obligations to ensure that their projects do not result in human rights abuses and that the communities in which the projects are located are not adversely impacted. The imposition of such principles is seen as the use of soft law that can carry with it hard law sanctions.

Ruggie's tripartite framework: 'protect, respect and remedy'

The session on CSR, 'The Financial Industry and Project Financing', explored the nature and impact of these soft law approaches. The Ruggie Principles ('Ruggie') are based on the tripartite framework of 'protect, respect and remedy'. The state has an important role to 'protect' human rights, for example, pursuant to the adoption of human rights treaties/conventions and through the application of customary human rights law. The responsibility to protect against human rights abuses extends beyond the actions of state agents to those of third parties, thus including businesses operating within the state. The responsibility to 'respect' means that, in conducting its business, the corporation must respect the human rights of others, and, at a minimum, do no harm. This can often require companies to respect human rights in instances in which the state does not protect them or is too ineffective to do so. The company thus has an obligation to investigate the effect that the project might have on human rights and seek to prevent and/or mitigate any adverse impact. The scope of protected human rights extends to 'the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families… [In] situations of armed conflict, enterprises should respect the standards of international humanitarian law'. Thus the right to work, the health and safety of the local community, including environmental protection, constitute types of human rights that should be afforded protection.

The responsibility to 'remedy' the adverse impact of a project takes into account the use of grievance mechanisms that the company can put in place to address community concerns and issues as they arise. Engaging in ongoing collaboration and dialogue with the community improves relationships and avoids costly disruption and delays. More formal types of dispute settlement mechanisms can also be used if problems arise.

Thus under Ruggie, corporations have the responsibility to 'identify, prevent, mitigate and account for how they address their adverse human rights impacts'. It is not uncommon for large companies to create a code of conduct that is made public and can be cited as a means of self-regulating corporate behaviour. In addition, the company has the responsibility to carry out ongoing HRDD to ensure that it knows the actual and potential human rights risks its business could cause and devise mechanisms to avoid and, when necessary, rectify problems that arise.

16 Co-chairs: Michael Steen Jensen, Gorrissen Federspiel, Copenhagen, Denmark; Ignacio Randle, Estudio Randle, Buenos Aires, Argentina. Speakers: Stéphane Brabant, Herbert Smith, Paris, France; Ade Ipaye, Attorney-General and Commissioner of Justice, Lagos, Nigeria; Liisa Jauri, Nordea Group, Helsinki, Finland; Patricio Leyton, FerradaNehme, Santiago, Chile. Prepared by Mary Gold.

CSR: environmental protection in Latin America

In the Latin American context, large project financing and development have been aimed at improving economic growth and increasing employment opportunities. Of growing importance is the recognition of the need for more environmentally friendly growth that addresses the goals and aspirations of local communities. This can be achieved by following pertinent ILO convention rules:

- a company should engage in informed consultation with the local community prior to the implementation of a project;
- it should acknowledge the territories and land the communities have used but do not own; and
- it should share the investment decision-making process.

The process that is used must be inclusive and thorough so that discussions occur and decisions made at the community, industry and government levels to ensure that community concerns are effectively and efficiently addressed. The use of inclusive processes can help to achieve legitimacy for the project and improve its competitiveness. Finally, the parties should take an approach aimed at preventing the adverse impact of large projects on human rights and the environment.

The key to the implementation of Ruggie is the belief that protecting human rights is good business. The gap that frequently exists between what the law mandates and what society requires might be successfully closed by the implementation of the kind of CSR regime contained in these principles. Furthermore, companies are increasingly finding that banks involved in financing large projects are concerned about the long-term health of these projects and identify a commitment to CSR as a condition that must be met in order to obtain financing.

Using the Equator Principles as a tool to decide project financing

The Equator Principles (EP) constitute another approach to CSR that complements Ruggie. Major banks around the world have adopted these Principles 'to ensure that projects [that they] finance are developed in a manner that is socially responsible and reflect the sound environmental and management practices'. This includes such factors as labour, health and safety concerns. The Principles apply to projects that have 'total capital costs of US$10 million or more'. Furthermore, the EP particularly target projects located in non-OECD countries and in OECD countries not designated as high income. Borrowers are required to comply with the Principles in order to obtain financing and must begin by conducting a due diligence assessment of the social and environmental impact and risks of the project.

A review of the practices of the Nordea Group provides an example of how a bank has successfully implemented the EP in projects it financed. Nordea's shareholders adopted the EP in 2007 because of their desire to engage in responsible lending for projects that would have a social and environmental impact. Nordea explains the EP 'as a credit risk management framework for determining, assessing and managing environmental and social risk in project finance transactions'. The bank also wanted to provide transparent and clear information about its products and services. In addition, in 2007, Nordea signed the UN-initiated Principles for Responsible Investment. This initiative 'reflect[ed] the view that ESG can affect the performance of investment portfolios and therefore must be given appropriate consideration by investors'.

Nordea has produced its own EP Manual (toolkit) that provides guidance to the bank's project finance deal managers on how to proceed. The ten EP principles are reflected in the workflow steps the managers follow:

1. initial project review;
2. project appraisal;
3. project negotiation, commitment and monitoring; and
4. external reporting.

These steps are integrated with Nordea's general credit evaluation and decision workflow. Specialists in ESG provide assistance to the managers. Nordea's EP Advisory Group can then make recommendations on all project finance cases. With respect to the successful ones, the Advisory Group will establish the terms and conditions governing the participation in the project, including those related to environmental and social issues.

CSR: impediments to implementation

The role of corporations in socio-economic development, particularly in Africa, was also addressed in the session. The development of CSR regimes constitutes an approach to using a non-statutory instrument of development to promote ethical ways of doing business. Such regimes support the view that corporations are entities that have social responsibilities. Furthermore, the adoption of both Ruggie and the EP by corporations and banks raises an expectation that we are moving towards the adoption of internationally established principles.

However, despite the fact that banks and corporations seek to adhere to CSR principles, there are circumstances that threaten their successful application to project financing. The present economic situation compels bankers to focus sharply on profitability. If money cannot be made and loans, carrying high interest rates, cannot be paid, CSR goals are threatened. The assessment of projects for possible financing is very strict due to the presence of high interest rates and the probability of default.

In Nigeria, for example, many companies have seen long-term risks in the environmental and human rights impact of large projects and have sought to shift responsibility to the government. The existence of poor infrastructure in the countries in which the projects operate can hamper environmentally friendly operations. Because a fair amount of corruption still exists, project fairness is compromised and ethical behaviour is penalised.

Government has an important role to play in ensuring that a company meets its CSR. First, it must improve the regulatory structure, the laws and their enforcement. In the absence of laws and enforcement, governments should encourage voluntary compliance with CSR principles. These principles should be built into the way business is done and should be an integral part of business policy and practice.

Three conclusions can be drawn from this session:

1. The key to the success of CSR in protecting human rights is the notion of trust, credibility and partnership as well as the notion of soft law and hard enforcement.
2. CSR should be built into the project financing decision-making process and not left until the end.
3. Responsible business practices are a prerequisite to a sustainable result and such practices definitely pay.

Guidelines for advising clients on CSR responsibilities

Lawyers must be aware of their responsibilities in advising clients about their CSR. Companies seeking project finance no longer have a choice as to whether to meet these obligations. If lawyers do not correctly advise corporate clients, they may bear responsibility if clients do not meet their obligations. In fact, severe breaches of human rights might well be declared to be breaches of international law. Lawyers must also be able to advise clients about the importance of preserving the integrity of their brand and reputation. The wide media coverage of human right abuses that CSR aims to protect can cause great harm to the image and integrity of the company. Furthermore, lenders for big projects are concerned about their long-term sustainability and will look at CSR issues very carefully. They do not want the projects they are funding to collapse. Thus the use of CSR principles and the EP provide a means of safeguarding the bank's loans. Sometimes law firms have to decide that they will not represent clients unwilling to meet their CSR obligations. To represent such clients can adversely affect the reputation of lawyers and their firms.

CSR in Africa: effective tool or convenient escape?

Joint Session of the African Regional Forum and the Corporate Social Responsibility Committee[17]

Framing the problem

The session, 'CSR in Africa: Effective Tool or Convenient Escape?' explored whether transnational companies operating in Africa have demonstrated a sufficient commitment to their corporate social responsibilities. At best, a company should view the use of CSR as an investment that is mutually beneficial to the company and the community, that by protecting and promoting the interests of the community, the financial wellbeing of the company is also protected and enhanced. Many examples exist in which companies view their CSR community projects as a duty they would place upon themselves that is part of the cost of successfully doing business, rather than as a commitment to the local population. Thus these companies might view their CSR obligations narrowly, eg, building the promised hospitals, schools, etc, and proceed to exploit the local community and ignore its legitimate interests. The problem with limiting CSR to 'feel-good' projects is that the corporation is not making a meaningful contribution to development, resulting in CSR being nothing more than window dressing. What is needed is compliance with environmental safeguards as well as a commitment to protect human rights.

Justifications for CSR

One of the speakers, referring to a December 2006 *Harvard Business Review* article, outlined the four prevailing justifications for CSR:

1. moral obligation (commercial success is linked to ethical values and respect for people, communities and the natural environment);
2. sustainability ('environmental and community stewardship');
3. licence to operate (companies need 'explicit or tacit approval from governments, communities and… stakeholders to do business'); and
4. reputation (commitment to CSR principles enhances a company's brand, etc).

The most successful CSR initiatives are those that: meet the needs of society and are anchored in the company's activities; are productive for the company and the community; and constitute a long-term commitment to development goals. Some companies try to incorporate CSR into all aspects of their business, have complaints divisions to handle problems and treat respect for human rights seriously.

Impediments to effective CSR

In some instances, companies, viewing CSR projects as charity, pursue tax breaks from the host country for making the investment. It would be an interesting and helpful exercise to determine whether companies doing business or seeking to continue to do business in Africa actually do pay taxes there. It would not be unreasonable for companies to expect to be subject to local taxation, regardless of their engaging in local philanthropy.

The effectiveness of CSR is also compromised by the fact that corporations are based offshore and have no owners in Africa who can be reached by the judicial system, thus making it much harder to enforce CSR non-compliance. Furthermore, company directors are protected from liability and are thus able to escape responsibility for ensuring that CSR obligations are met.

17 Co-chairs: Toyin Bashorun, Churchfields, Lagos Nigeria; Jacob Saah, Saah and Company, Accra, Ghana. Speakers: Jack Blum, BakerHostetler, Washington, DC, US; Babatunde Raji Fashola, Lagos House, Lagos, Nigeria; Kayode Oladele, Juris International, Detroit, Michigan, US; Thomas Trier Hansen, Nordic Law Group, Copenhagen, Denmark; Ashwin Trikamjee, Garlicke & Bousfield, Umhlanga Rocks, South Africa. Prepared by Mary Gold.

Problems that impede effective state oversight of CSR

The state has an important role in promoting CSR initiatives; it must see itself as a major stakeholder to ensure that multinational corporations meet their obligations. There is a need for the state to enact legislation and regulations to ensure CSR compliance. Regrettably, because of the existence of government corruption in many African countries, little effort is made to promote ongoing and sustainable development. Even if corruption is not present, governments can tend to be complacent with respect to monitoring the implementation of a company's CSR goals. In some instances, companies form affiliations with particular sectors of government when seeking to develop business opportunities, thinking that these government actors can help the company if it runs into difficulty meeting its CSR obligations. Finally, if the rule of law is weak in a country, it becomes more difficult to enforce CSR obligations.

Initiatives to strengthen CSR obligations

There have been initiatives to strengthen CSR obligations and their enforcement. The EC, in a 2001 policy statement, addressed the issue of permitting lawsuits to be filed in the European Court for activities that occurred in Africa and, in terms of choice of law, permitting the application of the national standards of the European country. In South Africa, the King Report on Corporate Governance and the King Code recognise that because a company has an impact on the community, it should be obligated to report on its CSR performance. The International Organization for Standardization, in its ISO 26000, sets out comprehensive standards for companies to use for identifying and meeting their CSR. Although the adoption of the standards is voluntary, it does provide another mechanism for the furtherance of CSR goals. The use of certification has been used to monitor and ensure CSR compliance. This approach does not always work because of the need to access public information about the trail of responsibility that was established to meet the CSR goals. Finally the UN, with Ruggie, has established human rights as central to its CSR regime; this approach is gaining wider acceptance. However, it is always better to have structures and processes in place to monitor CSR activities and ensure that they are met, rather than depending on imposing sanctions after the fact.

Lawyers' role in promoting CSR compliance

Lawyers have an important role in promoting CSR compliance. First they must advise clients on the importance of meeting CSR obligations and not on how to escape them. There is also a need to ensure clients understand that they must comply with the laws of the host country. One of the speakers made reference to a rule promulgated by the NYC Bar Association that makes it unethical for a lawyer to assist another person in violating the laws of another country. Lawyers should also seek to ensure that multinational corporations do not use their corporate structure and residency to escape liability in countries outside their own in which they do business.

Lawyers also have to be aware of the fact that civil society organisations have become active in Africa in monitoring and publicising both CSR initiatives and instances of non-compliance and human rights abuses. They play an important role because the reports they disseminate garner broad-based media attention that can affect the reputations of companies whose activities are suspect. Clients need to be advised about the adverse effect that negative publicity could have on a company's image and integrity.

Recommendations for government

- Institute or improve the regulatory structure, laws and the means for their enforcement that ensure CSR compliance by corporations.
- Find mechanisms that can be used to ensure that non-resident corporations and their owners cannot escape liability (eg, require the posting of performance bonds as part of the cost of doing business).
- Enact strict and transparent conflict-of-interest and AML laws to address issues of corruption.

Recommendations for corporations

- Revise the corporate code of conduct to ensure that it clearly states the organisation's CSR goal.
- Institute or re-examine the processes for assessing CSR compliance and for conducting effective due diligence reviews.
- Build CSR into the project financing decision-making process.

Recommendations for the legal profession

- Institute or review law firm protocols and oversight provision that will be applied when advising clients on their CSR obligations.
- Advise clients on the importance of meeting CSR obligations and on complying with the law of the host country.
- Support the implementation of provisions like those of the NYC Bar Association Code of Conduct that make it unethical for lawyers to assist another person from violating the laws of a host country.