

# IBA GLOBAL INSIGHT

Dec 2014/Jan 2015



## **Shinzō Abe**

Japan's Prime  
Minister on the  
rule of law

## **Exclusive IBA interviews:**

Myanmar's  
Nobel laureate  
Aung San Suu Kyi

UN Special Envoy  
for Climate Change  
Mary Robinson

## **Annual Conference highlights**

Showcase session  
on climate justice  
featuring 45th US  
Vice-President Al Gore

'A conversation with...'  
on the continuing crisis  
between Russia  
and Ukraine

'The Island President'  
Mohamed Nasheed  
on the plight of  
the Maldives

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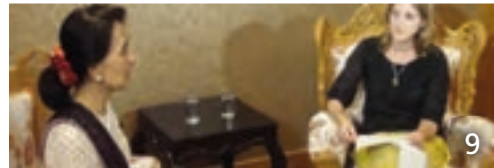
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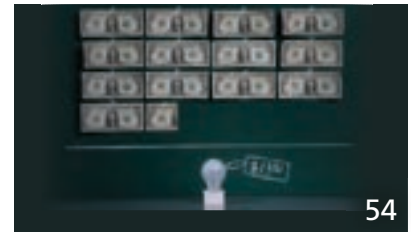
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The content of *IBA Global Insight* is written by independent journalists and does not represent the views of the International Bar Association.

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On the cover:

# Editorial

This edition of *Global Insight* presents various highlights from the Association's Annual Conference in Tokyo: Japan's Prime Minister Shinzō Abe addressing the opening ceremony on rule of law (page 14); his economic adviser, Heizo Takenaka, interviewed on the country's three arrows of reform (page 11); and high-level debate on the Ukraine crisis (page 35). In addition, films of showcase sessions, a 'Conversation with...' on the Middle East and interviews covering diverse issues, including corruption in sport and Bitcoins, can be viewed at [ibanet.org](http://ibanet.org).

As is evident in the pages that follow, the IBA is truly committed to addressing one of the most significant challenges facing the international community today: climate change. The showcase session focusing on the IBA's report on climate justice brought together some of the foremost figures attempting to effect significant reform of the international system (see page 23). It featured the UN Special Envoy on Climate Change, Mary Robinson (the IBA's exclusive interview with her is on page 12). Also contributing powerfully to the session was the 45th Vice President of the United States, Al Gore, who's been recognised by the Nobel committee for his work on the issue, and Mohamed Nasheed, the charismatic environmental campaigner dubbed 'The Island President' – the first to be democratically elected in the Maldives. Nasheed has done much to highlight the plight of the world's lowest lying nation, bringing the dramatic consequences of climate change into sharp focus (the IBA's exclusive interview with him is on page 13).

Mary Robinson, in particular, makes many important points. Notable is the way she links the issue at hand with one of the IBA's previous presidential priorities: tackling poverty. She is clear that there is currently 'huge injustice in the way that climate change is happening and affecting the poorest countries and communities'. Robinson is equally clear on what needs to be done: 'We need more money for financing for poor countries to be able to cope with the effects of climate change, but also the opportunities of benefitting from renewable energy.' Also key to meeting the challenge, as the IBA's report makes clear, is establishing accountability mechanisms (see page 4), such as a legally recognised universal human right to a safe, clean, healthy and sustainable environment, and appropriate legal forums to pursue remedy where such rights are infringed. The IBA is especially well placed to take up these aspects of the challenge, and, as incoming President David W Rivkin makes clear (see page 28), fully intends to do so.

James Lewis

## ONLINE

You can find *Global Insight* on the IBA website, with extra features.

This month's online highlights:

- Internet surveillance: Twitter challenges US government over right to disclose information requests
- Philippines–China dispute tests influence of institutions on great powers
- EU trading scheme could be 'game-changer' for illegal logging



## IN FILM

Watch the IBA's short films and in-depth interviews with high-level experts.

This month's film highlights:

- Bobby Lee, CEO of BTC China, on bitcoin
- Michael Beloff QC, Blackstone Chambers, on corruption in sport
- Tokyo session: 'We're all human rights lawyers now: convergence of business and human rights; what it means for you'



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# Ecuadorian communities' complaint to the ICC against Chevron executives is 'misconceived'

POLLY BOTSFORD

An unusual complaint was sent recently to the Chief Prosecutor at the International Criminal Court (ICC). Communities from the Ecuadorian rainforest filed a complaint against executives at oil giant, Chevron, under Article 7 of the ICC's statute, for crimes against humanity. It is an attempt to seek redress for environmental damage and serious health problems caused by, the communities argue, the exploration and drilling of oil in Lago Agrio in eastern Ecuador mainly in the 1970s and 1980s. It is only a recent chapter in a long-running battle between the communities and Chevron.

The ICC complaint is, however, fatally flawed according to international human rights lawyer and Professor of Law at the University of Notre Dame Law School Douglass Cassel. 'Their petition does not warrant so much as a preliminary inquiry... it fails to allege criminal acts amounting to crimes against humanity... and is not in the interests of justice,' he says. The communities argue that the oil company caused environmental contamination and fundamentally undermined the indigenous communities' way of life in the Amazon.

Steven Kay QC, international criminal lawyer at 9 Bedford Row and Co-Chair of the IBA War Crimes Committee, calls the complaint 'misconceived'. 'For instance, a crime against humanity must involve an "attack",' he explains. 'Pollution cannot be categorised as an "attack" as the term is understood under Article 7. Even if there was an attack, the polluting of the Amazon happened a long time ago and the court does not have jurisdiction over events prior to 2002 when it was founded.'

Yet the backstory to the complaint involves over two decades of litigation between corporation and community. The battle has attracted attention from celebrities, such as Bianca Jagger and Sting, as well as environmentalists, journalists, and film-makers.

The focus of the dispute is 450,000 square km of the Amazon rainforest in Ecuador. Various tribes had existed there such as the Cofan, Secoya and Waorani. Originally it was the oil company Texaco that was granted a concession to drill for oil in the 1960s, which it did until it

handed over the wells to the Ecuadorian state-owned oil company, Petroecuador, in 1992. (Chevron subsequently bought Texaco in 2001 which is why Chevron is the company cited in the litigation.)

But the litigation journey has been a tortuous one. It started with tort litigation launched by the communities in the US in the early 1990s against Texaco. But the US sent the case back to Ecuador on the grounds of *forum non conveniens* because Ecuador was where the alleged damage occurred. A trial was held there and in 2011 the local court found against Chevron to the tune of \$9.5bn.

Shortly afterwards, Chevron undertook its own investigations into the lawyer representing the Ecuadorian communities, Steven Donziger. It brought an action against him in the US. In May this year, the judge in that case declared that the Ecuadorian court case decided against Chevron was a fraud because there were various rule of law failings including forged expert reports, bribed experts, and that the judgment had been ghost-written.



In his brief to the US Second Circuit Court of Appeals, filed in July 2014, Donziger argued that Judge Kaplan lacked jurisdiction to hear the case and that allegations of attorney misconduct should not affect Chevron's liability for damages, as determined by the Ecuadorian judicial system, a process which included the initial verdict, review by an Ecuadorian court of appeal, and confirmation by the Ecuadorian Supreme Court.

As a result of this ongoing legal battle, efforts to secure the enforcement of the Ecuadorian decision have stalled. For those such as Bianca Jagger who have campaigned on behalf of the Ecuadorian communities, this is a devastating blow.

She told *Global Insight* at the December launch of the IBA's report, *Achieving Justice and Human Rights in an Era of Climate Disruption*: 'We had hoped that the legal result [against Chevron] would set a precedent for challenging the power of corporations. Instead we have plenty of victims but no accountability.'

The situation in Ecuador's former rainforest highlights the problems that potential victims of human rights violations and of breaches of environmental laws have in bringing cases against transnational corporations, and indeed states, for many legal (and non-legal) reasons – not least, weak rule of law in countries where such alleged damage occurs.

Despite the efforts of the Ecuadorian communities (who also tried to go to the Inter-American Commission on Human Rights), the ICC is unlikely to provide a solution. 'There are ongoing debates as to whether or not the ICC should extend its jurisdiction to issues such as money laundering, the drugs trade, terrorism and environmental cases,' Kay explains. 'But right now the court's jurisdiction is limited to international crimes as specified in its articles.'

Such concerns have led to the establishment of the UN's Guiding Principles on Business and Human Rights published in 2011 to encourage transnational corporations to take seriously their obligations, particularly in geographical areas of weak government and governance. The Guiding Principles are, however, only guidance and many (though not all) within the business and human rights movement are calling for an international treaty.

The lack of legal redress is something the IBA's Presidential Task Force on Climate Change Justice and Human Rights seeks to challenge, recommending a standalone international right to a safe, clean, healthy and sustainable environment and developing a model statute for legal remedies for climate change. Baroness Helena Kennedy is Co-Chair of the Task Force. 'We need international standards and mechanisms,' she said at the report launch. 'Many of which can be adapted from those already existing, which will enable such cases to be brought.'

# TOKYO 19-24 OCTOBER 2014

## ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

FULL COVERAGE ON THE IBA WEBSITE



## Tokyo 2014 in numbers

**5,775**

Total attendance

**131**

Jurisdictions represented

**2,806**

Law firms, bar associations, businesses and other organisations represented

**91.5%**

Proportion of attendees rating the conference as Excellent or Good\*

**28.8%**

Proportion of delegates from Asia

\* Based on the Attendees' Satisfaction Survey.

You can also find various sessions, addresses, photographs and the *Daily News* conference newspaper on the IBA website at [tinyurl.com/Tokyo2014Coverage](http://tinyurl.com/Tokyo2014Coverage)

Tokyo 2014 was another remarkable Annual Conference. The IBA's online coverage features films of the opening ceremony, sessions and interviews with prominent delegates and speakers. Highlights include:

- the Opening Ceremony speech given by Japan's Prime Minister, Shinzō Abe;
- the showcase session on climate justice with leading experts including Al Gore, Mary Robinson, and former President of the Maldives Mohamed Nasheed;
- interviews with Mary Robinson and President Nasheed;
- 'A Conversation with...' Vladimir Kotlyar, Andriy Shevchenko and Cherif Bassiouni on Ukraine and Russia;
- the Rule of Law Symposium on the independence of the judiciary; and
- sessions including, 'Human trafficking – best legal practices for a global response'.

## Bangladeshi lawyer Adilur Rahman Khan wins IBA Human Rights Award 2014

Adilur Rahman Khan, advocate of the Supreme Court of Bangladesh and founder and Secretary of Bangladeshi human rights organisation *Odikhar*, has been named winner of the 2014 IBA Human Rights Award.

Bestowed the title for his outstanding contribution to human rights, the award was presented by IBA President Michael Reynolds at the Rule of Law Symposium held at the conclusion of the IBA Annual Conference.

Khan has campaigned tirelessly against torture, extrajudicial killings, enforced disappearances, and violence against women and minority communities. In 1994 he founded the human rights organisation *Odhikar*, which has undertaken extensive fact-



finding and reporting of human rights violations in Bangladesh. As a result of this work, Khan and his family have endured harassment and persecution by the authorities.

Throughout his legal career Khan has provided pro bono legal counsel to political detainees and the families of victims of enforced disappearance and extrajudicial killings. Notably, he worked towards the first conviction of police officers in Bangladesh, who were found

guilty of torture and causing death in custody in May 1993.

In his acceptance speech, Khan told the 200 delegates gathered at the Symposium, 'The Rule of Law is under serious threat in my country. Justice for all the ongoing gross human rights violations is inaccessible for victims and their families. Their right to access to complaint mechanisms is denied, regardless of whatever is written in the law or the constitution of the country. Repressive laws are in force and the independence of the judiciary is under attack in a spree of politicisation of institutions of the state.'

For more about Khan's work and to read his acceptance speech, see [tinyurl.com/IBAHRAward2014](http://tinyurl.com/IBAHRAward2014)

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## Launch of global money laundering prevention guide for lawyers



**A** new guide aimed at providing lawyers across the world with practical guidance in detecting and preventing money laundering has been produced by the IBA in conjunction with the American Bar Association (ABA) and the Council of Bars and Law Societies of Europe (CCBE).

The guide, entitled *A Lawyer's Guide to Detecting and Preventing Money Laundering*, addresses the responsibilities of lawyers in many jurisdictions in this area and, as such, is the first of its kind. It focuses on the legal obligations lawyers have in various situations in terms of their own compliance with anti-money laundering (AML) laws and illustrates the latest detection techniques being employed by lawyers to avoid involvement in money laundering. In addition, the Guide provides thought-provoking commentary on the underlying ethical obligations that lawyers have – for example, being alert to finding themselves involved in criminal activity and taking care to avoid facilitating the work of criminals.

Demand for the guide was driven by feedback from lawyers at IBA, ABA and

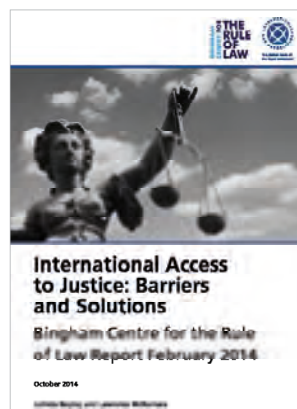
CCBE conferences in recent years, which called for practical guidance based on case studies of the 'unwitting' participation of lawyers in money laundering schemes. The resulting Guide is intended as a resource for lawyers and law firms to highlight the ethical and professional concerns relating to AML and to help lawyers and law firms comply with their legal obligations in countries where they apply. It comprises:

- a summary of certain international and national sources of AML obligations;
- discussion of the vulnerabilities of the legal profession to misuse by criminals in the context of money laundering;
- discussion of the risk-based approach to detecting red flags, red flag indicators of money laundering activities and how to respond to them; and
- case studies to illustrate how red flags may arise in the context of providing legal advice.

The Guide can be downloaded free of charge from the IBA Anti-Money Laundering Forum website at [www.anti-moneylaundering.org/AboutAML.aspx](http://www.anti-moneylaundering.org/AboutAML.aspx)

## International Access to Justice Report launched in Tokyo

The Bingham Centre for the Rule of Law, in collaboration with the IBA Access to Justice and Legal Aid Committee, has compiled a report entitled *International Access to Justice: Barriers and Solutions*. The report provides insight into barriers to access to justice internationally and uses this insight to identify common ground that transcends jurisdictions and can be used as a basis to make recommendations for improvement. The report, launched at the IBA Annual Conference in Tokyo, can be downloaded at [tinyurl.com/AccessToJustice2014](http://tinyurl.com/AccessToJustice2014).



## Nick Paul announced as Pro Bono Award winner 2014



The Pro Bono Award, presented by the IBA Pro Bono Committee recognises lawyers who are leading the legal profession in building a pro bono culture. This year's award honours Nicholas Paul's commitment to pro bono legal work, both domestically and internationally. Paul, of Doughty Street Chambers, received the award in recognition of his long career largely dedicated to helping others achieve their rights or increasing capacity by educating others internationally about human rights. This includes projects with Amnesty, Liberty, and Justice, as well as various training and lecturing appointments.

Paul began practicing law as a barrister in London in 1982, specialising as a criminal defence lawyer before representing claimants in tortious civil cases against the police for assault, false imprisonment and malicious prosecution. Paul also created an appellate practice, taking on clients who were the victims of miscarriages of justice, which subsequently led to undertaking death row cases that came to the Privy Council from the Commonwealth Caribbean Countries.

In 1990, Paul was a founding member of Doughty Street Chambers, an establishment that rapidly became one of the world's foremost human rights lawyer organisations. Paul has taught extensively as an advocacy trainer, both in the UK and internationally. He encourages young adults from disadvantaged backgrounds to pursue legal careers, working with students from Kingston University and youth mentoring charity, SkyWay.

Paul's dedication to pro bono work is shown through his compassion for the less fortunate. He has worked in less than favourable conditions and travelled to remote and potentially unsafe areas of developing countries to reduce costs for the pro bono clients he has assisted.

# Myanmar: focus on establishing independent national bar association



and eighty lawyers from across 12 of Myanmar's 15 administrative divisions attended the event. During the conference, Myanmar's legal profession took a significant first step towards the establishment of an independent, representative bar association, by forming the inclusive interim committee to steer its creation. During the third meeting of the committee, members discussed the association's draft constitution and by-laws which will be brought into force at the constitutive general assembly of the Association in 2015.

The IBAHRI has placed an international legal specialist in Yangon to facilitate the development of the representative and independent national bar association in Myanmar. The three-

year programme (from 2014 to 2016) combines capacity building and advocacy initiatives, and is broken down into three phases:

- to build the foundation and local consensus for a national bar association, to promote and protect the interests of the legal profession in Myanmar;
- to legally register the bar association as an independent, representative professional body, and to promote reform of the rules regulating the legal profession in Myanmar; and
- to strengthen the capacity of the bar to function independently and democratically, as a representative professional body mandated to promote and protect the rule of law in Myanmar.

On 28–30 October 2014, the IBAHRI and Daw Aung San Suu Kyi, Chairperson of the Myanmar Parliamentary Committee on the Rule of Law and Tranquility, co-hosted a workshop on the need to reform current rules governing Myanmar's legal profession. The workshop, entitled *Laws Regulating the Legal Profession: A Comparative Review from Around the World*, was attended by five representatives from the Union Attorney-General's Office, 21 of Myanmar's parliamentarians and 16 lawyers from across the country.

'In many developed legal systems, the laws governing the legal profession provide an overarching legal framework which enables lawyers to discharge their functions freely and

independently', said IBAHRI Director, Dr Phillip Tahmindjis AM. 'To bring Myanmar into line with such legal systems and to protect the integrity and professional standards of lawyers, the nation's bar associations will need to be established under law and the Myanmar Bar Council Act reformed, as a matter of priority.'

The workshop took place ahead of the third meeting of the Steering Committee on the Establishment of a National Bar Association in Myanmar. The Steering Committee – formed of two representatives from bar association and lawyers' group across Myanmar – was the outcome of a three-day legal seminar held in Nay Pyi Taw, Myanmar, organised by the IBAHRI and hosted by Daw Aung San Suu Kyi. One hundred

## 12th World Day Against the Death Penalty

On 10 October, the 12th World Day Against the Death Penalty, the IBAHRI joined an international social media movement to promote global abolition of the death penalty. The '#nodeathpenalty' campaign, organised by the World Coalition Against the Death Penalty, invites social media users to post a photo

with a sign stating why you're against the death penalty. The IBAHRI Council adopted its 'Resolution on the Abolition of the Death Penalty' in 2008.

Read the IBAHRI's Resolution on the Abolition of the Death Penalty at [tinyurl.com/IBAHRIDeathPenaltyResolution](http://tinyurl.com/IBAHRIDeathPenaltyResolution)



Download a paper on the death penalty under international law at [tinyurl.com/IBAHRIDeathPenaltyPaper](http://tinyurl.com/IBAHRIDeathPenaltyPaper)

# Myanmar: IBA interview with Aung San Suu Kyi

Since her release in 2010, following 15 years under house arrest, Nobel laureate Aung San Suu Kyi has spearheaded the drive for reform as leader of the opposition party National League for Democracy and as Chairperson of the Committee for the Rule of Law and Tranquillity. In November, she spoke to the IBA's Senior Reporter in an exclusive, filmed interview in Nay Pyi Taw.

**Rebecca Lowe:** Could you outline the key challenges facing the legal profession in Myanmar, and how you feel you're going to address those challenges?

**Aung San Suu Kyi:** There are so many challenges, starting with legal education. For many, many years legal education was the poor relation of the education system, because emphasis was placed on such subjects as medicine, engineering, and so on, and we had this rather peculiar system whereby the marks that you get at the matriculation examination decide which faculty you could join.

Those with the highest marks could join the medical profession, and then the second highest went in for engineering, and so on. And right at the bottom was legal studies. Those with the minimum marks were allowed to go in for law. So it started with that, that it was assumed that only the poorest students would go in for law, which meant that the brighter ones did not want to go in for law, because it was as though they were advertising themselves as the least capable.

So it started with that problem. And of course there were many others, the kind of problems that you would find in any authoritarian state.

**RL:** It takes a long time to create a strong rule of law, a powerful, independent judiciary. How do you go about creating that culture, creating that spirit of independence?

**AS:** Creating a culture takes time, but there are certain things that could be done through legislation. For example, if we want to establish an independent judiciary, we'll have to amend the Constitution. Under the present Constitution, the judiciary is

not independent of the executive. So there are things that could be done quickly, if people are prepared to cooperate.

All those who are in a position to influence whether or not the Constitution is amended will have to do their part in making sure that the necessary amendments are put through quickly.

**RL:** And yet the government and the military have shown very little inclination so far to reform the Constitution. How important is it that these reforms take place, and how confident are you that they can do so by the elections next year?

**AS:** The reforms are very important; they're not just for the elections. We have been talking about rule of law, and I've made the point that, unless the Constitution is amended, we will not have an independent judiciary, and that goes beyond just the next elections. That is to do with the future of the country.



And you talk about establishing a culture of rule of law, I usually talk about a culture of democracy, and there are many, many elements involved. And establishing such a culture takes time, but you have to start somewhere. And, as you pointed out, the government at this time, and the military, certainly do not show any inclination to amend the Constitution.

But what is very, very encouraging for us is the fact that the people understand the need to amend the Constitution.

**RL:** Because there was a survey of five million people, wasn't there, saying that they wanted...

**AS:** It wasn't a survey: it was a signature campaign. We invited the public to come and put the signatures to the amendment clause, which makes our Constitution about the most rigid in the world. And this was not quite like an ordinary referendum,

because it was not – to begin with, it was not like a secret vote. Everybody knew who was supporting this movement. And that still requires courage, at this time.

**RL:** Some believe that the focus on the Constitution and political reforms is distracting people from other concerns, other very real concerns in Myanmar, such as human rights issues and abuses in the ethnic states and...

**AS:** But how can you separate human rights from rule of law? How can you separate human rights from law and order? And how can you separate human rights from politics?

**RL:** So you don't believe that there's a distraction from issues in Rakhine state, in Kachin state?

**AS:** It's not that emphasis on the need to amend the Constitution, or the need for rule of law is a distraction from things like human rights. I think those who do not want to amend the Constitution are trying to distract people by making them think that the human rights issue is totally divorced from the issue of constitutional amendment, which of course it is not.

**RL:** You have advocated for forgiveness, for reconciliation, rather than retribution for past crimes. Others suggest that this might be a false distinction; that it's not about retribution, but it is about accountability, it is about justice, for past crimes over the last five decades.

What do you mean when you talk about reconciliation, and do you think that this is genuinely what is right for the population of Myanmar?

**AS:** I think our people agree that national reconciliation is absolutely necessary. I don't talk about forgiveness: forgiveness is a personal thing. You can't force people to forgive. But people can agree to a certain course, even if they don't forgive in their hearts. They can agree not to take the kind of actions that will have an adverse effect on national reconciliation. National reconciliation is a political process. We are thinking of it as an agreement between different factions to pursue a certain path in the name of peace, in the name of unity, even if it means that you have to forego your pound of flesh.

Watch the film of the interview at [ibanet.org](http://ibanet.org)

## Experts discuss solutions for justice reform in Brazil and their global significance

**B**razil's criminal justice system has attracted international notoriety because of the scale of its problems. Crime levels and public security have been a key policy battleground in the recent presidential elections. However, these challenges have a wider international relevance and Brazil's experiences of justice reform may provide examples and good practices from which other countries can learn.

On 13 October 2014, the IBAHRI launched the English-language version of a leading torture prevention manual for legal professionals in Brazil, at a high level panel event in London. The event, co-hosted by the IBAHRI, Matrix Chambers and Lex Anglo-Brasil, aimed to bring Brazil's experiences to a wider international audience and promote global exchange and dialogue in justice reform. At the event, the high-level panel of international and Brazilian experts



discussed some of the challenges facing justice reform, potential solutions and their global significance.

Authored by Conor Foley, *Protecting Brazilians from Torture: A Manual for Judges, Prosecutors and Lawyers* provides practical guidance to Brazilian legal professionals in the application of national and international torture prevention standards and examples of good practice from across Brazil. 8,000

copies of the Manual's first edition, developed in collaboration with key Brazilian justice institutions, were printed and used in nationwide trainings for judges, prosecutors and lawyers in 2011–2013. This second edition contains up-to-date material and is published in both Portuguese and English.

Read more at [tinyurl.com/IBAHRIJusticeReformBrazil](http://tinyurl.com/IBAHRIJusticeReformBrazil)

### BBC radio series featuring IBAHRI Co-Chair

A series of half-hour BBC Radio programmes with Baroness Helena Kennedy QC, IBAHRI Co-Chair, in conversation with some of the world's most influential lawyers and judges were broadcast recently on the BBC World Service and Radio 4. Entitled *A Law unto Themselves*, the series included: **Hon Michael Kirby**, IBAHRI Council member, former Australian High Court Judge, and Chair of the UN Commission of Inquiry on Human Rights in North Korea; **Gareth Peirce**, a British solicitor who has spent much of her 30-year career representing Irish and Muslim terrorism suspects; **Jeremy Hutchinson**, a British defence lawyer whose career ranged from defending Penguin Books in the *Lady Chatterley's Lover* obscenity trial, to taking on the might of the British intelligence service in the ABC official secrets trial; and **Eva Joly**, a Norwegian-born investigative judge who has devoted much of her career to fighting corruption 'in the upper echelons of French business and political life'.

All episodes are available to listen to online until August 2015 at [tinyurl.com/ALawUntoThemselves](http://tinyurl.com/ALawUntoThemselves).

### IBAHRI launches UN Programme to advance independence of legal profession

A new United Nations Programme focussing on the advancement of UN recommendations relating to the independence of the judiciary and the legal profession has been launched by the IBAHRI in Geneva.

'Strengthening the Role of the Legal Profession in the UN Universal Periodic Review' was the theme of a lunch reception on 20 November at the Geneva Academy of International Humanitarian Law and Human Rights. The event provided an informal forum for the IBAHRI to meet with missions and organisations working in Geneva on issues related to the UN process which involves reviewing the human rights records of all UN Member States.

IBAHRI Senior Fellow–UN Liaison (Geneva), Dr Helene Ramos dos Santos, is based in Geneva to develop and promote the UN Programme which has three main components:

- **Advocacy.** Regular expert reports with key recommendations will be produced by the IBAHRI, forming the basis of its work to advance the independence of the judiciary and legal profession. There will be special emphasis around the UPR.
- **Capacity building.** Through this component the IBAHRI aims to develop opportunities for lawyers, judges and bar associations to engage with UN mechanisms on issues related to their professional independence.
- **Research and analysis.** Through this third, and final, component IBAHRI will produce reports to inform state policies; advance the implementation of UN recommendations on the ground; and inform sector advocacy and capacity building.



## Heizō Takenaka on Abenomics, the three arrows of reform and lessons for the West



Heizō Takenaka is Economic Adviser to Prime Minister Shinzō Abe and was formerly Minister for Economic and Fiscal Policy in Prime Minister Junichiro Koizumi's government. At the Annual Conference in Tokyo, he spoke to the IBA's Director of Content.

**James Lewis:** I'll start by asking about the much-heralded three arrows of reform—what's been dubbed Abenomics. The jury's out and it's possibly a bit early, but what's your assessment of progress?

**Heizō Takenaka:** There's another economic advisor, a famous economist at Yale University, Professor Hamada. He said: we have three arrows. One is monetary policy – A. The second is fiscal policy – this is B. The third is growth strategy. This is very controversial. Growth strategy is very weak, so our score is E. So, A B E, Abe. He said it that way. It is quite true our monetary policy is doing well. Last year, the new governor of Bank of Japan took office – Mr Kuroda – and he took a very clear policy to double base money in two years and this message changed the expectation of investors in the market. So, Japan's stock price increased by 57 per cent. This is an amazing increase – about double that of America.

The second arrow is flexible fiscal policy. This means two things. One, in the short run fiscal expansion is needed to give economic stimulus, but the second half of this second arrow is a fiscal consolidation or a fiscal rehabilitation. So far the short-run fiscal stimulus policy has been taken, but we still have many things to do to realise fiscal consolidation. So, as for the second arrow, about half of that is released or flying. The third arrow – this is very controversial. Deregulation and also the reduction of corporate tax is needed. We are on the way.

However, in this process, Prime Minister Abe made a very good promise, an international promise in the Davos meeting in January. He promised that he'll make a breakthrough to so-called bedrock regulations, making use of the special economic zone system. He promised to reduce corporate tax rate and accept foreign labourers. He would have very bold reform on government pension investment fund. This is maybe the largest sovereign wealth fund in the world and, if this kind of reform were successful, it would change Japan and also the economic growth.

**JL:** Nobel Prize winner Paul Krugman says we're all Japanese – he feels that we're all looking for lessons and perhaps hope from Abenomics that this is the way forward. What would you say are the key lessons for Western economies?

**HT:** I used to be in the government; the minister for economic fiscal policy and minister for financial services. At that time Japan could make some bold reforms like the disposal of non-performing loans and privatisation of Japan Post. At that time many economists in the world appreciated that effort. However, after Prime Minister Koizumi stepped down about eight years ago or so, the momentum of the reform declined. Again, now, momentum of reform is going up. Then Prime Minister Abe appeared. He's making use of this trend – the momentum of the people's sentiment that we need reform. So, an important lesson – if any – would be that of course economic policy at the surface is very important. However, it's very important for a political leader to make use of people's sentiment towards reform. Well, there is a very interesting term in Japan: C-R-I-C cycle. Crisis happens. Then response is made. Then improvement can be seen. Then after that complacency comes. Then the momentum of reform declines. A very important point is how to keep momentum of the reform high.

**JL:** Do you feel there was complacency in the West? They could have seen clearly Japan's own property bubble and subsequent lost decades. Are you surprised that the West and its banks sleepwalked if you like, were complacent,

and encountered their own property-led financial crisis as a result?

**HT:** Anytime, anywhere a so-called bubble phenomenon can happen. A bubble can be understood as a bubble when it bursts. It's very important to make sound economic management. In the 1980s we had a very serious asset bubble. At that time monetary expansion was too active and also even in the case of the Lehman shock, even before that they had some mistakes in monetary policy. So, this is a very typical case of sound macroeconomic management and especially monetary policy management is very important. So, it is very important to watch very carefully and an early warning system to the market and to the policymakers is needed in this regard.

**JL:** Coming back to Abenomics: you outlined very nicely the three arrows of fiscal stimulus, monetary easing, and structural growth measures. Is any one of those more important than the others?

**HT:** In the short run, fiscal expansion succeeded. However, also in the short run we have another problem. That is the consumption tax hike. We are suffering from a huge budget deficit. Our government bond-GDP ratio is much higher than that of Greece – and very serious. Consumption tax rate was increased this spring from five to eight per cent. But this gave a very negative impact on aggregate demand. So, this is a kind of trade-off where we need sound economic management to stimulate the economy. At the same time fiscal consolidation is needed. But the most important point is anyway first to conquer deflation where tax revenue is very proportional to the nominal GDP. So, it is very important to conquer deflation and at the same time it is very important to place a cap on expenditures. The expenditure side of reform is much more important than the revenue reform like tax hike, but this revenue reform is very difficult. This will provide some pain, because, for example, we should reduce the amount of pension payment. Many people will be against that.

This is an edited excerpt from the full length filmed interview, which can be viewed at [www.ibanet.org](http://www.ibanet.org)



## UN special envoy Mary Robinson on the urgent need for action on climate change



Formerly President of Ireland and UN High Commissioner for Human Rights, Mary Robinson now focuses on climate justice. In July, she was appointed UN special envoy for climate change. She spoke to the IBA's Director of Content at the Association's Annual Conference in Tokyo.

**James Lewis:** What do we mean when we talk about 'climate justice'?

**Mary Robinson:** Climate justice essentially links human rights, development and climate change, and recognises, as does the Human Rights Council, that climate change is having huge negative impacts on human rights. Then we also add in what I would call the 'opportunity side'.

Since we're undermining the livelihoods of the poorest people, their food security and so on, through climate shocks, through the rainy seasons not coming, through long periods of drought and flash flooding, which is happening all over Africa, and other problems in South Asia, we should prioritise the poorest in access to clean energy.

If they get clean energy, they'll become productive; they'll largely bring themselves out of the terrible poverty that we're making worse.

**JL:** So, how important is redistribution of wealth and tackling poverty in dealing with climate justice or injustice?

**MR:** Tackling poverty is essential and I think it's good for it to be looked at through the prism of justice and injustice because there is such huge injustice in the way that climate change is happening and affecting the poorest countries and communities. It's our lifestyles that are

undermining the very poor life chances of much poorer people who are not responsible for it. So, linking that, in the sense of acknowledging that injustice, we need more money for adaptation, more financing for poor countries to be able to cope with the effects of climate change, but also the opportunities of benefitting from renewable energy.

**JL:** How do we fund that? Is it as simple as a global taxation system?

**MR:** We can start by funding the Green Climate Fund, which has been established, and Christiana Figueres, the Executive Secretary of the UN Framework Convention has said that the fund should have at least \$10bn, preferably \$15bn by the conference in Lima in December. There's a pledging conference in November. At the moment it has \$2.4bn. [this rose to \$9bn in November]

**JL:** So we're not doing terribly well on that?

**MR:** One billion from Germany, one billion from France, which was announced at the climate summit, and \$400,000 from others, including countries like Mexico, which takes climate so seriously. So we need to be serious. We need to understand the injustice, apart from anything else. We must capitalise the Green Climate Fund and take the measures that are necessary to help countries to adapt.

**JL:** Who's taking leadership on this, who are you impressed by? You've talked about Germany, France, Mexico. Are you disappointed by Australia's position on this, doing away with a programme that was working, not putting on the agenda for the G20?

**MR:** Of course, yes, Australia's very disappointing in getting rid of a carbon tax, which was just beginning to work in a country that's very affected by climate and will be more so, unfortunately. The countries that impressed at the climate summit... it was interesting... those countries that were committing as quickly as possible to go to zero carbon: Samoa, Costa Rica; Ethiopia wanting to be a middle income African country but also reach zero emissions, and they are finding a pathway to doing that. So, I think what we're realising is

that leadership comes from different countries, large and small, but we're not seeing enough of it yet.

**JL:** You're suggesting there's more of a bottom-up approach these days.

**MR:** To a certain extent, yes, the reason being that at the bottom they feel it most so they are urgent to get to zero carbon.

**JL:** But it's America and China that are really very important. Are you impressed or unimpressed by their efforts? They weren't covered by Kyoto, but they are bringing in measures.

**MR:** Both America and China are doing quite a lot. President Obama understands the climate issue and he's trying to do it through regulation, through the Environmental Protection Agency, largely, and encouraging states within the US, and cities, to do far more. And China is doing a great deal and understands that it has to move faster and move away from coal and so on. This still isn't enough. That's the problem.

**JL:** One of the key recommendations in the IBA report is to recommend that there be legal recognition of a universal human right to a safe, clean, healthy, sustainable environment. I assume you welcome this but I just wanted to know from you what that means in practice.

**MR:** Yes, I do very much welcome it. It's in a number of international instruments in a number of countries, but it's not really part of the old common law system, so most of the countries that have inherited common law don't have reference to, in some measure, a right to a healthy environment, a sustainable environment and so on. It can make a huge difference because it captures the reality that climate change is negatively affecting food, and health in particular, and that there need to be remedies, there need to be ways of addressing this or ways of calling attention to it, and if we had that right, it would be very good. The Task Force asks the Office of the High Commissioner for Human Rights to look at what the implications would be, and I think to have such a report with my former office is always a very good prelude to the Human Rights Council taking the next step.

## President Mohamed Nasheed on the plight of the Maldives



President Nasheed shot to worldwide fame in 2009 when he held the first ever underwater cabinet meeting to raise awareness about climate change. In 2011, he was made the subject of the critically acclaimed documentary, *The Island President*. He spoke to the Association's Senior Reporter at the IBA Annual Conference in Tokyo.

**Rebecca Lowe:** Perhaps you could explain a little bit, first, about what climate justice is and why it means so much to you.

**Mohamed Nasheed:** Climate change is having a very profound impact on the people of the Maldives, and a number of other people all over the world. For us, in the Maldives, it's not something in the future but it is something which is happening now. 'Climate change' – what we basically mean by that is 'climate aberration'. The winds are stronger, the seas are rough, the wet seasons are wetter and the dry seasons are drier. And the sea level is also rising. Now, these changes in climate are having a very profound impact on the people. Now, there are a number of injustices that arise from these issues, especially issues to do with migration, issues to do with having to relocate yourself. And also food security and issues to do with conflict. So we feel that it's very, very important that we look into these issues now. The Maldives, probably, will not be there in our lifetime, and if that happens, we are asking this question: where will our people go? And, if our people go, [...] would we be going into someone else's nationality. Would we be going in as a nation, as a people? Where would our culture go? Where would our language go? The Maldives has

been there, in the middle of the Indian Ocean, for the last 10,000 years, and we have a written history that goes back 2,000. Now, exactly, would that history also go with us? Would everything to do with us go with us?

**RL:** Is it a frustration for you when you see other, much more powerful countries – where, perhaps, it is still a pressing issue, but not quite so immediate – not really paying due attention to this subject?

**MN:** It is. In some people's views, carbon emission, which lies at the heart of the climate issue, climate is changing, according to the science, because of increasing carbon emission and carbon

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*'It's possible to have a carbon neutral world economy by 2050 and we are unable to get a good grip on this... because of the strength of oil companies and energy companies who are spending so much on anti-earth messaging and environmentally degrading ideas'*

**Mohamed Nasheed**

*Former President of the Maldives (2008–2012) Maldivian Marine Scientist and environmental activist*

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pollution in the atmosphere. Now, very often, emission is equated with development, so in one sense, there is this view that developed countries, anyone who is asking anyone to be mindful of the environment, apparently, is asking developing countries not to develop. I don't think that we should view the issue in that regard. There is a carbon free development projection, trajectory, that I'm sure we can achieve that. The kind of renewable energy available now is very, very different from even the last few years.

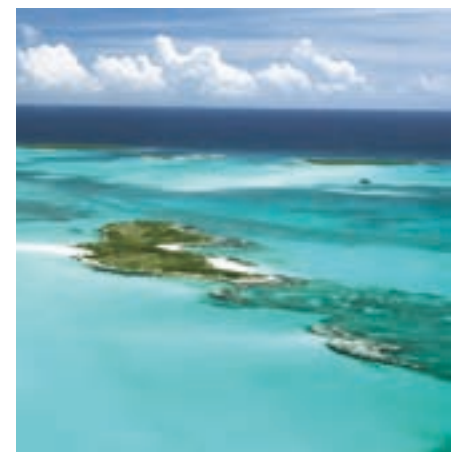
So in my view, for India, for China, for Brazil, South Africa, Indonesia, all these developing countries, if you want to be the leaders of tomorrow, you cannot be hooked on to technology, Victorian

technology of internal combustion. You must embrace the technology of the future, which is renewable energy. So yes, there is this issue of bigger countries and big emerging countries, developing countries, taking a very short minded view on what we are talking about and proceeding business as usual. I think the consequences of that on themselves would be far greater in the very near future.

**RL:** It is understandable, though, that developing countries might feel frustrated that they haven't had their opportunity to develop with cheap energy in the way developed countries have with fossil fuels, coal and gas. So how do you try and change the mind-set?

**MN:** Well, it was cheaper during Victorian times, but it is no longer cheaper. It's not cheap in the sense that we are not costing it, the effect it has on other people. What we must all very much focus on right now is to understand that the economics have changed. Carbon or fossil fuel is no longer cheaper than renewable energy. It's very, very possible to have a carbon neutral world economy by 2050 and we are unable to comprehend this or we are unable to get a good grip on this, not because the economics is not settled, but mainly because of the strength of oil companies and energy companies who are spending so much on anti-earth messaging and environmentally degrading ideas.

This is an excerpt from a longer interview, which can be viewed at [tinyurl.com/Nasheed-interview-IBATokyo](http://tinyurl.com/Nasheed-interview-IBATokyo).





# Prime Minister Shinzō Abe

**At the Annual Conference in Tokyo, in the presence of Their Majesties The Emperor and Empress, Prime Minister Shinzō Abe shared his thoughts on rule of law with the opening ceremony audience, focusing first on the tradition in Japan.**

**T**he term ‘rule of law’ has its origins in Western civilisation, but the idea is universal. The rule of law is by no means limited to the West. From ancient times there were also similar concepts in Asia. The essential nature of the rule of law is that power is not absolute. Rather, the law is a moral presence that exists above power; a presence that power must serve and by which power is bound. In Western philosophical thought this presence is referred to as the ‘general will of the people’, while in Japan and the other countries of Northeast Asia, it is called the ‘heavens’ or ‘providence’.

My hometown is in Yamaguchi Prefecture, a region that was home to many of the patriots of the Meiji era who guided Japan on its path to modernity. Allow me to quote Yoshida Shōin, who was a teacher to these patriots and a man

who could well be said to have been the pioneer of the Meiji Restoration:

‘To watch the Heavens is to watch the people, to listen to the Heavens is to listen to the people’

*Kama Satsuki, Vol III, Part 2, Chapter 6*

This quote clearly equates the voice of the people with the voice of the heavens. The hearts and minds of the people are as one with the heavens, and the ‘heavens’ can be said to be the collective hearts and minds of the people. The young samurai who were inspired by these teachings went on to make history themselves, leading Japan towards the modern era.

Looking back on history, we can see that Buddhism was introduced to Japan in the sixth





century and it was from this time that Japanese civilisation flourished and concepts concerning the rule of law came to be held dear. The Golden Light Sutra, which was often read by statesmen of the day, teaches that unless a king rules under the law, he demolishes his own realm, just as an elephant destroys a lotus pond. Prince Shōtoku, who was a devout believer in Buddhism, had, by the seventh century, already formulated Japan's first constitution, consisting of 17 articles.

### Tradition of the rule of law in Asia

The reason why the Western concept of the rule of law was able to take root in the countries of Asia and help foster democracy was because from ancient times concepts similar to the rule of law were already deeply embedded in the spiritual traditions of these countries, many of which have histories dating back more than a thousand years.

The concept of the rule of law is universal. At its root is always the warm and caring human heart. It is imbued with a deep love for humanity. In the case of East Asia this is referred to as 'compassion'. These are essential in order for people to help each other and create a society in which they can all live. The Indian spiritual leader Swami Vivekananda and the Russian writer Tolstoy were also probably referring to the same thing, namely, 'God is Love'.

Law represents the morals and norms of society, created through consensus among people who work together, and bound by their shared love of humanity. In all human societies there is always the law, and power is always the servant of the law.

### Rule of law as the basis for Japanese diplomacy

The same is also true of the international community. It was in the 20th century that the international community itself was formed on the basis of the rule of law. Prior to the 20th century, violence had yet to be universally condemned in the international community. Wars and colonial rule were accepted as part of the norm. It was in the mid-20th century that war came to be condemned and a new international community was created based on the Charter of the United Nations. It was in the same century that former colonies around the world achieved independence.

The international community of the 21st century must create an improved international order, through consensus and in accordance with rules. We live in a world where no one should live in fear of unilateral violence.

This is the international community that we have sought to build in the post-war years.

It was 2,300 years ago that the Chinese philosopher Mencius said that when all is well under the heavens a moral and wise country will rule, but if the world under the heavens turns to be bad a big and strong nation will prevail. We must never again allow ourselves to fall into the world without justice that Mencius speaks of (Mencius, Lilou ed).

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*'The law is a moral presence that exists above power... in Western philosophical thought this is the "general will of the people" while in Japan and the other countries of Northeast Asia, it is called the "heavens"'*

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Preserving an international community ruled by law and justice is in the Japanese national interest and is the principle for Japanese diplomacy. Japan is engaged in broad diplomatic efforts that seek to realise the rule of law in the international community.

First, there is support for the development of legal systems in other countries. To date, Japan has worked to provide support for the development of such systems, mainly in Asian countries. These efforts have not been limited to government ministries and agencies, such as the Ministry of Justice, Ministry of Foreign Affairs and Japan International Cooperation Agency, but have truly been an 'all-Japan' effort, benefitting from the cooperation of universities and other educational institutions, the Japan Federation of Bar Associations, regional bar associations and individual attorneys.

Furthermore, Japan in particular is participating actively in international efforts to help women gain further skills and to protect and promote women's rights. On 1 April this year, the Convention on the Civil Aspects of International Child Abduction (The Hague Convention) entered into force in Japan. Japan is actively involved in efforts to resolve issues of child removal, in accordance with international rules.



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### **The role of the legal profession in strengthening the rule of law**

It goes without saying that states cannot establish the rule of law by acting alone.

It is truly an honour to welcome the Annual Conference of the International Bar Association to Japan. For more than half a century, the IBA has worked vigorously to fulfil a role as the ‘United Nations of bar associations’ for attorneys worldwide. It will undoubtedly continue to bear an exceptionally important responsibility towards the realisation of the rule of law in the international community.

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*‘The concept of the rule of law is universal. At its root is always the warm and caring human heart. It is imbued with a deep love for humanity’*

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Moreover, amid the globalisation of the international community, not only do we see legal issues becoming similarly internationalised, such issues are also becoming increasingly complex and diverse. To appropriately

resolve such issues, the world needs attorneys equipped with both legal knowledge and an international outlook to apply their expertise throughout the international community, without the constraints of national borders. Japan is currently engaging actively in efforts to develop and utilise skilled attorneys who are capable of playing a leading role on the frontlines of the international community. With broad cooperation from a great many attorneys and legal professionals, I would like Japan to continue to work to establish and strengthen the rule of law in the international community.

### **Conclusion**

Over the 70 years of the post-war period, Japan has continued to strive for the stability and prosperity of the international community, as a country that values democracy and basic human rights and as a peaceful nation that respects the rule of law. Looking back on the first half of the 20th century we can see that it was an era of almost endless revolution, war and struggle for colonial independence. The abiding lesson we can draw from the experiences of the 20th century is surely the importance of the rule of law, which represents the rules for democracy, basic human rights and peaceful conflict resolution. Together with the members of the IBA and together with your respective governments, let us exercise our leadership as we seek to establish universal rule of law on this earth. 🌐

In his IBA speech, Prime Minister Shinzō Abe set out the case that the Asian tradition, and specifically the Japanese tradition, of rule of law can be traced back to strikingly similar philosophical origins to the western tradition. It is also notable that both regions’ traditions recognise the Universal Declaration of Human Rights. The IBA is interested in readers’ views on the themes covered in Abe’s address and on human rights and rule of law in the Asian tradition. Your views can be emailed to [editor@int-bar.org](mailto:editor@int-bar.org)



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31 January – 1 February 2015

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# What next for Hong Kong?

**Pro-democracy protests in Hong Kong have divided legal opinion. While the use of tear gas by the police against what has been dubbed the 'Umbrella Movement' represented a human rights violation, some local lawyers argue that the persistence of the protests erodes the rule of law. *Global Insight* reports on a city divided.**

**STEPHEN MULRENAN**

For many in Hong Kong – myself included – the continuing presence of protesters across strategic sites in the districts of Admiralty, Causeway Bay and Mong Kok is having little direct impact on daily life. For others, such as

the owners of various banks, jewellery shops and clothes stores in the busy Kowloon shopping district of Mong Kok, the chaos and disruption is having a material impact on livelihoods.

While many Hong Kongers may have supported the fight for real universal suffrage when student activist groups began protesting outside government headquarters on 22 September, the prolonged blockades have resulted in the 'Occupy' movement losing much of that public support. In every sense, Hong Kong is a city divided at the moment, with no obvious end in sight.

The protests were originally ignited by China's decision, on 31 August, to pre-approve candidates for the 2017 Chief Executive election. In the minds of the protesters this represented a complete betrayal of the 1984 Sino-British Joint Declaration, which led to the drafting of Hong Kong's mini-constitution – the Basic Law (the 'Law').

One of the stated aims of the Law (Article 45) was to introduce universal suffrage for the election of the Legislative Council ('LegCo') and the Chief Executive, following 'nomination by a broadly representative nominating committee'. There was no reference in the Law to that committee needing to be approved by Beijing.

## Human rights violations

While the civil disobedience movement has the ambitious goal of securing universal suffrage for the elections of LegCo and the Chief Executive ‘according to international standards’, its methods of protest were always designed to be peaceful.

Things started to get out of hand on 26 September when, having witnessed up to 100 student protesters ‘reclaim’ the privatised Civic Square area of the Central Government Offices, the police started using pepper spray and tear gas on an unarmed crowd that had gathered near LegCo.

This aggressive approach, which immediately raised fears of a Tiananmen Square-style conclusion, led to the novel use of umbrellas as a means to defend against the spray – leading to the widespread adoption of the name ‘Umbrella Movement’. It also prompted the ‘Occupy Central with Love and Peace’ movement to bring forward the start of its occupation of the Central district, in order to capitalise on the mass student presence.

John Vernon, a partner with The Vernon Law Group in Dallas and Chair of the IBA Human Rights Law Working Group, is very active in China. He says that the protesters had the right under the law for peaceful assembly and protest. The 1984 Sino-British Joint Declaration guaranteed various rights and freedoms to Hong Kongers, including those of person, of speech, of the press, of assembly, of association, of travel, of movement and even of strike.

‘The police use of pepper spray was a huge human rights violation,’ Vernon says. ‘The civil disobedience movement is hardly the red brigade. It seems to me that they are doing their best to protest as peacefully as possible [...] everyone has been showing restraint, except the police.’

## Rule of law

Hong Kong-based solicitor Doreen Kong believes that Hong Kong enjoys much freedom of expression, particularly when compared with other parts of the world. ‘Hong Kong is a special administrative region and so the approach to Hong Kong must be different from that to Mainland China,’ she says. ‘Although some people may think that this freedom is being restricted, they may have forgotten that it has in fact been progressing when compared to the colonial days.’

Along with fellow solicitor Stanley Chan, Kong initiated a silent gathering of approximately 50 lawyers outside the Hong Kong High Court in early November to express their concerns that the continued protests were undermining the rule of law. The initiative followed the flouting




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*‘The police use of pepper spray was a huge human rights violation... The civil disobedience movement is hardly the red brigade’*

John Vernon  
The Vernon Law Group; Chair, IBA Human Rights Law Working Group

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Left: Clashes between riot police and pro-democracy protesters, Mongkok, Hong Kong October 2014 ©REUTERS/Carlos Barria

Below: Messages of support for pro-democracy movement, Hong Kong ©Stephen Mulrenan

by protestors of three temporary High Court injunctions to clear portions of roads in Mong Kok and Admiralty.

Kong says that the occupation and obstruction of the roads is illegal, and that the civil disobedience movement has ‘trampled’ on the rule of law. ‘The non-compliance of the various injunction orders clearly demonstrates that the rule of law is severely affected by the movement,’ she says. ‘The protesters also seem to have a different interpretation of the enforcement of laws. When the police or the anti-Occupy Central protesters did something illegal, the protesters would press for enforcement of laws without hesitation. However, when the protesters themselves are in breach of the law, they would say the matters should be dealt with by political means. That is just double standards, and how can the rule of law be subject to double standards?’

The Hong Kong Bar Association (HKBA) has weighed in on the potential damage being done to Hong Kong’s rule of law. Slamming the protesters for ignoring the High Court

injunctions, it said that open calls to disobey a court order undoubtedly lead to an erosion of the rule of law.

‘Independence of the judiciary and respect for the dignity and authority of the court are fundamental tenets of the concept of the rule of law,’ says an HKBA statement. ‘When deliberate defiance of a court order is committed *en masse* as a combined effort, a direct affront to the rule of law will inevitably result.’

### Public confidence

John Vernon says that the rule of law does not always equal justice. ‘It bothers me tremendously that the Hong Kong Bar Association is against the protests,’ he adds.

Stockholm-based Sveriges advokatsamfund partner Anne Ramberg is Secretary-General of

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*‘It can be a sensitive task to strike the balance between national security and the protection of civil liberties and human rights’*

Anne Ramberg

*Sveriges advokatsamfund; Secretary-General,  
Swedish Bar Association; IBA Rule of Law  
Action Group*

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the Swedish Bar Association and an officer of the IBA Rule of Law Action Group. While agreeing that all laws must be respected and observed by all parties, she says that the rule of law also guarantees rights and freedoms to Hong Kongers.

‘It is obvious there are several rule of law challenges in post-colonial states,’ she says. ‘There is also a need for cultural sensitivity in order to be successful, since the rule of law requires a justice system that enjoys public confidence. It can be a sensitive task to strike the balance between national security and the protection of civil liberties and human rights.’

Time will tell whether the protests draw to a peaceful conclusion or not. Given the additional scrutiny of developments in Hong Kong, it seems highly unlikely that events will escalate to the tragedy of Tiananmen Square.

Kong says one concern is that the civil disobedience movement has now been hijacked by other forces. ‘The longer the movement goes on, the less possibility there is for a peaceful conclusion, because its purpose has altered,’ she says.

Certainly the protesters appear to have given up on negotiating with CY Leung and his administration, and now appear to be directing their grievances at Beijing. Recent reports that the Chinese Government is willing to pay more respect to the ‘two systems’ element of the post-handover formula appear to be a step in the right direction.

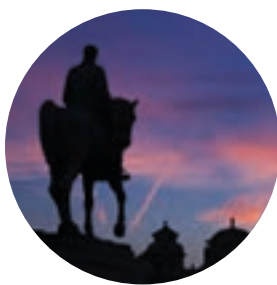
### Market stability

Ultimately, as with most things in Hong Kong, it is likely to be money that dictates the pace and direction of change. The Big Four accounting firms were among the first to raise concerns that the protests would bring ‘instability and chaos’ to the markets, and could ultimately damage Hong Kong’s status as an international financial centre.

Key foreign investors would not be the only ones seeking a peaceful end to the demonstrations. ‘[China] Mainland-controlled companies account for close to 60 per cent of Hong Kong’s stock market capitalisation, and the Communist Party’s nobility own several private equity funds and much prime real estate in Hong Kong,’ says Ramberg. ‘They have no interest in seeing a bloodbath in Hong Kong which, apart from instability and other consequences, could trigger a flight of capital.’

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On screen: Al Gore, 45th Vice President of the United States and Nobel Laureate. L-R, on stage with task force members: Mary Robinson, UN Special Envoy on Climate Change; and President Mohamed Nasheed, the first democratically elected president of the Maldives.

# Climate change: achieving justice and human rights

The showcase session to debate the IBA report, *Achieving Justice and Human Rights in an Era of Climate Disruption*, brought together presidents, vice presidents and other highly influential figures. *Global Insight* brings you the highlights from Al Gore, Mary Robinson and Mohamed Nasheed.

## Al Gore:

**'We are paying the cost of carbon every hour of every day...'**

Without immediate action to solve the climate crisis [...] injustices will become more intense and more common. Our continued reliance on dirty fossil fuels is clearly unsustainable and unjust. We are paying the cost of carbon every hour of every day; we must internalise that cost into our market system. We need to put a price on carbon in markets and we need to put a price on denial in politics. Fortunately, the way

forward is now becoming clear [... it's] towards clean, sustainable, renewable energy that's already available and is spreading rapidly. Many are surprised to learn that now, in the fourth quarter of 2014, solar photovoltaic electricity is equal to or cheaper than the grid average from all other sources in 79 countries, and within six years, at the end of this decade, more than 80 per cent of all the world's people will live in regions where solar electricity is competitive with fossil fuels – indeed, is equal to or cheaper than electricity from these other sources.

The importance of this trend simply cannot be overstated. Wind energy is already by far the cheapest source of electricity in many parts



of the world. In my own country during the first half of this calendar year zero per cent of the new electric generating capacity came from coal; the majority of it came from solar and wind. This is the path forward. It leads us away from a dangerous and polluted world and towards one that is simultaneously sustainable, just and prosperous.



### 'We risk designing climate policies that undermine human rights...'

**A**s a lawyer myself, I have felt for quite some time that the legal profession worldwide has been behind the curve on the negative impacts of climate change. [...] We face the prospect of millions of climate-displaced people who are not recognised as refugees, and for whom there is as yet no international convention. We're told that by 2050 there could be 200 million climate-displaced people. [...] What might be the implications for rule of law when large cities are flooded, or people are displaced by persistent drought?

The significance of this report lies firstly in its assessment that current law is inadequate to meet the challenges of climate change. As a result, the legal profession has a critical role to play in strengthening and creating the laws, norms, regulations and policies needed to ensure an effective and equitable response to climate change. We cannot solve the climate crisis without you, the lawyers of the world. The report is also significant for its legal treatment of the impacts of climate change on human rights, and the proposal of practical ways of using and strengthening legal frameworks and human rights law to ensure climate justice. For too long climate change has been seen as an environmental issue and as a result the focus of only a small pool of the legal profession specialising in environmental law at domestic or international level. What this report shows is that climate change is an issue of justice

Fossil fuels are still receiving from governments around the world annual subsidies that are 25 times larger than the meagre subsidies that are given to renewable energy. Those subsidies for dirty energy must be halted, because a continued subsidy of dirty fossil fuels simply fuels climate injustice. It cannot continue.

with repercussions for all aspects of law, from corporate law to litigation, human rights law to trade law. Whether you work to protect the interests of business, citizens or states, climate change is part of your portfolio.

2015 is the year that will define our response to climate change through the new climate agreement, the Post-2015 Development Agenda, including the Sustainable Development Goals, and new initiatives for financing development. [...] We have a short window of a number of years only to make a fair transition to a carbon neutral world. [...] Law plays a role in shaping and informing these policies and in regulating the resulting actions to make sure they deliver justice. Climate justice is about protecting those with least capacity to protect themselves and who bear least responsibility for the causes of the problem.

Human rights play a role in all aspects of climate action, from procedural rights such as participation and access to information, to the substantive rights, such as the rights to food and to health that we seek to protect from the impacts of climate change.

The evidence presented [in the IBA task force report] shows that poorly designed policies and actions can have negative impacts

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*'I am surprised at the number of people who say to me, what on earth is [climate justice]? They have no idea what climate justice is about because they have no idea of the injustice of climate'*

Mary Robinson  
UN Special Envoy on Climate Change

## Q&A on carbon justice and common law

### **Pauline Wright, Treasurer, New South Wales Law Society:**

What can be done to address [...] party politicking around this very important issue?

**Mary Robinson:** [...] Politicians do respond to pressure and Australia is going to be very vulnerable, as we know, is already very vulnerable, to climate shocks. [...] I think it's a case of keeping the voices for progressive policies heard.

**David Estrin:** I sympathise, I'm from Canada and we have a prime minister that withdrew Canada from the Kyoto Protocol. [...] We from the British common law tradition have a problem, we don't have a constitution that actually talks about the environment and the right to have a safe, clean, healthy environment; [approximately] 100 countries in the world do. Those who got their constitution, if you like, [...] from the British mould are the lesser off. [...] Citizens are able to go to courts in Chile, in Africa, in Europe even and say, we have a right to a safe, clean, healthy environment. [...] So I think we have to work in these former Commonwealth countries to at least get the same level of legal [and] constitutional protection.

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**Helena Kennedy:** Many of our membership in the IBA are commercial lawyers advising commercial entities, often advising [...] fossil fuel companies, and will seek to [...] hold back the tide of law that is likely to infringe upon the profitability of their clients. [...] Many commercial lawyers might be very sympathetic with what [climate change] means ultimately, but they know that when they're giving advice to their own client base, there will be other imperatives that will be coming into contest. [...] The phrase that Al Gore used was that this is a challenge to our moral imagination, but it's also a challenge to our legal ingenuity.

**David Estrin:** [When] you're acting for companies, [advising] on what the legal risks are, and the [company's] exposure and [the necessary] due diligence, [consider that] due diligence looking down the road means you cannot continue current practices as they are carried out today. The resources, the materials that you've got racked up in your inventory, as Al Gore said, may well not be the resources you think they are. So assess the viability of those [resources] and think carefully about [whether it is] in your own best interest to try and use other means to generate [energy, or] whatever you're doing. [...] that will, I think, help turn corporations around.

**Helena Kennedy:** Reputational threat, the risk of litigation, those are the things that we as lawyers are going to have to raise with our clients on this subject matter.

on people's human rights and can contribute to unfair and unjust outcomes. If we get climate policies wrong they risk furthering the injustice already encountered due to climate impacts. [...] If we design climate policies with human rights and fairness in mind, they will be more effective and benefit people and the planet. [...] Research commissioned

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*'It is very much a plan, indeed a first priority of my upcoming presidency of the IBA for the two years of 2015 and 2016, to continue the work of this task force'*

David W Rivkin  
Incoming IBA President 2015

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by my foundation reveals that [...] only 12 countries made the link between human rights and climate change in reports both to the UNFCCC and the Human Rights Council. This demonstrates a lack of coherence and a lack of collaboration between experts working on climate change and human rights. Clearly this has to change, or we risk designing climate policies that undermine human rights.

The task force report shows us that the current system of international law is not well-suited to addressing climate justice. This is deeply troubling. [...] The fragmented nature of the relevant legal regimes and their origins, in most cases in a world before climate change, means that reforms are needed to enable them to respond effectively and to deliver climate justice. More effective and coherent use of existing laws, rules and norms would inform better climate responses at the international and national level, and the legal reforms required to ensure fair and effective climate policies and actions. As a result, the final chapter of this [IBA task force] report is critical, spelling out many of the steps needed to revise and strengthen the legal system.

[...] I absolutely encourage the IBA to establish an international network of climate change counsel to raise awareness of climate justice among attorneys, judges and lawmakers in developed and developing countries and to build their capacity to use international law more effectively to respond to climate change, while realising rights.

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### 'What becomes of a people without a territory...?'

**T**his year the question of climate justice has taken on a new urgency. [...] We have watched New Zealand grant residency to a family who fled their homeland because of climate change and we have seen Kiribati become the first climate vulnerable nation to purchase territory in another country in preparations for the floods that will submerge their islands. Every week brings more evidence that climate change is already changing lives. The drumbeat is growing stronger, but so is the grunting sound of dissent from mouthpieces of polluting economies.

[...] To break with our tradition of inaction, we need people from outside the movement to speak out. Business and professionals are essential advocates for progressive climate policy. Every time a respected financial or security institution talks about climate risk the case for climate action grows louder. Governments are sensitive to risks, and that includes legal risk. So the legal profession will play a key role in driving climate policy.

By drawing attention to specific consequences of inaction you can make the implication of climate change a little more real. The law is, as you know, a living thing. Its evolution reflects the forces changing society,

Considered the lowest-elevation country on the planet – at just 1.5 metres above sea level on average – the Maldives faces a very real threat of rising sea levels





from human rights to equal opportunity. But the legal fraternity itself can also shape these forces. In the United Kingdom slavery was abolished by legislation, but only after the courts ruled that slavery had no place in England. [...] Lawyers and the law have had a profound effect on the way things are done in society.

For Maldivians these are not abstract problems. They are not distant concerns to be filed away as something we will have to worry about later: they are happening. The inundation of the Maldives is just a generation

away. When I was elected president I caused some controversy by saying we would someday have to leave our islands. I was hopeful then that we would be able to change the way our story ends, but I fear it's too late for the Maldives. The world has lost the window of opportunity to mend its ways. Big emitters have sentenced us. The world temperature will rise and the seas will rise over our nose. The Maldives is home to 400,000 people. We have lived scattered across our distant archipelago for thousands of years. When our islands come to the water we will leave. We will take with

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*Fossil fuels remain heavily subsidised, but this has not been challenged so far within the World Trade Organization. By contrast, although they're relatively rare, subsidies for renewable energy have been challenged'*

Dr Stephen Humphreys

Associate Professor, London School of Economics

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## IBA next steps

**David W Rivkin:** It is very much a plan, indeed a first priority of my upcoming presidency of the IBA for the two years of 2015 and 2016, to continue the work of this task force. Essentially we have taken every one of [the report's] recommendations and assigned them to [...] the two working groups that are specifically recommended in the task force report. One on a model statute and one on issues regarding legal adaptation, specifically as President Robinson mentioned, defining climate change refugees and setting in place a legal mechanism for that, because that doesn't currently exist. We will certainly take to heart the recommendations we heard today, including [them] in the discussions about the model statute, and a potential international court on the environment.

In addition, many of the recommendations fall within the scope of existing IBA committees, [in particular] the section on energy, environmental law: SEERIL. We've talked about the important role that SEERIL will have in taking forward many of these recommendations. In addition, many of the recommendations fall within the scope of the Arbitration Committee, the Corporate Social Responsibility Committee, the Human Rights Institute, the Bars and our 206 member

organisations. Some of you may or may not know that IBA has a small working group, but important, [...] on business and human rights. They will all be involved, and we will assign to them the particular recommendations that fall within their scope, and we will coordinate this work and make sure that it continues.

Most importantly, there are many recommendations aimed at the UN and asking the UN to take various steps, and we look forward to working with President Robinson on those recommendations, and finding the best way to work with UN members. [...] Indeed, we've talked about and expect that we will send two representatives of our task force to the COP meeting in Lima in December. We've been invited because of the importance of our recommendations. We will take them up on that and make sure that that dialogue continues. So we look forward to continuing to report to you at future IBA conferences about our progress. We look forward to the discussions in Lima and in Paris and elsewhere and we look forward to the assistance of all of you. I can promise you that the IBA will be the global voice of the legal profession on this issue.

us as much of our culture and customs as we can carry, our stories, our history, our food, our distinct language and its beautiful script, but that will be nothing compared to what we will be leaving behind. We will leave behind our homes, our streets, our buildings. We will leave behind the beautiful Friday mosque carved out of coral stone seven centuries ago. We will leave behind the trees we grew up with, the sand we played on, the sounds we hear daily. The sea will claim those things and with it our people. It is hard to put this to words. The feeling of losing what makes us us.

If current trends continue the Maldives will be among the first climate refugees. We will face issues of citizenship, sovereignty and repatriation. If our nation sinks we will be forced to answer questions more familiar to Palestinians, Rohingas and the Kurds. What becomes of a people without a territory? Can you have sovereignty and dignity without land? Can an independent nation exist on a foreign soil? What would happen to the land that we had? And what restitution, if any, can be made for the damage done to us, damage we warned about but did not cause? I fear that these questions will be answered one day not in the abstract, but in a court of law, and I fear that we the people of the Maldives will be the star witness.

So we look to the international community to provide legal protection where it could not provide environmental protection. To build new defences against a changing climate. To help us prosecute those responsible after the fact, if they will not accept responsibilities before it.

[...] Two efforts, building a clean economy and rebuilding our natural defences, are clearly underway. But they can be kick-started by a new consensus on climate action. So we should continue to pursue a strong global agreement on climate change in Peru this

year and in Paris next year. For the best part of a decade UN climate negotiations have been stuck in a rut, with countries hiding behind labels and few showing leadership. A

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*'You've set high standards for us and encourage us to meet those high standards. I hope you will continue to do that and to, as we say in English, keep our feet to the fire as we go forward into what you've said quite rightly is the very critical second stage'*

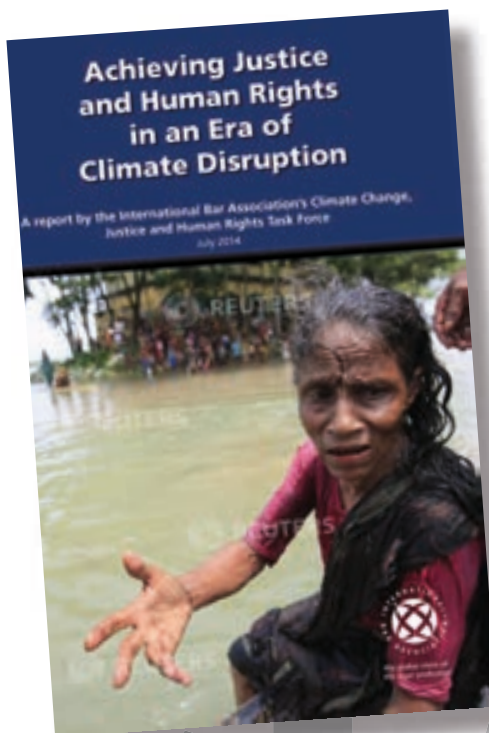
Michael Reynolds  
IBA President 2013/2014  
[addressing Mary Robinson]

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comprehensive deal will require developed and developing nations alike to abandon their comfortable entrenched positions and have the courage to find common ground. Ambitious countries should continue to work together and bring along those who are falling behind.

It may be too late to save homelands in Kiribati, Tuvalu or the Maldives. It may be too late to save the species which depend on stable temperature, clean air or placid seas, but it is not too late to change our ways. There's an old Chinese saying which says the best time to plant a tree is 20 years ago. The second best time is now. The best time to secure climate justice for the people of islands, delta nations, for the poorest and most vulnerable was 20 years ago. The second best time is now. ☘

This is an edited excerpt of the filmed session, the full version of which can be viewed at: <http://tinyurl.com/IBA-climatejustice>





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# Protecting the rights of the child, 25 years on

This year marks a quarter of a century since the adoption of the UN Convention on the Rights of the Child. *Global Insight* considers why the Convention is important, its successes and failures, and what still needs to be done.

**POLLY BOTSFORD**

**T**hese days children are seen *and* heard. Consider the vocal child activists who find their way into the mainstream media: Malala Yousafzai is the most famous, but there are many others, such as Om Prakash Gurjar, a former child labourer from India, who campaigns for free education.

Until Nkosi Johnson died of an AIDS-related illness at the age of 12, he bravely spoke out against the discrimination he faced as an HIV-positive child in South Africa.

Consider the number of initiatives worldwide designed to improve the welfare and standing of children, from Bill Gates' mosquito nets in

Africa to Amnesty International's campaign to stop the use of child soldiers. The lid has been lifted on historic – and current – child abuse scandals, and on the practice of female genital mutilation. We have even cast our eyes over the slap and the place it has in family life.

As the United Nations Convention on the Rights of the Child celebrates its 25th anniversary, it is worth asking ourselves whether it is responsible for these new child voices and child-focused campaigns. The Convention outlines a set of fundamental rights for children on health and education, and against child labour and exploitation. States that have ratified the Convention are

legal principles, which are pinned up for everyone to see. As Anne Ramberg, council member of the IBA's Human Rights Institute, says, it has had 'a fundamental impact on our way of thinking and our social and legal culture'. Can we say anything more?

The World Policy Forum, a research and data organisation, has tracked specific examples of law and policy flowing from the Convention. For instance, Article 32 of the Convention protects children from economic exploitation. The forum's analysis shows that, whereas previously countries had allowed child labour 'without restrictions', 75 per cent of states now prohibit labour for children aged 12 years old and under.

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*'What exactly is the Committee [on the Rights of the Child] reviewing? That is not what I call holding governments to account. We need a Committee which independently audits and reports on states' track records for rectifying wrongs'*

Kevin Watkins  
Executive Director  
Overseas Development Institute

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legally obliged to uphold those rights: all UN Member States, with the exception of the United States, Somalia and South Sudan, have approved the Convention, making it the most widely ratified human rights treaty in the world.

Taking the period since the Convention was introduced, evidence indicates that there is good news for children across the world. For instance, according to the UNICEF report compiled for the anniversary, *Is the World a Better Place for Children?*, mortality rates for children under the age of five globally have reduced by almost 50 per cent, more children can access clean drinking water and more children are enrolled in school. But, how far is the Convention itself responsible for these improvements? Or can it be argued that this progress has more to do with economic growth, particularly in the developing world? Cause and effect are difficult to identify. We can say that the Convention provided context for drastic changes in children's health, social and educational development worldwide, that it set minimum standards and that it contains

According to Article 28 of the Convention, primary education must be compulsory and free for all: now only one per cent of states have not fulfilled this Article.

However, legislation alone is not sufficient; it is mere words on a page until governments bring it to life by enforcing it. Even if the law says all primary school-age children should be at school, it doesn't mean the authorities ensure that they are. Kevin Watkins, Executive Director of the Overseas Development Institute, says: 'The number of successful prosecutions under some of these laws is miniscule, to be honest. Such laws are not of themselves going to improve lives.'

In order to properly realise legislation, states need to allot resources to monitoring, investigating and enforcing their own laws. In fact, some argue this starts with the UN itself: the Committee on the Rights of the Child is designated as the guardian of the Convention. Countries report to the Committee on the state of their own child rights; the Committee then reports back. In practice, however, Watkins says: 'State reports are normally



Nobel Peace Prize laureate Malala Yousafzai of Pakistan speaks at the World's Children's Prize ceremony in Mariefred, Sweden, October 2014

just reciting legislation, not whether or not that legislation has been enforced.' If that is the case, then he asks: 'What exactly is the Committee reviewing? That is not what I call holding governments to account. We need a Committee which independently audits and reports on states' track records for rectifying wrongs.'

There may be change ahead: enforcement could be bolstered by a new mechanism, the third Optional Protocol to the Convention, introduced in April of this year. Global in reach, the Optional Protocol allows a case to be presented directly to the Committee

– in the same way that allegations of torture can be made directly to the Committee Against Torture. The only catch is that a child complainant would have to exhaust all domestic remedies first. If enforcement can be improved through mechanisms such as this, then it seems more likely that legislation prohibiting child labour, or making birth registration compulsory, could indeed change behaviour.

Enforcement is also a question of means. Ramberg argues that what might be called progressive states are in many ways failing to 'live up to the Convention'. But it is in countries 'without adequate resources and institutional infrastructure' where there are the greatest problems.

There are areas, however, where the Convention has failed to deliver, not on enforcement but on actual reform of the law. For example, the Child Rights International Network (CRIN) advocates for greater recognition of children's rights within criminal justice systems, such as in sentencing. Their research has found that the death penalty for children is lawful in 14 countries, that corporal punishments such as whipping or flogging of children happen in more than 40 countries worldwide, and that life imprisonment for children is still common. Meagan Lee, Legal Policy Advisor with CRIN, says: 'There has been much progress in introducing juvenile justice systems so that children are not treated the same as adults, allowing them separate detention, for instance, and only using detention as a last resort, but there are still areas where work needs doing.'

According to CRIN, the US currently has 2,000 life prisoners who were children when they committed the crime for which they were incarcerated. As the US is not a signatory to the Convention, this is not so unexpected. 'The US has a track record of refuting this type of international "interference",' says John Vernon, Chair of the IBA Human Rights Law Working Group. This is also a failing of the Convention: having no influence in what some may consider the world's only superpower is a problem, and one that needs fixing.

On the 25th anniversary of the Convention, we can feel proud that we have given the likes of Malala the right to be heard, but we should also be ashamed that she had cause to speak out in the first place. ☒

Polly Botsford is a freelance journalist and can be contacted on [polly@pollybotsford.com](mailto:polly@pollybotsford.com)



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# Ukraine crisis

**Three experts – Vladimir Kotlyar, member of the International Law Council of the Russian Federation; Ukrainian MP Andriy Shevchenko; and Emeritus Professor of Law at DePaul University Cherif Bassiouni – gave their markedly differing perspectives on the Ukraine crisis in a debate moderated by award-winning former CNN anchor Todd Benjamin.**

**Todd Benjamin (TB):** Right now, we have a very uneasy truce in the Ukraine [between Ukraine and Russia] and there's strong disagreement over who's to blame for what's going on there. I want to start by asking, was there a clear violation of international law?

**Andriy Shevchenko (AS):** When I was travelling from Europe to Tokyo, and was putting together some notes on this upcoming panel, I was thinking about some other people who were doing the same route, following the same route from Amsterdam to Kuala Lumpur: 298 people who died in this terrible accident when the [flight MH17] plane was shot by this missile – shot from the territory controlled by the Russian separatists. And you remember the whole nightmare which

came later: the pictures of kids' bodies lying on the ground... and the international rescue team which did not get proper access to the crash site and many other things.

So for me it's very clear that it was the consequence of the violation of the basic principles of international law, when we saw one country – which happened to be a neighbouring country to us – which first did its best to prevent Ukraine from signing the association agreement with the European Union; then, when it failed, decided to occupy the Crimea; and then they put on fire [*sic*] the east of Ukraine and fuelled that by sending mercenaries and regular army officers, and food, ammunition and arms to that territory. And I think it's a very dangerous challenge to the principles of international law.



We see the Helsinki Accords, its ten principles, thrown away; we see NATO [the North Atlantic Treaty Organization], which now says that we see a hybrid war in Ukraine and that Article 5 of the [UN] Charter does not respond to all the new challenges. We see the United Nations challenged – because how can other nations expect decent help from the UN when we see that there is one member of the Security Council that can stop any decision and this member believes that force is more important than principles of international law?

But if you analyse this tragedy more attentively you'll see that when the Malaysian plane went down on 17 July with 298 passengers on board, press observers in Moscow, for instance, couldn't help noticing that this crash actually had come in very handy – both for Washington and Kiev. Eight European Union Member States had threatened to block the US efforts to apply sanctions against Russia. The war was going badly for Kiev. For several hours after the crash the government, supported immediately by the leading Western countries, put the blame



Finally, why should Iran or other nations stop their nuclear programmes if they see Ukraine being torn apart after it has given away its nuclear arms? So we see the whole set of challenges and the only way to get on the right track is to return to respect of the basic principles of international law.

**TB:** Vladimir, you just heard what Andriy has to say: he says that Russia values force more than international law. Is he right?

**Vladimir Kotlyar (VK):** The first thing Andriy mentioned was the tragedy with the Malaysian plane. And he had no doubt whatsoever that it was the local militia which got, probably, the equipment from Russia. What's interesting is that Kiev came up with this idea the second day after the crash, even long before there were first coordinated efforts to investigate the matter, and they tried to impress upon people their own idea of how it happened.

squarely on the rebels and sometimes even on Russia, without so much as waiting for an international investigation, documentary proof to back this accusation.

Kiev, if you remember, issued a series of 'photos', which Russian experts quickly proved to be falsified. And the US intelligence community, which gets \$68bn a year from the US federal budget, found no more convincing sources of argument than to say the Ukrainian army didn't do it because President Poroshenko said so, referring to unspecified intelligence information and to Ukrainian social networks.

**TB:** Clearly you don't feel the blame is properly placed for the Malaysian air crash there. Can we move on to what actually happened in Crimea? What's going on in eastern Ukraine? Is there any legal justification for Russia's actions in both those instances?

Pictured above, L-R:  
Todd Benjamin,  
Vladimir Kotlyar,  
Cherif Bassiouni and  
Andriy Shevchenko

**VK:** As far as Ukraine is concerned, there's no doubt in my mind whatsoever that whatever was done in Crimea was *not* contrary to international law in any way for the simple reason [of the] very first statement which [interim President] Turchynov made [...] Everybody, including three European foreign ministers, signed an agreement that there will be government of national consensus installed and all the regions of the country and all the political parties will be part of that government.

Now, the next day after that there was that coup d'état and that changed everything immediately. The very same three foreign ministers of the Western countries who signed this agreement together with Yanukovich and Yatsenyuk, those very people kept silent as if nothing had happened while in fact [...] there was an unconstitutional change of power.

So that immediately rang alarm bells for Crimea and for south-eastern Ukraine because the next day, in his very first statement, Turchynov, interim president, said two things: one, the treasury is empty. You would suppose that next he would say how to fill it: no, next what he said was that they should refute, recall the law which gave the Russian-speaking population the right to use the Russian language in their dealings with the authorities.

**TB:** You obviously feel what Russia did was justified based on the facts that you just gave and further facts that Russia has used to justify their actions. Cherif, it's very interesting that you're [sitting] in the middle of these two gentlemen. That wasn't by design but perhaps it's appropriate given the polarisation between their views. Was there a breach of international law or am I being too simplistic when I ask it that way?

**Cherif Bassiouni (CB):** If I can start with a more or less humoristic note, I'm in disagreement with both speakers but I think I'm more in disagreement with you, Todd. And the reason is that the way you have formulated the questions necessarily led each of the two to feel that they have to defend a certain position. And then they immediately went onto facts, which we as lawyers would say are not really in the records. We have no idea as to whether or not those facts are true or not true, whether there are other facts about it [...] And so what are we trying to do? Are we trying to fix the blame or are we trying to fix the problem? Because if we're trying to fix the problem we're not going to make much progress by hearing, 'You shot the plane', 'No

we didn't shoot the plane', 'Somebody else out there shot the plane'.

So let me sort of get back to and sort of pose to all of you the following: we see a series of factual situations that have evolved. We're not really too sure of what these facts are, how they have evolved and what's beneath these facts – both in the Ukraine, within the Ukrainian body politic, and within Russia. We have to ask ourselves, what is it that we're not seeing?

Well, maybe what we're not seeing is a concern by Russia that regards its national security. Maybe we're not seeing the fact that when the Ukraine was negotiating with the EU an agreement that there were security measures in [that] agreement that may have indicated to Russia, 'This is going to be a slight opening door for NATO to come in'. And if that's the case it's obvious that Russia's national security would be threatened by having NATO possibly entering through the back door and being at the border of Russia – just as the US would probably be very concerned if there was any effort to enlist, let's say, Mexico in an alliance with Russia.

So that's a factor that we need to look at. And the other factor is really the internal political dynamics and realities of what's happening in Ukrainian society. So all of that being out there, I would like to encourage you all as lawyers and judges to think of [...] you know [...] what is it that can be done to move from this confrontational stage of 'You did this', 'He did that' to how can we fix the problem and maybe at a subsequent stage find out who is to blame for what?

**TB:** Andriy, is there a way out of this crisis and, if so, what is it?

**AS:** [...] I see three immediate directions to start moving. At first it's [that] we definitely should find some efficient ways to stop fighting – and it's not truce that we would like to see on the ground; in these last months of so-called 'ceasefire' more than 1,500 times this regime of the ceasefire was violated by the separatists and we see every day people dying in the east of my country, both civilians and military. Not a single day passes without people being shot so it means we should seal the border and I think in both of the interests of Ukraine and Russia, if we are sincere in our attempts to stop the fire because that's the major source of arms, ammunition, money and supplies for the separatists and to clear terrorists and mercenaries. And [...] we should think about some international monitoring of this ceasefire and of this sealed border.



The second direction is humanitarian issues. We should think about how to get water, food, medical help to the people who are suffering from this war – and we're talking about a territory where up to seven million people live, we are talking about hundreds of thousands of internally displaced persons and refugees. It's not on the news any more but we're talking about hundreds and thousands of people, and millions of people, who're looking forward to this terrible winter, which gets really cold in my part of the world.

and then we should proceed to the new local elections in the troublesome regions. So we can do all of that if we're sincere in our desire to put an end to this terrible war.

According to different calculations, something between 4,000 and 10,000 people have died in the conflict, both military and civilians, and it's happening in Europe in the 21st century. So I think only under very clear international monitoring and support we can go ahead.



And also we must think about the exchange of bodies, we should think about the proper identification of the bodies. There are no conditions even to do simple DNA procedures, DNA testing, for those people who were killed in the territory.

And finally, direction number three is politics [...] This part of the job should be done as well. And Ukraine is in the process of rewriting its constitution and I see no reasons to, not to go ahead with decentralisation and with giving as much powers to the regions of Ukraine as possible.

The whole nation has been badly suffering from a very centralised government, corrupt, very arrogant so we should go ahead with that

**TB:** So you raise several points: one, they should seal the borders; two, there should be international monitoring; three, you have to address humanitarian issues such as access to water and so on; fourth, exchange a proper identification of those who have been killed; five, politics in terms of rewriting the constitution, a much greater decentralisation and followed by local elections. Those are your solutions.

Vladimir, you've heard what has been proposed. Do you agree with a lot of that or what do you see as the best way to resolve this conflict?

**VK:** What has been just proposed is a very short review of a couple of agreements which



have been taken by the Ukrainian government, by the militia, by the Russian government and the OECD and EU in Minsk [the 'Minsk Agreements'], but was presented in a slightly prejudiced way, I would say. First of all, let's stop talking about militiamen killing the population of their own cities. This is their home, they don't shoot at dwelling houses, they don't shoot at civilians because they live there. Their family are there, their wives, their elders, their children are there.

But who is actually shooting at them is those detachments of Ukrainian army forces who found refuge in underground structures in Donetsk Airport. It was built many years ago as a headquarters for the Ukrainians' state leadership and army in case of a nuclear war. It has seven floors underground and it's nearly impossible to smoke people out of these seven floors – and it is *these* people who shoot at Donetsk, who shoot indiscriminately, without looking properly at what they are shooting because it's incredible to imagine militiamen who live in Donetsk, that they're shooting at the houses where their family live. It's nonsense.

**TB:** Let's stop the blame. How do we stop the shooting?

**VK:** The shooting is being done by people who do not obey President Poroshenko. President Poroshenko did give his order not once but at least twice but the people who are shooting are members not so much of the regular forces of Ukraine but are punitive battalions who are financed and commanded by representatives of a couple of oligarchs and they're listening to their orders, not to the President's. The President actually is limited in his power over them.

And one more thing: one of the most important points in the Minsk Agreements was that the outline for the future, political future of Ukraine should be worked out together by Kiev and by militia with the support from the other participants in the Minsk Agreements. But as you just heard from Andriy, they are planning to work on the draft constitution themselves without talking to anybody else and then [...] it will be impossible to implement because it will not be implemented in the regions which object against the kind of power which is now in Kiev.

**TB:** You just heard what Vladimir said, that it is not inclusive as envisioned under the Minsk Agreements.

**AS:** It is inclusive and, once again, as of the moment, Kiev and the central government is ready to give as much, as many powers to the regions as possible. It's not just a matter of survival but it's also a matter of common sense: we do need this decentralisation. And you know, I think we really need to do some fact-sharing here because when we talk about [flight] MH17 we don't see a clear picture – which is not just an issue for the Ukrainian government but also for international governments. When this missile came from the territory, which is controlled by the pro-Russian forces, with equipment which most likely came from Russia, and it requires some professional deal with this equipment and is done by the people who are politically and physically and financially supported from Moscow, I think it pretty much brings the puzzle together.

And I think it's really important. When I worked as a journalist I really enjoyed talking to lawyers because, unlike politicians, when they spoke to us correspondents it was about arguments and evidence, and I think we really should expect that. We might want to talk about, whether it's the Malaysian aeroplane or a submarine in the Swedish waters or anything else, and the same goes – sorry, just one remark about the legitimacy of the new government in Ukraine because I hear this word, 'coup d'etat'.

And I think Yanukovich, the former dictator in Ukraine, lost the last drops of his legitimacy when he gave the orders to shoot his own people and I think he clearly realised that he would not be able to live in that country any more and that's why he fled the country the next moment after he signed this agreement with the Europeans. And which country did he run to? It wasn't the UK, it wasn't the United States of America, which are known for their inventive and creative lawyers. It wasn't Switzerland or Austria where the mother of his family was but it was Russia. And let me guess why: because it was one of the few countries on Earth where – sorry to say that – force and the solidarity of non-democratic regimes means much more than the international principles of laws and I think this something which we should understand about the legitimacy of what happened in Ukraine in the beginning of this year. ☒

This is an edited excerpt of the filmed session, the full version of which can be viewed at [tinyurl.com/Ukrainesession](http://tinyurl.com/Ukrainesession)

# Sign of the times: financial governance must reflect reality



As the global economy evolves, the institutions and conventions that govern it are struggling to keep up. *Global Insight* assesses the potential for change.

JONATHAN WATSON

In July this year United States' authorities fined BNP Paribas \$9bn for sanctions violations. Some argued that it was the dominance of the US dollar in international

transactions that had put the US in the unique position of being able to take action over what were, in this case, reprehensible actions. As the balance of the global economy shifts, we need



to ask: how much longer can this dominance be maintained?

The dollar remains far and away the most important currency for invoicing and settling international transactions, including imports and exports that never go anywhere near the US. South Korea and Thailand, for example, set the prices of more than 80 per cent of their trade in US dollars, even though only around 20 per cent of their exports go to US buyers. Seventy per cent of Australia's exports are invoiced in US dollars, even though less than six per cent go to the US. All the main commodity exchanges give prices in dollars; oil is priced in dollars; and dollars are used in 85 per cent of all foreign exchange transactions across the world.

Dollars account for nearly half the world's stock of international debt securities. They are also the form in which central banks hold more than 60 per cent of their foreign currency reserves; the euro accounts for just under a quarter of foreign currency reserves.

Data from the International Monetary Fund (IMF) suggests this percentage is not changing significantly over time. 'It moves around a little bit, partly because of valuation, but in general it seems like the world wants about 60–65 per cent of central bank reserves in US dollars,' says Marc Chandler, Head of Currency Strategy at US private bank Brown Brothers Harriman.

This situation is 'more than a bit peculiar', says US economist Barry Eichengreen in his book *Exorbitant Privilege: The Rise and Fall of the Dollar*. It made sense in the immediate aftermath of the Second World War, when the US accounted for more than half the economic output of the 'Great Powers'. However, these days, China and Germany export more than the US, whose share of global exports is just 13 per cent. The US is the source of less than 20 per cent of foreign direct investment, down from nearly 85 per cent between 1945 and 1980.

One recent shock to the system came in August 2011, when credit rating agency Standard & Poor's (S&P) downgraded the US's top-notch AAA credit rating for the first time ever. The company cut the long-term US rating by one notch to AA+ with a negative outlook, arguing that the country's deficit reduction plan did not go far enough.

All this has helped to undermine faith in the dollar. Some outside the US are attempting to move away from it as a unit in which to invoice and settle trade, denominate commodity prices and conduct international financial transactions. However, most remain sceptical about the potential for completely replacing

the dollar from candidates such as the euro, China's renminbi, or the bookkeeping claims issued by the IMF, known as Special Drawing Rights (SDRs).

'When the euro started, people thought that would replace the dollar, but it hasn't happened,' Chandler says. More recently, people have been saying it will be the renminbi, but there's no sign of that taking place anytime soon either. 'Some countries have put some renminbi in their reserves, but it's way too small,' he says. 'You have to think about what China offers. Central banks want liquidity, but the Chinese bond market is not all that liquid. You can buy US Treasuries 24 hours a day – it's much more difficult to do so for Chinese bonds. The dollar market is also very transparent. There are very few restrictions on capital movement.'

Chandler says one way in which the dollar might feasibly be replaced is through abdication. The US and other countries have already decided to make it more difficult for some Russian institutions to access the financial

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*'The Bretton Woods twins need governance reform to gain legitimacy in the eyes of emerging markets and developing countries. Such reform has been promised by the high-income countries, but it hasn't been delivered'*

Barry Eichengreen  
Professor of Economics, Berkeley

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markets: what if the situation deteriorated to the point that the US decided not to allow other administrations to access the dollar market? That might force the rest of the world to find an alternative.

The dollar's influence would also decline if a compelling alternative were to emerge. 'What would it take to persuade you to switch to a different, non-QWERTY keyboard?' Chandler asks. 'It would have to be something that is substantially better than the one you have

been using for years.’ A similar argument applies to switching from the dollar as a global reserve asset.

‘Moving away from a dollar-based global financial system presupposes the existence of alternatives,’ Eichengreen tells *Global Insight*.

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*‘If we’re going to have global institutions, they should be truly global and they should reflect the best talent that the world has to offer’*

Walter White  
Partner, McGuireWoods

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‘The only conceivable alternatives that scale are the euro and the renminbi. The euro is troubled, while the renminbi is starting out far behind (in terms of market liquidity and so forth). I think there is progress, but it is painstaking.’

There will come a time when the US currency has a less dominant role, but no one really knows when that will be, adds Larry Christensen, a member at Miller & Chevalier and of the IBA International Trade and Customs Law Committee. ‘It’s rather like a stockbroker saying the market will go up, but if you ask them when, they will say they don’t know.’

### **The terrible twins?**

It is not just the dollar’s dominance that seems outdated: increasingly the International Monetary Fund (IMF) and the World Bank appear skewed in favour of developed nations. For example, their leadership has been reserved for a European and an American respectively since their creation in 1946 under the terms of the Bretton Woods agreement.

‘The IMF and the World Bank are both based on World War Two post-war concepts,’ says Walter White, a partner at law firm McGuireWoods, who campaigned for Ngozi Okonjo-Iweala – now Nigeria’s finance minister – when she sought the presidency of the World Bank. ‘In today’s world, there is no justification for the tradition that the US appoints the president of the World Bank and the EU appoints the president of the IMF.’ The world’s

economic centre of gravity is shifting. ‘If we’re going to have global institutions, they should be truly global and they should reflect the best talent that the world has to offer,’ he adds.

Voting in the IMF is based on a quota system, which is designed to mirror each country’s relative size in the world economy, as measured by its gross domestic product (GDP). The problem for many years has been that the GDP of developing countries like China, India, Brazil and South Africa has risen dramatically, without an increase in voting power. This means the voting power of BRICS countries (Brazil, Russia, India, China and South Africa) is disproportionately low. Even though they account for 24 per cent of the world economy, they have approximately 10 per cent of the voting power.

China’s GDP, for example, is ranked second in the world at \$9.24tn, more than three-and-a-half times the GDP of the UK, yet it receives only 3.81 per cent of total votes in the IMF, compared to the UK’s 4.29 per cent. Even though reforms to increase the voting power of developing countries were approved in 2010, the US Congress has not approved them. They would reduce the voting power of the US from 17 per cent to 16.5 per cent.

‘As Asia, particularly China, India and Singapore, and to a lesser extent the Middle East, Nigeria, Brazil and South Africa take on greater weight and move from the “emerging” status to the “fully developed global economy” status – that is, move into the G20 – they’re entitled to have a voice,’ White says.

‘The Bretton Woods twins need governance reform to gain legitimacy in the eyes of emerging markets and developing countries,’ says Eichengreen. ‘Such reform has been promised by the high-income countries, but it hasn’t been delivered. In addition, the IMF needs more financial resources, while the [World] Bank needs more focus.’

Then, of course, there are concerns about the ‘conditionalities’ imposed on borrower countries. These often focus on liberalisation (of trade, investment and the financial sector), deregulation and the privatisation of nationalised industries. ‘Often the conditionalities are attached without due regard for the borrower countries’ individual circumstances and the prescriptive recommendations by the World Bank and IMF fail to resolve the economic problems within the countries,’ says Ronny Mkhwanazi, Managing Director of Mkhwanazi Incorporated in South Africa and member of the IBA International Trade and Customs Law Committee.

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Other concerns relate to: countries effectively losing the authority to govern their own economies when they accept IMF help; the types of development projects being funded; the World Bank's role in the global climate change finance architecture; its apparently automatic preference for working with the private sector; and the way the IMF and World Bank shape development discourse through their research, training and publishing activities.

'The World Bank and the IMF need to overhaul their modus operandi to remain relevant in today's world,' Mkhwanazi says. This could take the form of reviewing their membership participation, voting mechanisms, sympathetic 'needs analysis' engagement and a clearly defined 'conditionalities methodology'

that would be driven by practical needs other than profit.

'My respectful view, however, is that these institutions are deeply embedded by shareholder prerogatives, and the only way such radical changes could happen is through the creation of alternative institutions,' he says.

#### **'There is no alternative' (or is there?)**

Do alternatives to the IMF and World Bank exist? There have been many attempts to create them over the years, but so far none have proved convincing.

The trauma of the 1997 Asian financial crisis, for example, spurred Asian nations into deeper regional cooperation. The most visible outcome

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*'Moving away from a dollar-based global financial system presupposes the existence of alternatives. The only conceivable alternatives that scale are the euro and the renminbi. The euro is troubled, while the renminbi is starting out far behind'*

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Professor of Economics, Berkeley

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of this was the Chiang Mai Initiative, which established a network of bilateral currency swap agreements among the region's central banks. The arrangement was multilateralised in 2010 and relabelled as the Chiang Mai Initiative Multilateralization – a self-managed reserve pooling mechanism for its member economies. Yet it has never been used, not even in 2008, at the height of the global financial crisis.

In July this year, a deal was agreed in Brazil by the leaders of the five BRICS countries to create a new development bank and emergency reserve fund. The New Development Bank (NDB) will have its headquarters in Shanghai, China and operate much like the World Bank. With \$50bn in initial capital, it will seek to finance infrastructure and development. The emergency reserve fund – Contingent Reserve Arrangement (CRA) – will operate much like the IMF. With \$100bn in initial capital, it will be a source of financial assistance for member countries that are suffering financial difficulties. The first president will come from India, while Brazil will head the board of directors. The chairman of the board of governors will come from Russia, and there will be a regional base established in South Africa.

'The creation of the NDB and the CRA is motivated by frustration with the pace of reform of the IMF and the World Bank to give a greater voice to the BRICS and other emerging and developing economies,' says Mkhwanazi.

In the Fortaleza Declaration, which established the NDB and CRA, the BRICS declared that 'international governance under its current structure and power configuration shows increasing signs of losing legitimacy and effectiveness'. It added: 'the BRICS are an important force for incremental change and reform of current institutions toward more representative and equitable governance capable of generating more inclusive global growth.'

'This clearly serves as a caution to the Bretton Woods institutions that the status quo of unequal participation and distribution of resources is unsustainable,' Mkhwanazi says. The BRICS represent 42 per cent of the world's population. Total trade between them is \$6.14tn – nearly 17 per cent of the world's total. Taken together, they add up to the world's largest market and their combined GDP has grown by more than 300 per cent in the last ten years.

However, there are doubts about the CRA. If one of the BRICS faces a crisis and wants to use the facility, will the other members agree

to meet its needs? If there are any doubts about repayment, they may only be prepared to offer token amounts. One way around this might be to follow the IMF's example of imposing conditions on the country that is doing the borrowing. But the imposition of conditions on financial assistance is often controversial and is one of the reasons why the BRICS set up their own mechanism in the first place.

Strangely, the treaty setting up the CRA requires countries who draw more than 30 per cent of their swaps (which allow monetary authorities to pump foreign currency into their

home markets) to negotiate a programme with the IMF, suggesting that ultimately, it does not really offer that much of an alternative to the IMF. In addition, the BRICS' commitments to the CRA are expressed in dollars. According to Eichengreen, all this means the CRA is little more than 'empty symbolism'.

In addition, if the NDB and CRA are to be successful, they cannot just operate as a closed shop for the subscribing members. This would deprive them of an opportunity to create a sustainable and strategic alternative to the current IMF and World Bank-led developmental agenda, Mkhwanazi says.

He believes the BRICS 'should devise ways in which they could allow other developing

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*'The creation of the New Development Bank and the Contingent Reserve Arrangement is motivated by frustration with the pace of the reform of the IMF and the World Bank to give a greater voice to the BRICS and other emerging and developing economies'*

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Ronny Mkhwanazi  
Managing Director,  
Mkhwanazi Incorporated

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countries, particularly small and medium-sized ones, to buy into the NDB and the CRA on terms they can afford'. Arrangements should also be made for borrowing by developing countries on less onerous and more sympathetic conditions than the requirements of the IMF and World Bank.

Chandler agrees. In its present form, the NDB 'is interesting, but it's not going to go anywhere', he says. 'They basically reserve a monopoly for the BRICS. Countries have been looking for an alternative to the IMF ever since the Asian financial crisis of the late 1990s – is this going to be it? I doubt it.'

It's possible that creating competitive conditions for lending will encourage the Bretton Woods twins to review their current participation requirements so that developing countries might have better access to finance. The BRICS countries could also use the existence of an alternative in the form of the NDB and CRA to negotiate larger voting shares for themselves.

Stephen Hine, Head of Responsible Investment Development at pressure group EIRIS, says it is inevitable that the BRICS will have a greater say in the evolution of the global financial system. However, he is not convinced that the new 'BRICS bank' is a positive step.

'Arguably it would be better to reform the governance and operations of the existing mechanisms such as the International Finance

Corporation [a member of the World Bank Group] and World Bank by opening them up to greater participation by BRICS and other emerging nations,' he says. 'For all the sometimes justified criticism levelled at the incumbent institutions, they have, in many ways, served the global economic system well.'

And like the IMF and the World Bank, the dollar position as reserve currency is likely to stick around for some time yet. In his recent book, *The Dollar Trap*, Eswar Prasad, Tolani Senior Professor of Trade Policy at Cornell University in the US, argues that far from losing its position as the world's leading currency, the dollar has in fact strengthened its prominence in global finance since the onset of the global financial crisis. Financial assets denominated in US dollars, especially US government securities, are still the preferred destination for investors interested in the safekeeping of their investments.

'The dollar will remain the dominant reserve currency for a long time to come, mostly for want of better alternatives,' says Prasad. 'In international finance, it turns out, everything is relative.' In an imperfect world, the dollar still stands out as a paragon of strength – relatively speaking. ☒

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# US–Africa trade: time for a rethink

The value of US trade with Africa is declining, while China's is booming. *Global Insight* analyses why the US is struggling to trade on a large scale with Africa and assesses what impact the Ebola outbreak has had.

MAYENI JONES



**\$85bn**

the value of trade between  
the US and Africa in 2013

**6**

bilateral trade agreements  
between the US and  
Sub-Saharan  
African countries

In August this year, US President Barack Obama hosted a three-day Africa Leaders Summit, the largest event any US President has held with African heads of state. The event was largely seen as America's first step towards challenging China's dominance in trade relations with the continent: trade between China and Africa was estimated as being worth over \$200bn last year, more than double that between the US and Africa. Indeed, during the Summit Obama admitted that the level of US trade with the entire continent of Africa was only comparable to that between America and Brazil.

Since the Summit was held, all eyes have been on Africa as the alarming extent of the Ebola outbreak in the west of the continent has become apparent. 'The challenge with Ebola is that very little is known about the disease. Most people would rather play safe,' says IBA African Regional Forum member, Dr Dapo Olanipekun of Wole Olanipekun & Co in Lagos. And the Ebola crisis has brought the trade relationship between the US and Africa into stark relief once again. 'Recently, major airlines and cargo firms have reviewed their African operations due to the Ebola outbreak.'



# \$210bn

the value of trade between  
China and Africa in 2013

2,500 Chinese businesses in  
Africa,  
creating 100,000 local jobs

China has been Africa's  
largest trading partner for  
five consecutive years

# 27

bilateral trade agreements  
between China and  
Sub-Saharan  
African countries

Many other countries have also placed restrictions and controls at border entry points. This encumbrance on movement of goods and services invariably will affect US–Africa trade,’ continues Olanipekun.

With trade levels between the two continents dwindling and the new challenges posed by the outbreak of Ebola, a different approach is clearly needed if the US is to compete with China.

193

million people in Brazil in 2013



**African growth and opportunity**

In 2000, a trade preference programme aiming to promote trade and investment in Africa was created. It aimed, in particular, to boost US trade with the continent. Yet what impact the African Growth and Opportunity Act (AGOA) may have had has certainly not been long-lived: last year, the volume of US–Africa trade was only worth \$85bn, down from \$98bn in 2012, and \$125bn in 2011.

*‘You have to have a broader view and a more long term view of Africa than a lot of American investors have, and that means education’*

Edmund Sim

Appleton Luff; Chair, IBA International Trade and Customs Law Committee

On the other hand, Africa’s trade with China grew dramatically from \$10.8bn in 2001 to \$150.3bn in 2011 according to the United States International Trade Commission (USITC), and reached \$210.3bn last year, a figure recently announced by the Chinese Ministry of Commerce, and one which positions China as Africa’s largest trading partner for five consecutive years.

One reason for the lag in US–Africa trade under the AGOA is the termination of the World Trade Organization Agreement on Textiles and Clothing (ATC), a temporary agreement created to phase out the Multi Fibre

Arrangement, which had regulated the amount developing countries could export to developed countries. ‘The problem is, what trade there was between Africa and the United States, a lot of it was textile and garment oriented,’ says Edmund Sim, partner at Appleton Luff and Chair of the IBA International Trade and Customs Law Committee. ‘When we had quotas, exports from Africa were at high levels because you couldn’t buy from other regions. Now you can and so a lot of those orders have shifted from Africa to Asia and Latin America.’

International trade lawyer and policy expert Evelyn Suarez agrees. ‘AGOA didn’t give the African countries the same benefit when the quotas went away,’ she says. She also points to the recent threat to the African textile industry posed by the possibility that certain provisions of AGOA favourable to African textile producers may not be included in the Act if it is renewed next year. ‘They [the clothing industry] had a special rule, the “yarn forward” rule, which makes it easy for them to qualify for the preferential duty. But what happened is it was about to expire [...] When there’s not predictability and certainty of whether a law is going to be extended then companies don’t invest.’

**A matter of concentration**

The composition of bilateral trade is one factor that cannot be underestimated. Ronny Mkhwanazi, Managing Director of South African law firm Mkhwanazi Incorporated, takes South Africa as an example: ‘During the 2008–2009 financial crisis, South Africa’s exports to its major trading partners declined sharply. China, however, was an exception as exports continued to increase. Similarly, the decline in imports from China was less significant than from the US.’ The reason for this, suggest Mkhwanazi, is that South Africa’s exports to China are ‘concentrated in minerals and non-fuel commodities’.

Sim agrees. ‘The Chinese are primarily resource driven, whereas the United States are not as concentrated on resources, but are also focused on services and investment in digital trade and e-commerce, for which Africa is not as attractive a market, at least at this stage. In the future it could be because the continent is growing very fast.’

316

million people in the US in 2013



(Figures from <http://data.worldbank.org/>)

1.1

billion people in  
Africa in 2013

In particular, Sim notes that: 'China is making huge investments in the continent and so you have large capital inflows coming [to Africa] from China compared to the US.' Indeed, Chinese direct investment in Africa amounted to \$25bn by the end of 2013, with more than 2,500 Chinese companies doing business on the continent, in sectors including finance, telecommunication, energy, manufacturing and agriculture, creating more than 100,000 local jobs.

A recent report by Brookings's Institution's Africa's Growth Initiative (AGI) revealed that resource-rich countries such as South Africa and Nigeria receive more foreign direct investment (FDI) from China and the US than other Sub-Saharan African countries, and that the sectors in which China and US invested were the mining and extractive industries. It points to the fact that China's FDI composition tends to be more diversified than that of the US, with 15.3 per cent in manufacturing, compared to five per cent in the case of the US. As such, FDI flows to productive sectors such as manufacturing and mining could have a positive correlation with bilateral trade patterns.

#### A continent, not a monolith

A number of commentators point to the US's inability to deal with Africa as a diverse set of entities. Suarez suggests that, for many Americans, Africa is unfamiliar. 'There's an education issue: many people in the US think of Africa as one country, a monolith. It's foreign; it's far away; we don't have the historical connections that Europe has with Africa. All that makes it difficult.' This tendency to see Africa as a single market explains why the US has bilateral trade agreements with just six Sub-Saharan African countries, whereas China has agreements with 27 countries.

Moreover, although US trade with Africa is governed by AGOA, it doesn't have a free trade agreement with any individual Sub-Saharan African country. For Sim, free trade agreements with individual countries are central to the success of regions like the EU, which trades heavily with Africa: 'The EU, for the longest time, has had trade preference agreements with Africa and they have maintained them and come up with new generations of agreements

[...] whereas the trade preference [agreement] between Africa and the United States has not been as far reaching, hasn't been updated and so that's where things have fallen behind.'

Most commentators agree that China's historical trading connection with Africa has been advantageous. 'Historically China was very involved in southern Africa, Angola, Tanzania, dating back 50 years,' says Sim, 'And people remember those ties. [...] Chinese involvement in Africa is a long-standing topic: it's not that they just came out of the woodwork five years ago or six years ago; they've been there a long time.' He adds: 'There are some natural advantages for the United States, the diaspora and such, but in terms of which countries are active in Africa and have growing markets, there is not as strong a relationship between those countries and the United States. So, for example, Nigeria and the United States: yes, oil is relatively strong but you look at other areas of trade, it's not as developed as say Great Britain, which of course has a strong Nigerian diaspora.'

#### Take the long (and broad) view

For US companies to compete with China in Africa, Sim believes 'a broader view of trade is needed' and that the solution lies in more indirect investment on the part of US companies in areas like education and health aid. 'You have to have a broader and a more long-term view of Africa than a lot of American investors have, and that means education.'

1.36

billion people in  
China in 2013

For Suarez, education and capacity building in Africa are central to improving trade relations between the US and Africa, ‘to help companies in Africa understand the market, understand what works in the US’. As a customs expert she points out that capacity building also involves customs modernisation and trade facilitation. She suggests looking into regional integration as a way of creating a place for African countries in the global value chain, similar to what Asian countries have achieved, enabling giants such as Apple to have their products seamlessly manufactured in different Asian countries. ‘If you’re a company that makes consumer products

and you want to set up a manufacturing facility in one country and you want to serve a region, the customs and the corruption is an impediment to fulfilling that objective.’

Sim adds that African companies have to offer added-value exports. ‘Instead of exporting palm oil, export biodiesel like Indonesia has done. We’re not talking huge steps, but it’s a natural one in the evolution of trade. Or, instead of exporting raw cocoa, export cocoa powder. These are the kinds of things US companies are good at, having seen the potential of the market.’ He points to the great potential for US companies in the technology sector: Africa has overcome its

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*‘It’s a very complicated issue for American companies. Public companies have to protect shareholder value and so they have to mitigate the risks’*

Evelyn Suarez

*International trade lawyer and policy expert*

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**\$72bn**

the value of trade between the US  
and Brazil in 2013



### Dispensing with formalities

Other advantages Chinese companies have over their American counterparts include business practices. Asian and African cultural norms are often seen as being more aligned than they are with Western ones, with the focus of deals revolving around people and relationships, rather than text. ‘I think Chinese companies are more willing, in a legal context, to live with ambiguity,’ says Edmund Sim, partner at Appleton Luff and Chair of the IBA International Trade and Customs Law Committee. ‘Not everything has to be reduced to paper.’ The US’s stringent Foreign Corrupt Practices Act (FCPA) means less formal relationships are simply not an option for American companies, as proved by instances such as the Security and Exchange Commission (SEC) customs bribery investigation against seven oil and freight companies, including Panalpina and Shell, which spread across over ten countries and resulted in a \$236.5m settlement.

‘I think the underlying concern or urgency about improving the economic situation in Africa relates to security,’ says international trade lawyer and policy expert Evelyn Suarez. That’s the underlying motivation, but at the same time it’s the impediment. The [US] government is trying to promote trade and investment in a place that is quite diverse, with a growing middle class, but other areas have conflict. Then you have the other issues of inefficiencies and red tape at the border and corruption and that makes it difficult for US companies to venture out into Africa. So it’s a very complicated issue for American companies. Public companies have to protect shareholder value and so they have to mitigate the risks.’

(Figures from [www.census.gov/foreign-trade](http://www.census.gov/foreign-trade))

infrastructural hurdles – such as a lack of landlines – by advancing straight to e-commerce via mobile phones. Given reports from the African Development Bank about the high potential presented by Africa’s growing middle class, the sector offers a credible growth area. Tech hubs like Konza Techno City in Kenya and Botswana Innovation Hub in Gaborone proves that African governments and companies are already exploring this growing potential.

In order to close the trade deficit with China, Mkhwanazi says the US needs to diversify its trade with Africa beyond the traditional primary and mineral commodities, improve its FDI flows into productive sectors of the economy and improve the status of governance in countries like South Africa. Indeed, promoting good governance and reducing corruption was repeatedly listed as a prerequisite for the increase of US–Africa trade relations. International efforts such as the WTO Trade Facilitation Agreement, currently being negotiated, are seen as key to reducing corruption at the border, by providing the necessary financial backing for initiatives such as the modernisation of borders, which would improve transparency and reduce red tape.

There are, for example, plans to provide automated systems, including automated payments for customs duties, which would remove some of the discretion and corruption businesses can face at borders. Suarez is hopeful: ‘There is a lot of work being done. There is a project by the maritime industry being done with customs in Nigeria [...] They’re trying to address corruption at the port and it’s a collective action effort by a number of companies.’

**\$562bn**

**the value of trade between the US and China in 2013**



**\$85bn**

**the value of trade between the US and Africa in 2013**



All the signs indicate that investors are increasingly seeking opportunities on the continent. This October, London’s Global African Investment Summit saw 300 international business leaders and government officials from across the African continent come together to discuss opportunities for private sector engagement and investment in Africa. One of the main themes was the need to enhance the continent’s financial and physical infrastructure. The variety of companies and attendees, coming from all over the world, shows that Africa has more potential trading partners than ever before. Having a variety of partners will strengthen the ability of African countries to broker deals that are favourable to their populations, which will lead to inclusive growth. As the Chair of this year’s Global African Investment Summit, former Nigerian president Olusegun Obasanjo, stated on the first day of the conference: ‘Old practices are no longer acceptable. Today we expect our partners to place the social and economic development of our citizens at the forefront of their projects’ design.’

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The cost of a light bulb in Venezuela shown in dollars. The last 12 months have seen further currency devaluations in the country



## No country for compensation

The economic situation has gone from bad to worse in Venezuela and the country must pay its debts to avoid further financial catastrophe. With inflation predicted to rise as high as 110 per cent in 2015, *Global Insight* assesses an economy in turmoil.

### RUTH GREEN

**G**ripped by high inflation, chronic shortages and an ever-widening fiscal deficit, Venezuela a year ago was not a pretty picture. But after 12 months that have seen further unrest, currency devaluations, a dramatic slump in oil prices and a bitter stand-off between the government and international airlines, turmoil has taken on a whole new meaning in Venezuela.

'The economic situation in Venezuela has worsened considerably since measures have not been taken to resolve the main problems affecting the country,' says former IBA President Fernando Peláez-Pier, a partner at Hoet Peláez Castillo & Duque in Caracas.

Despite indications that Nicolás Maduro's government was taking action to combat the crisis, ongoing shortages of basic food, medical supplies and foreign currency – not to mention the estimated \$12bn a year the government is spending to subsidise domestic gasoline sales – have pushed the economy to breaking point.

'In July this year [Rafael Ramírez], president of PDVSA [Petróleos de Venezuela], [former] Minister of Energy and Vice-President of the Economy, announced in London and made a statement to the international press that they would adopt a series of measures to counteract some of these problems, announcing an increase in the price of petrol [...] as well as



the revision of exchange controls with a view to creating a single, unified exchange rate system,' says Peláez-Pier.

And after Ramírez was removed from these posts in the government's widespread cabinet reshuffle in September, it seemed increasingly unlikely that change will be on the cards, according to Peláez-Pier. 'It is expected that inflation will reach 75 per cent by the end of the year and according to economists it will rise to around 110 per cent in 2015.'

However, in mid-November, as part of a package of 28 new laws, the government said it would increase taxes on luxury goods, alcohol and tobacco to help diversify and revitalise the economy.

Moreover, already home to one of the most complex exchange rate systems in the world, in a bid to resolve its ongoing cash flow problems, earlier this year the government drew the ire of many international companies as it introduced a new 'preferential rate' of 6.3 Venezuela bolívares per US dollar for state-owned companies and importers of certain goods, such as food and medicine.

Effectively devaluing the bolívar for flights abroad, this did not sit well with international airlines, which refused to sell tickets, consequently Venezuela quickly turned into a de facto 'no fly' zone.

The effect on the country has been staggering, says Mia Wouters, Chair of the IBA Aviation Law Committee and Of Counsel at LVP Law in Brussels. 'International airlines operating on routes to and from Venezuela have downsized dramatically their seat availability,' she says. 'According to the International Air Transport Association, international airlines have cut seat availability in and out of Venezuela by 49 per cent.'

'The airline problem in Venezuela derives from a government requirement that ticket sales need to be in local currency. But airlines are unable to convert the money they receive into hard currency, which is due to delays in authorisations from the government, which operates a strict foreign exchange control.'

Although the government is estimated to owe international airlines in the region of \$4bn, it has been slow to repatriate the funds, making basic travel for Venezuelans virtually impossible.

'It is also practically impossible nowadays to buy airline tickets in bolívares, meaning that you have to buy them outside of Venezuela in dollars and the tariffs are much higher compared to similar segments charged by the same foreign airlines within the region,' says Peláez-Pier.

'This has generated a great deal of difficulty for travel, whether for business or pleasure. Due to the government's own limited available foreign

exchange it is not thought in the short term that it will honour airlines' debt and the situation will continue to deteriorate.'

Wouters agrees that a conclusion seems a long way off, but says the situation cannot continue. 'Airlines have been negotiating and some have reached an agreement, but they received no guarantee. Flying to a country where they cannot be paid is in the end not sustainable for the airlines,' she says, adding

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*'The economic situation in Venezuela has worsened considerably since measures have not been taken to resolve the main problems affecting the country'*

Fernando Peláez-Pier  
Hoet Peláez Castillo & Duque;  
former IBA President

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that Venezuela's domestic carriers are also struggling. 'They find it hard to obtain dollars to import spare parts for maintenance. Some aircraft are just sitting on the tarmac because they don't have spare parts.'

And as the largest oil reserves holder in the world, air travel, unsurprisingly, isn't the only area in Venezuela under the international spotlight.

In early October a World Bank arbitration tribunal ruled the country should pay Exxon Mobil \$1.6bn to compensate for Venezuelan assets seized in 2007. The ruling was seemingly welcomed by the government, which hailed it as a victory in the face of 'exaggerated claims'.

Given the likelihood that the final settlement would be significantly lower than the original claim – since it will take into account the \$900m PDVSA has already paid the US oil giant following a 2012 ruling by the International Chamber of Commerce – and the fact that Exxon had originally claimed at least \$10bn over the 2007 nationalisation of its Cerro Negro and La Ceiba projects in the Orinoco Belt – it seemed as if Venezuela had gotten off lightly.

Yet around two weeks later the International Centre for Settlement of Investment Disputes (ICSID) announced it was temporarily suspending the enforcement, after receiving a request from

the Venezuelan government to revise the award.

Although Venezuela opted to withdraw from the ICSID Convention in January 2012, from a legal perspective the country is still required to pay out to successful claimants for the dozens of ICSID claims that were pending or had already been initiated by 25 July 2012.

And while Peláez-Pier says the timing is curious, occurring when the government faces the ominous task of paying around \$5bn in foreign debt, he said Venezuela would have no choice but to foot the bill.

'The government is going to pay and has to pay the amount but today, more than ever, it requires the support of foreign oil companies, not only to maintain current production levels, but also increase them through new exploration, exploitation, development, without taking

into account the need to maintain existing infrastructure in different refineries, and for this PDVSA needs financing and the participation of foreign companies.'

And as Venezuela continues to moot the idea of selling the US refining unit of PDVSA subsidiary Citgo to generate some much-needed cash flow, he says the ICSID ruling was a stark reminder of Venezuela's dire economic situation.

'Even though the amount it has been asked to pay is comparatively low compared to the amount asked for, it still represents a serious problem for Venezuela in relation to its cash flow problems.' ☒

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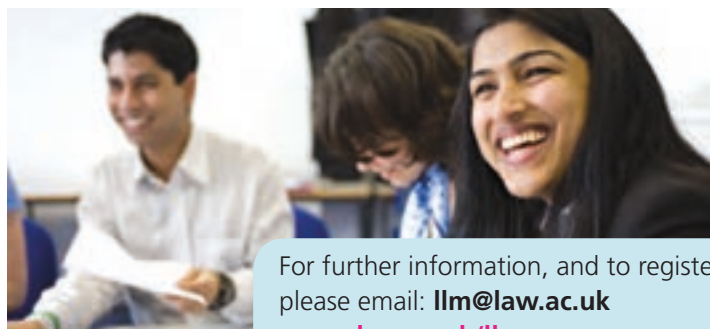
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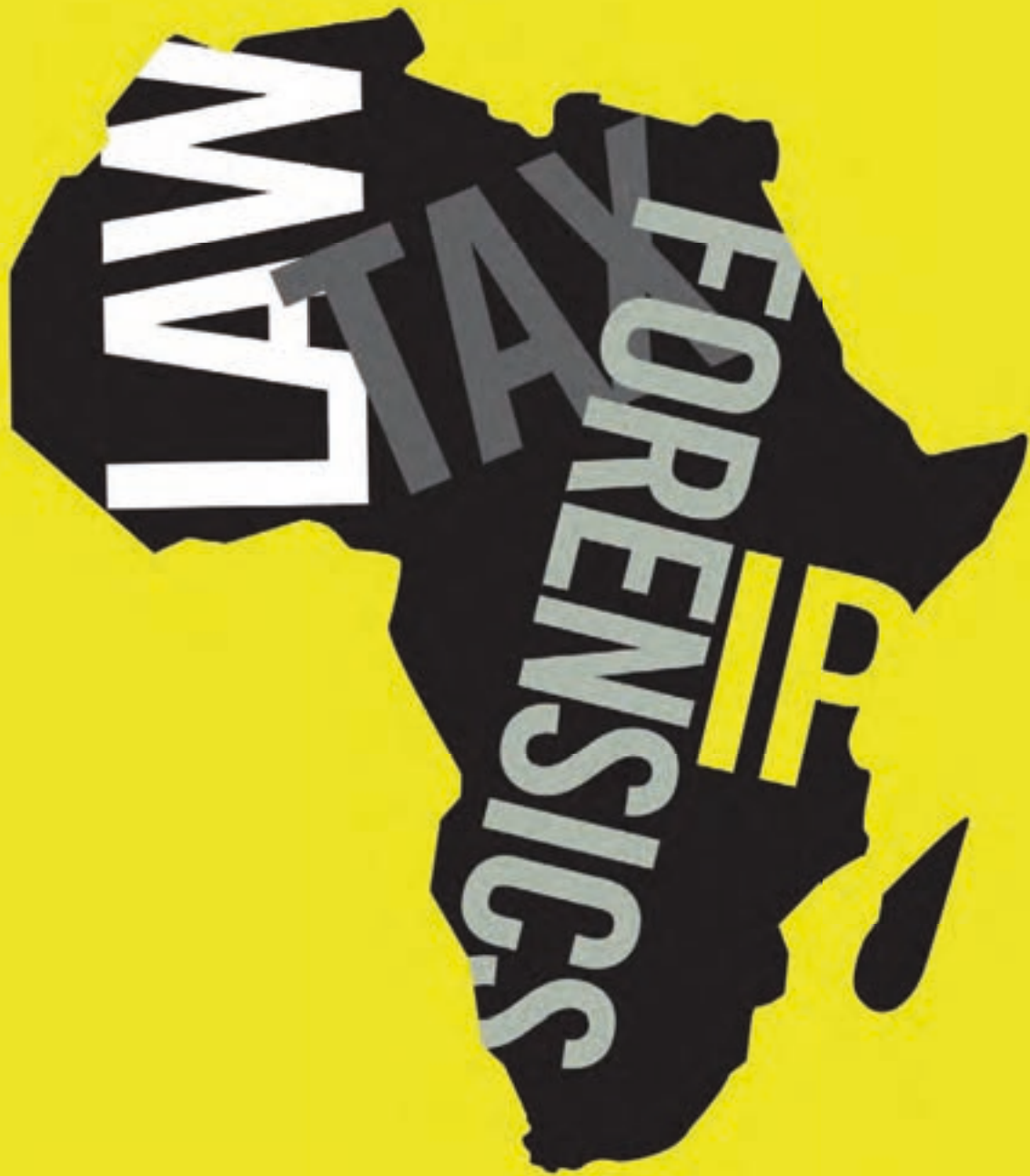
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