

IBA GLOBAL INSIGHT

June/July 2014

Ukraine: fighting for a better future

Assessing the issues that will shape the outcome of the crisis following Russia's annexation of Crimea

Sanctions: guilty until proven innocent

Justice at last for Chilean exiles



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On the cover: Russian tanks, Crimea, March 2014. REUTERS/Stronger

Editorial

Welcome to the June/July edition of *IBA Global Insight*. This issue focuses attention on the remarkable events at the eastern extremities of Europe, following protests, the ousting of a president and the annexation of Crimea by Russia. Talk of corruption, flawed rule of law, human rights violations, and the implications for the flow of scarce energy resources make this natural terrain for this magazine.

The cover feature (**Fighting for a better future**, page 12) was filed shortly before the presidential elections in late May. Nevertheless, the matters discussed are still very much live. As the edition goes to press, the future of Ukraine appears to be hanging in the balance.

The pages that follow also give in-depth coverage to closely related issues. Among the primary responses from the world's leading powers has been the imposition of sanctions. **Guilty until proven innocent** (page 19) lifts the lid on this Kafkaesque world where the normal rules of justice and accountability appear not to apply.

Elsewhere, (in **Crises highlight energy dependency concerns**, page 28, and **Energy: the future of fracking**, page 30) we explore the implications of unrest – not only in Ukraine, but also in Venezuela – when it comes to dwindling natural resources. The position of Russia and its growing links with an increasingly powerful and energy-hungry China look likely to become ever more pertinent.

We hope you enjoy this edition.

James Lewis



ONLINE

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

This month's online highlights:

- Egypt: judiciary undermined by badly trained ex-police
- UN climate change talks: pressure is on to reach legally-binding, global agreement
- Ukraine: clear breaches of international law in Crimea



IN FILM

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

This month's film highlights:

- Sir Nicolas Bratza, former President of the ECtHR, on the Abu Qatada case
- *Azerbaijan: Freedom of Expression on Trial*
- Economist Jim O'Neill on the growing economies of Nigeria and Turkey



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M&A focus: Pfizer's abortive AstraZeneca bid sparks renewed debate

JONATHAN WATSON

American pharmaceutical company Pfizer's bid for AstraZeneca has raised some familiar concerns over the rights and wrongs of takeover deals, concentrated on the impact the deal would have on British jobs. For the companies involved, however, the priority was to act within the confines of the law, and in the interests of their shareholders.

In an attempt to allay any concerns in the UK about its bid for AstraZeneca, Pfizer sent an open letter to the UK Prime Minister stating that the company would set up its headquarters in the UK, complete a planned AstraZeneca science hub in Cambridge and keep 20 per cent of its global R&D headcount in the UK.

It's not certain, however, that these commitments would be legally binding. Rule 19.1 of the UK's Takeover Code states that information provided during an offer must be published with the highest degree of care and accuracy; but Note 3 to the rule, introduced after the Kraft deal for Cadbury, and as yet untested, implies that commitments made remain valid 'unless there has been a material change of circumstances'.

According to Adam Carling, partner in the corporate finance group at Charles Russell, Pfizer's commitments might be considered legally binding, 'but the reference to changing circumstances offers an important carve-out and would make enforcement difficult'.

The Panel does have several powers of sanction, in addition to both public and private censure. Under section 952 of the Companies Act 2006, it can impose a sanction for any breach of the rules in the Takeover Code. And under section 955 of the Act, the Panel can refer any breach of rules to the High Court to 'secure compliance with the requirement'.

However, Slaughter and May partner and Vice Chair of the IBA's Corporate and M&A Law Committee, Craig Cleaver, told *Global Insight* that 'the Panel has never referred anything to the High Court for enforcement and it is as yet not clear how the High Court would "secure compliance with the requirement" '.

Selina Sagayam, a partner at Gibson



'There is a huge amount of divergence within the EU. Introducing an EU-wide public interest test would be a huge challenge'

Selina Sagayam
Gibson Dunn & Crutcher

Dunn & Crutcher, who was seconded to the Takeover Panel between 2004 and 2006, argues that the role of the Panel and the purpose of the Takeover Code are often misunderstood. The Code is not designed to regulate, or to determine the commercial merits or demerits of a bid, she says. 'The Code regulates the framework within which bids are conducted, with a focus on market stability. The rules address disclosure, transparency and timetabling issues, and the actions and the conduct of bidders and targets during the course of a bid.' As part of that, it's a long-standing principle of the Code that parties are held to the public statements they make.

Many in the UK have been itching to intervene and are frustrated that the law does not allow them to do so. Under the terms of the Enterprise Act 2002, UK governments can only issue European intervention notices on three specific grounds: media plurality,

national security or financial stability. The UK's Business Secretary, Vince Cable, issued one such notice in 2010 for News Corporation's ill-fated attempt to acquire the rest of the shares in satellite broadcaster BSkyB.

'The working assumption is that because of the size of the deal, this would fall under EU merger rules,' says Sagayam. 'While the UK could ask for the deal to be referred back to its national regulator, it's unlikely the European Commission would agree to that.'

There have been proposals to enlarge the scope of the law so that intervention notices could be issued for industries of strategic importance. This could emulate France, where the government has announced a decree requiring prior state approval for most foreign bids, as part of a battle with US firm General Electric over a proposed \$13.5bn deal to buy the energy business of French company Alstom. But this too is likely to be overruled in Brussels.

This contrast between the UK and France highlights an inconsistent approach to M&A deals across Europe. 'It took years for EU member states to agree the Takeover Directive, and that only deals with an overall framework, rather than issues of substance pertaining to the bid' says Sagayam. 'It has key compromise positions and opt-outs, meaning there is a huge amount of divergence within the EU. Introducing an EU-wide public interest test would be a huge challenge. We have seen very different interpretations of what level of protection is required in the "public interest" across different EU countries.'

At the time of going to press Pfizer had confirmed it would not make a formal bid for AstraZeneca, as the deadline for it to 'put up or shut up' loomed. However, some shareholders may not be happy about the way things have played out. BlackRock, for example, had urged the AstraZeneca board to relaunch discussions once the current rejected offer expired. Ultimately it may be shareholders rather than regulators who have the last word – and many would say that is just as it should be.

The voice of the legal profession comes to Japan: 2014 Annual Conference in Tokyo

TOKYO 19-24 OCTOBER 2014 ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION



Prime Minister, Shinzo Abe



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The IBA Annual Conference continues to be the premier opportunity for legal professionals from across the globe to meet, share experience, develop business and learn from each other. This year's Conference will take place in Tokyo on 19-24 October. The city is a global business centre and an exciting hub for the fast-growing legal services markets in the Asia Pacific region. We will be celebrating the role played by lawyers in Asia as they build relationships between the region and the rest of the world.

The IBA is particularly pleased to announce that Japan's Prime Minister Abe has agreed, in principle, to be

the keynote speaker at this year's opening ceremony.

Tokyo will also be a delight to discover, from the finest foods to compelling history, and will provide a rich cultural experience for everyone. As usual there will be day tours exploring areas of Japan beyond the city, full details of which can be found in the tours brochure.

Looking through the programme, you will encounter a wide range of informative and substantive sessions covering the latest developments in all areas of law. Law firms and services across Asia are growing rapidly and US, European and other law firms are increasingly interested in partnerships

or opening offices there. Asian legal practice will feature throughout the programme, covering issues such as negotiating fees, antitrust enforcement agencies and Asia's investment in other parts of the world.

Alongside this, the IBA Annual Conference provides an exceptional opportunity for networking and making key contacts. Our members from the BRICS countries (Brazil, Russia, India, China and South Africa) already know that the IBA Annual Conference is truly an international hub where you can make invaluable connections around the world. In 2014, Mexico, Indonesia, Nigeria and Turkey (the 'MINT' countries) have been recognised as having rapidly growing economies and we particularly encourage lawyers from those countries to be in Tokyo to benefit from the knowledge they will gain and the international business contacts they will make.

The culmination of the work of IBA President, Michael Reynolds' two Presidential Task Forces will also be presented in Tokyo, outlining the recommendations for law reform in the areas of human trafficking and climate change justice/human rights. Members are also encouraged to look at the IBA Showcase focusing on 'the convergence of business and human rights', which will provide concrete examples of how we can take due consideration of the political and social climate when initiating business contracts, or opening new offices.

Full preliminary programme and registration details can be found on the Tokyo 2014 website at www.ibanet.org/Conferences/Tokyo2014.aspx.

Keep up to date with the IBA on Twitter



Are you or your firm on Twitter? Keep up to date with the IBA via our Twitter feed, @ibanews, and expand your online legal and business community. Our account continues to grow in both content and popularity, bringing you articles of interest from *IBA Global Insight*, information and news from our many events, links to our news releases, IBA initiatives and much more. The International Bar Association's Human Rights Institute can also be found on Twitter @ibahri, as can the IBA Hague Office, dealing with international justice issues, @ibahagueoffice.

South Africa: Pistorius case not typical of 'erratic' justice system

REBECCA LOWE

The trial in which Paralympic athlete Oscar Pistorius stands accused of murdering his girlfriend Reeva Steenkamp has brought the South African legal system to the world's attention. Some will question the likelihood of a fair trial being achieved given the presence of cameras in the courtroom, and the media circus they create. However, according to South African lawyers speaking to *Global Insight*, this trial actually showcases the best of the country's criminal justice system, which is otherwise beset by incompetence, corruption, inefficiency and police brutality.

While the judiciary is generally viewed as capable and professional, poorly trained police are accused of bribery, beatings and slapdash investigations. Defence counsel for all but the richest defendants is often substandard, it is claimed, while prosecutors have been accused of lacking independence from the government.

'The criminal justice system is rather erratic,' says Peter Leon, head of the Mining Regulatory Group at law firm Webber Wentzel and a member of the IBA's Legal Practice Division Council. 'Police work is often shoddy and cases take far too long to get to court. The Pistorius case is the system at its best, but it's not representative of the norm.'

The criminal justice system is in a 'state of crisis', according to Wits University law professor and public defender Stephen Tuson. Police investigations are 'shocking', he says, and allegations of brutality and torture are common. Compounding the problem is the lack of computer facilities – all summaries of court proceedings are on paper – and the huge workload. 'It's not uncommon for a detective to have a caseload of over 100 matters,' Tuson says. 'If you have an average of three witnesses per case, that's 300 witnesses he has to contact, take statements from, follow up, subpoena for trial.'

Corruption is another serious concern. In 2010 police chief Jackie Selebi was imprisoned after accepting \$156,000 in bribes from a drug dealer. Two years later, his successor Gen Bheki Cele was dismissed following corruption allegations. Low salaries in the profession – newly qualified officers in the Johannesburg Metropolitan Police



'Police work is often shoddy and cases take far too long to get to court. The Pistorius case is the system at its best, but it's not representative of the norm'

Peter Leon

Partner, Webber Wentzel; member of the IBA Legal Practice Division Council

Department earn around \$10,000 – mean bribes are a constant temptation.

In a joint statement to *Global Insight*, Kathleen Matolo-Dlepu and David Bekker, Co-Chairs of the Law Society of South Africa, confirm the police force is in urgent need of reform. 'Many cases are not properly investigated and the police, it is felt, have serious problems with regard to the manner in which they deal with the public at large. Service at many charge offices is ineffective, and in many cases unprofessional.'

The inefficiency of the police contributes to 'debilitating and endemic' delays and severe prison overcrowding, Tuson says. Prisons are around 30 per cent oversubscribed and pre-trial detainees comprise almost a third of all inmates, according to official figures.

Affirmative action policies designed to make the police more demographically representative have led to a loss of experienced senior management, says Leon. 'There has been huge, and understandable, pressure to change the colour of the police service, which

unlike many other countries, is centrally organised. A number of people have been promoted into senior positions for which they do not always have the requisite experience.'

Similar claims have been made about the judiciary. There are concerns the institution's integrity may suffer if the push for demographic reform continues at the current pace. 'There is quite a scandal that there are not very many women appointees, and hardly any black women,' says a senior South African lawyer, who declined to be named. 'There is certainly a pressure to make the bench more representative, and this has led to some dodgy appointments.'

However, the criminal justice system has seen significant improvements over recent years. Since 1994, the year Nelson Mandela became president, all low-earning defendants have been legally entitled to legal representation, and the legal aid budget has swelled 20-fold. However, public defence lawyers remain inexperienced and poorly paid, and a large proportion of middle class defendants fall between the cracks, too wealthy for aid but too poor to afford private counsel.

Concern about the prosecution service has focused on its perceived lack of independence. Both President Jacob Zuma and his predecessor Thabo Mbeki were criticised for replacing the head of the National Prosecution Authority (NPA) with candidates loyal to the administration. Owing to low morale and government interference, many of the most capable prosecutors have left the NPA to enter private practice. 'The NPA is not in great shape,' says Leon. 'You have people like [Gerrie] Nel (prosecutor in the Pistorius case), who is very competent, but I'm afraid he is the exception, not the rule.'

Most experts believe justice will be done in the Pistorius case. 'I have no doubt that in the Pistorius trial, being conducted by a particularly experienced senior prosecutor and senior defence counsel, due process is being well observed,' says South African lawyer George Bizos, former friend and legal adviser to Nelson Mandela. 'We are proud of our constitutional democracy and independent judiciary.'

IBA establishes new Business and Human Rights Working Group

The IBA has set up a new Business and Human Rights Working Group with the support of the Corporate Social Responsibility (CSR) Committee and coordination of the Legal Projects Team. The Group will design and advise on the implementation of a capacity building and technical assistance plan to help bars raise awareness of the importance of the UN Guiding Principles on Business and Human Rights for legal professionals. The Group, chaired by John F Sherman III, former Co-Chair of the CSR Committee, is currently discussing producing guidance for Bar Associations on business and human rights.

In 2005, Harvard Kennedy School Professor John Ruggie was appointed as Special Representative to the Secretary General of the UN on Business and Human Rights. He undertook six years of international consultations and research, after which the UN Human Rights Council unanimously endorsed his Guiding Principles on Business and Human Rights (the 'UNGPs'). The Guiding Principles implement the three pillars of Professor Ruggie's Protect, Respect, and Remedy Framework – the state's duty to protect human rights, business's responsibility to respect human rights, and the need for greater access to remedy.

Since the endorsement of the Principles by the UN Rights Council, the IBA has continued its efforts to promote and encourage discussions through seminars, articles, conference sessions and webcasts.

Once a draft of the Guidance has been agreed by Working Group members, the IBA will carry out three pilot projects to assess the challenges and opportunities faced during the implementation stage of the recommendation at the national level. The Spanish National Bar, the Law Society of Namibia, and the Costa Rica Bar Association have confirmed their interest in participating in this phase, which is to take place over the next 12 months.

To read more about the project see tinyurl.com/IBA-BHRWG

IBA President and former President make ground-breaking visit to Cuba



L-R, Fernando Peláez-Pier, President of the Organización Nacional de Bufetes Colectivos, IBA President Michael Reynolds

From 30 March to 2 April, the IBA President Michael Reynolds and former President Fernando Peláez-Pier made an official visit to Cuba, visiting the Unión de Juristas de Cuba, an organisation which brings together all Cuban lawyers including practitioners, judges and academics. They met with the Union's President and its Governing Council to discuss how the IBA could cooperate with them, especially with regard to conferences and providing speakers to their events.

Michael and Fernando also held meetings with the Organización Nacional de Bufetes Colectivos, which is made up of Cuban law firms and organised on a collective basis. The President of the Organización de Bufetes Colectivos arranged visits to a number of individual *bufetes* (law offices) in the Havana district, which gave a fascinating insight into the daily work of these law firms.

The IBA President will draw up a programme of action for Cuba following this visit indicating the areas in which the IBA can cooperate with the bar associations and law firms to support Cuba's legal profession, particularly in the light of changes brought about by the new law on foreign investment that has just been approved by the Cuban General Assembly.

Former President Akira Kawamura appointed to IAAF Ethics Commission

The IBA's immediate Past President, Akira Kawamura, has been appointed a Member of the International Association of Athletics Federations (IAAF) Ethics Commission for a four-year term, which commenced on 1 January 2014. This follows the IAAF's recent approval of its Code of Ethics. The Code states that 'it is an object of the IAAF to safeguard the authenticity and integrity of athletics and to take all possible measures to eliminate corrupt conduct, which might place the authenticity, integrity and reputation of athletics at risk.'



Female Saudi lawyers pioneer 'new era' of women's rights

REBECCA LOWE

Attitudes towards women in Saudi Arabia are undergoing a radical transformation as the younger generation strives to get on the career ladder and gain greater independence, newly-licensed female lawyers have told *Global Insight*.

Women were first granted licences to practise law last October, putting them on an equal footing with men. Female lawyers were formerly referred to as 'consultants' and were unable to litigate cases in court.

'There has been a huge shift in attitude,' says Jamila Al-Shalhoub, associate at Omar Alrasheed and Partners, who received her licence in February. 'Ten years ago women didn't care if they had a job, all they wanted to be was a housewife. Now everyone wants a career.'

The country's first all-female law firm, founded by Bayan Mahmoud Al-Zahrani, opened its doors in January 2014. The firm works with both genders, but has proved particularly popular with women reluctant to deal directly with a male lawyer, or to appoint a male agent for their affairs.

Nadia Al-Anani, senior associate at Squire Sanders, one of the international firms leading the charge for women's rights in Saudi Arabia, believes Zahrani will act as an important role model. 'Her firm will help society become more comfortable with the idea of female lawyers,' she says. 'She is a pioneer for other women.'

Despite these advances, Saudi Arabia remains a deeply conservative and unequal society. Women are unable to obtain driving licences, and need permission from a male guardian to travel, work or marry. However, King Abdullah has challenged religious scholars in recent years by bringing in a series of reforms: in February 2013, 30 women were appointed to the 150-strong previously all-male Shura Council; and from 2015, women will have the right to vote and stand in municipal elections.

Omar Nasser Alrasheed, founding partner of Omar Alrasheed & Partners and officer of the IBA's Arab Regional Forum, believes the women's rights



Jamila F Al-Shalhoub receiving her permit

'Her [Bayan Mahmoud Al-Zahrani] firm will help society become more comfortable with the idea of female lawyers. She is a pioneer for other women'

Nadia Al-Anani

Senior associate at Squire Sanders

movement is gaining pace, but is doubtful equality will be achieved in his lifetime. Only around five to ten per cent of the country are 'liberal' and supportive of women, he says, while a quarter are 'extremely conservative', and the rest are 'generally conservative', with sympathy for the more extreme factions.

'I would be very proud if it happened in my lifetime,' he tells *Global Insight*. 'But the extreme culture and religion here have enormous influence. It took the US and UK hundreds of years to get there – we hope to do it a little quicker, but change can't be forced.'

Until last year, Al-Shalhoub was the only woman at Alrasheed & Partners,

but she says she 'always felt equal'. Indeed, not only does she do the same work as her male colleagues, but she is paid a higher wage than many because she speaks more than one language.

Al-Shalhoub studied law at Prince Sultan University, which became one of the first universities to offer a law degree to women in 2005, following pressure from the 28-year-old and her peers. She was one of 20 female law students to graduate in 2011; now six universities offer law degrees to women and around 700 graduate each year. Across the board, there are now more female university graduates (60 per cent) than male.

Female lawyers still face substantial barriers, however. While women are now legally allowed in court, the system remains dominated by men and most courtrooms do not have segregated spaces. 'Courts are not yet fully prepared,' says Al-Anani, who has yet to enter a courtroom. 'If they had more female clerks it would be a more comfortable place. It is hard to enter a room with 100 men and no women.'

'The few courageous women going to court face significant obstacles,' says Alrasheed. 'The judges give them a very hard time and will reject cases on any pretext. The people running these courts are old, conservative and rule by God-made rules that you can't predict; it is very hard to argue against them.'

And it is not just men who are divided on the issue. Most women hold deeply conservative beliefs and are reluctant to break down barriers between the genders, both physical and symbolic. Even the most progressive are reluctant to criticise the country's discriminatory policies, and instead couch their desire for greater freedoms in positive terms – as a means to a better, more rewarding life.

What is clear, however, is that reform is on the horizon. 'We do have people who are scared of change,' says Al-Shalhoub. 'But we are barely 150 years old, and each generation is becoming stronger and more aware of their rights. We're in a new era.'

To read the full article, see tinyurl.com/Female-Saudi-lawyers.

Annulment of controversial Turkey judicial reform law welcomed by IBAHRI

The IBAHRI has welcomed the decision by the Constitutional Court of Turkey to overturn controversial provisions of a judicial reform law enacted earlier this year, tightening government control of the judiciary and consequently violating the principle of the separation of powers.

'The new law contained provisions of acute concern to the independent functioning of the judiciary in Turkey and changes such as these could render the judiciary vulnerable to political influence and thus undermine its impartiality, which in turn can lessen public confidence in both the judicial system and government administration,' says Sternford Moyo, IBAHRI Co-Chair.

The Turkish Judicial Reform Act 2014, signed into law by President Abdullah Gül on 26 February 2014, aimed to restructure the governance of the judicial system in Turkey. In particular, the law altered the regulatory powers of the High Council of Judges and Prosecutors (HSYK), transferring control from the HSYK to the Minister of Justice on matters including the appointment of judges, the management of judicial disciplinary investigations and the selection of judicial training personnel and HSYK Staff.

Speaking on the significance of the Court's decision, Mr Moyo adds: 'Turkey's Constitutional Court has played an important role in the protection of fundamental principles of law, ensuring that the separation of powers among the different branches of government is in line with international legal standards. This is a very positive development.'

Urgent need for Venezuelan justice system reform is highlighted by criminal trial of Judge Afiuni, states new IBAHRI report



Judge Maria Lourdes Afiuni walks out of her house with her lawyer Jose Amalio Graterol in Caracas.

A new IBAHRI report concludes that the Venezuelan justice system does not contain adequate systemic safeguards to guarantee judicial independence and cites the trial of Judge María Lourdes Afiuni as emblematic of the situation in general.

Describing her trial as being characterised by multiple violations of due process and other human rights, the IBAHRI points to an urgent need for reform of the Venezuelan judiciary and details a number of specific irregularities in the trial of Judge Afiuni.

IBAHRI Co-Chair Sternford Moyo commented: 'The IBAHRI remains deeply concerned by the serious damage the criminal trial of Judge Afiuni has caused to the independence of the Venezuelan judiciary and the legal profession as a whole by creating an atmosphere of fear. On multiple occasions the IBAHRI heard that "no one wants to be the next Afiuni".'

The IBAHRI sent international observers to attend Afiuni trial hearings between November 2012 and October 2013. The trial was annulled on 23 October because of it being 'interrupted' by the prosecution failing to turn up at an evidentiary hearing. A retrial date has yet to be scheduled.

The Execution of Justice: The criminal trial of Judge María Lourdes Afiuni is the IBAHRI's sixth report on Venezuela. With each one the separation between the executive and the judiciary is observed to be diminishing.

'The Afiuni trial is one of the most important political cases in Venezuela and the IBAHRI finds it troubling that Judge Afiuni was arrested without the issuance of a warrant following her decision to release a "political prisoner" in accordance with the Venezuelan Penal Code and a United Nations Working Group on Arbitrary Detention decision. The only conclusion a person can reach is that the arrest was arbitrary and politically motivated' commented IBAHRI Co-Chair Baroness Helena Kennedy QC. She added, 'Four years later, having endured death threats, abuse and serious health complications, there is still no final decision in sight. Judge Afiuni remains in a Kafkaesque criminal process.'

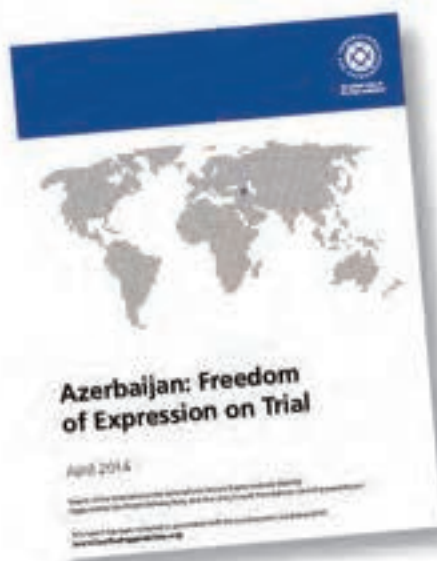
The Execution of Justice, published in Spanish with a translated English executive summary, was launched on Tuesday 29 April 2014, at the plenary working group meeting at the annual meeting of the Federation of Latin American Judges' Associations (Federación Latinoamericana de Magistrados - FLAM) in Santo Domingo, Dominican Republic.



IBAHRI publishes its 2013 Annual Report

The IBAHRI has published its 2013 Annual Report. The 56-page publication presents select details of the IBAHRI's capacity building programmes, fact-finding missions, trial observations, advocacy initiatives and major training programmes across all continents. The report outlines some of the numerous challenges and dangers facing many lawyers and judges across the globe who are striving to promote and protect the fundamental principles of human rights. To download the Report see tinyurl.com/IBAHRI-Report-2013.

New IBAHRI report urges Azerbaijani government to uphold fair trial rights in freedom of expression cases



The IBAHRI's latest fact-finding report urges the Azerbaijani government to uphold fair trial rights in freedom of expression cases. Specifically, the IBAHRI has called on the government to take active steps to establish effective mechanisms, consistent with international standards, to protect journalists.

The report, *Azerbaijan: Freedom of Expression on Trial*, is based on the findings of an IBAHRI investigative mission to Baku undertaken in December 2013. It provides a detailed

examination of the various procedural guarantees of a fair trial under Azerbaijani law and notes serious deficiencies in cases concerning journalists, including: the availability of effective legal assistance; the right to sufficient time to prepare defence; the right to call and cross-examine witnesses; and the right to a reasoned decision.

Noting that a fundamental part of a country's criminal justice framework is its legal profession, *Freedom of Expression on Trial* examines the role of the Azerbaijani legal profession, and in particular the Bar Association of Azerbaijan, in protecting fundamental freedoms. The report finds that a shortage of defence advocates, particularly those willing to represent journalists who have been critical of the government, is a major obstacle to fairness of trials. The report further examines the role of the judiciary in safeguarding the right to a fair trial and the role of the government in protecting the rights of journalists.

In order to strengthen the rule of law in Azerbaijan, 16 specific recommendations to key stakeholders are made. As IBAHRI Co-Chair Sternford Moyo highlights, the IBAHRI

recommendations come at a significant time for the country. '[Azerbaijan] has just assumed the Chairmanship of the Council of Europe's Committee of Ministers. Freedom of expression is the lifeblood of democratic society and the right to a fair trial is the foundational basis for the rule of law. As the guardian of the Council of Europe's fundamental values, which comprise the essential freedoms guaranteed in the European Convention on Human Rights, Azerbaijan should be encouraged to adhere to the rights of the organisation which it is about to represent,' he stated.

Freedom of Expression on Trial was launched with a high-level panel discussion on Friday 2 May in Baku, Azerbaijan. British Embassy Chargé d'Affaires Adrian Lee delivered a keynote address and panellists included Dr Eric Metcalfe, English barrister specialising in human rights, public law and EU law, and IBAHRI mission rapporteur, and Mark Stephens CBE, Partner at Howard Kennedy Fsi specialising in media law and an IBAHRI Council Member. Nadia Hardman, IBAHRI Programme Lawyer, moderated the discussion.

For more information about the Azerbaijan Report see tinyurl.com/IBAHRI-Azerbaijan

Call for increased vigilance on Sri Lanka following UN Resolution

The United Nations Human Rights Council voted in March to open an international investigation into alleged war crimes by both the Sri Lankan government and the Liberation Tigers of Tamil Eelam (LTTE) in the final stages of Sri Lanka's 26-year civil war. The resolution was welcomed by the IBAHRI, which called for increased vigilance by the international community following an escalation in threats to human rights defenders in Sri Lanka. The UNHRC resolution passed on 27 March 2014, with a majority vote of 23 to 12.



Syria: open letter to the UN on humanitarian aid

On 28 April, the IBA published an open letter – drafted by Crisis Action – calling on the Syrian Government to allow cross-border humanitarian operations. The letter was signed by 39 eminent lawyers, judges and academics including Hans Corell, Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations 1994–2004; Justice Richard Goldstone, Honorary President of the IBAHRI; Mark Ellis, Executive Director of the IBA; Asma Jahangir, Former Chair, Human Rights Commission of Pakistan; and Professor Leila Nadya Sadat, Special Advisor on Crimes Against Humanity to the ICC Prosecutor. The letter has now also been published in media outlets across the world.

Open letter to the UN Secretary General, Emergency Relief Coordinator, the heads of UNICEF, WFP, UNRWA, WHO, and UNHCR, and UN Member States

'More than three years into the Syrian conflict, 9.3 million people are in urgent need of humanitarian assistance. Three point five million are in so called 'hard to reach' areas, many of which are concentrated in the opposition-controlled north of the country.

While the United Nations and humanitarian agencies based in Damascus are able to deliver some aid to these people by undertaking 'cross-line' operations, both the UN and other humanitarian agencies have long argued that many hundreds of thousands can only be reached effectively from neighbouring countries such as Turkey and Jordan. But the Syrian Government continues to refuse consent for complementary cross-border operations of this kind despite a clear UN Security Council demand that it do so.

Blatant disregard for the most basic rules of international humanitarian law by the Syrian Government and elements of the opposition is causing millions to suffer. But this appalling situation has been compounded by an overly cautious interpretation of international humanitarian law, which has held UN agencies back from delivering humanitarian aid across borders.

International humanitarian law is unequivocal that where a civilian population is in need of life-saving aid, impartial humanitarian action 'shall be undertaken'. In order to protect the sovereignty and territorial integrity of states, international law requires impartial humanitarian actors to seek the consent of the parties concerned. In February 2014, the UN Security Council unanimously adopted Resolution 2139 demanding that all parties, in particular the Syrian authorities, allow rapid, safe and unhindered humanitarian access across conflict lines and across borders. Yet such consent continues to be withheld. Because the Syrian Government has refused to consent to cross-border aid, the UN has not undertaken these vital operations for fear that some member states will find them unlawful.

As a coalition of leading international lawyers and legal experts, we judge that there is no legal barrier to the UN directly undertaking cross-border humanitarian operations and supporting NGOs to undertake them as well. We argue that cross-border operations by the UN would meet three primary conditions for legality:

First, the United Nations clearly meets the first condition for legitimate humanitarian action, which requires it to respect the principles of humanity, neutrality, impartiality, and non-discrimination in delivering aid.

Second, in many of these areas various opposition groups, not the Syrian Government, are in control of the territory. In such cases, the consent of those parties in effective control of the area through which relief will pass is all that is required by law to deliver aid.

Third, under international humanitarian law parties can withhold consent only for valid legal reasons, not for arbitrary reasons. For example, parties might temporarily refuse consent for reasons of 'military necessity' where imminent military operations will take place on the proposed route for aid. They cannot, however, lawfully withhold consent to weaken the resistance of the enemy, cause starvation of civilians, or deny medical assistance. Where consent is withheld for these arbitrary reasons, the relief operation is lawful without consent.

The UN has been explicit that the Syrian Government has arbitrarily denied consent for a wide range of legitimate humanitarian relief operations since the unanimous adoption of UN Security Council Resolution 2139. According to the top UN official for humanitarian affairs, Valerie Amos, the 'continued withholding of consent to cross-border and cross-line relief operations...is arbitrary and unjustified.'

The stakes for correcting this overly cautious legal interpretation are high – hundreds of thousands of lives hang in the balance. Humanitarian organisations will surely face enormous risk in carrying out cross-border relief operations and may decline to do so. These are not easy calculations to make. But in the case of Syria, UN agencies and other impartial aid agencies that are willing and able to undertake cross-border actions can lawfully deliver life-saving food, water, and medical assistance to desperate women, children, and men inside Syria. We urge the UN to apply international humanitarian law so that it enables, rather than prevents, life-saving assistance reaching those in need.

For more information about the open letter and to read the full list of signatories see tinyurl.com/open-letter-Syria.

Fighting for a better future



IBA GÖTTSCHE LOWE JUNE/JULY 2014

Last year, protesters in Ukraine called for an end to corruption and ineffective governance at the highest levels. Now, with the country under threat following Russia's annexation of Crimea, *Global Insight* assesses the issues likely to shape the outcome of the current crisis.

SCOTT APPLETON

Last autumn, Ukraine's then president Viktor Yanukovich decided unilaterally to call off a proposed trade treaty with the European Union in favour of closer and more lucrative economic ties with Russia. The decision became a catalyst for popular protests focused on Kiev's *Maidan Nezalezhnosti* (Independence Square), bringing to the surface underlying tensions.

With the protesters supported by the West, Yanukovich fled to Russia in February, taking with him an estimated \$32bn in state funds. The result was the collapse of his authoritarian regime and the appointment by the Ukrainian Parliament of an interim President, Olexander Turchynov, ahead of formal elections in May.

Yanukovich's ousting seemed to herald a new economic direction, as well as the promise of a more transparent and accountable government. 'Last November we really felt that we were just a few weeks away from an historic agreement with the EU and that real change was coming,' says Wolfram Rehbock, Senior Partner at Arzinger in Kiev and the IBA Power Law Committee's Advisory Board Member for Europe.

In fact, an unforeseen consequence of the unrest was that it prompted Kremlin-backed forces to seize control of Crimea, home of Russia's Black Sea Fleet. The local population of Crimea then voted to join Russia, in a referendum on 16 March that both the government in Kiev and the West consider illegal. The apparent success of the referendum, despite such claims, fuelled renewed separatist demands for increased self-rule in parts of eastern Ukraine, notably the industrial Donetsk region, home to a large ethnic Russian population. At the time of writing, controversial referendums had been held in Donetsk and Luhansk with the results in favour of independence from Ukraine; however, their validity had been called into question by Kiev and international commentators.

'After the events of recent months it is fair to say that Ukraine is still in a state of shock. But the government to my mind is moving in the right direction. We are now seeing wholesale reform, including of our legal institutions and framework. Reducing the powers of the state was fundamentally what the Maidan was about,' says Daniel Bilak, Managing Partner of CMS Cameron McKenna in Kiev.

International rules

The antecedents to the annexation of Crimea can be traced in the region's Soviet past. Having first become a member of the Russian Soviet Federative Socialist Republic (RSFSR) in 1921, Crimea was ceded to the then Ukrainian Soviet Socialist Republic in 1954. With the collapse of the Soviet Union in 1991, Crimea was affirmed as part of independent Ukraine by the Alma-Ata Protocol. Ukraine's borders were further guaranteed when it signed the 1994 Memorandum on Security Assurances in Budapest, along with Russia, the United States and the United Kingdom, in exchange for giving up its nuclear arsenal.

The territorial integrity of states is a key foundation of international law, on which there is clear jurisprudence, including through United Nations Security Council and General Assembly resolutions. 'The moment Russian troops began moving out of their Crimean bases – with or without insignias – they were committing an act of aggression under international law and under the UN definition of aggression,' says Malcolm Shaw QC, a practising barrister at Essex Court Chambers in London and a Senior Fellow at the Lauterpacht Centre for International Law at Cambridge University.

'Ukraine is a sovereign state,' says Mark Ellis, IBA Executive Director. 'Russia, as a UN Member State, is bound by the UN Charter's prohibition on the use of force against it. The prohibition against force has only three exceptions: when

authorised by the UN Security Council under Chapter VII; when there is consent from the territorial state; and when it is in self-defence. The first two exceptions do not apply in this case, as the Security Council has not issued a Chapter VII resolution authorising Russia to use force, and Ukraine has not consented to Russia's military intervention. The third exception of self-defence applies only in response to an armed attack. Ukraine has not perpetrated an armed

'After the events of recent months it is fair to say that Ukraine is still in a state of shock [...] We are now seeing wholesale reform, including of our legal institutions and framework'

Daniel Bilak

Managing Partner

CMS Cameron McKenna, Kiev

attack upon Russia and, accordingly, Russia cannot employ the self-defence exception.'

The 1994 Memorandum and Russia's renegotiation in 2010 of a 1997 agreement allowing it to retain a military presence and its Black Sea Fleet base in Crimea underlined the integrity of Ukraine's territory. Crimea was part of Ukraine when Russian troops took to the streets, up until the referendum on 16 March, and under international law it remains part of Ukraine.

'Under Article 2 of the UN Charter the forceful acquisition of territory is illegal. This is clearly what happened in relation to Crimea. It doesn't matter what the result of the so-called referendum was, or what the will of the Crimean people may have been – it had no legitimacy under international law. Russia used force against the territorial integrity and political independence of Ukraine,' says Robert Volterra, an expert in public international law at London-based Volterra Fietta.

Experts say that it is not credible for Russia's President Vladimir Putin to claim that the region's ethnic Russians were facing an imminent risk, or that President Yanukovich requested intervention. By the time Russian troops entered Crimea, Yanukovich had deserted his office, left the country and the Ukrainian Parliament had already sworn in a new interim President.

Occupying powers

The consequences of events in Crimea are still being digested. But the obligations imposed on the Russian forces in Crimea to safeguard the people and property of the Peninsula are clear under the 1907 Hague Regulations, Geneva Convention and International Law of Occupation. Based on the current facts, the Law of Occupation may also extend to Russia's troops active elsewhere in Ukraine.

'There is little doubt that Russia is pulling the strings of many of the so-called separatists in East Ukraine. Local militia tend not to use heavy artillery or carry military grade weaponry. Nobody is fooled by the deployment of troops devoid of any insignia on their uniforms,' says John Vernon, partner at Dallas-based Vernon Law Group and Vice-Chair of the IBA Human Rights Law Working Group.

Bilak offers a similar perspective. 'People need to understand that Ukraine is not being pulled apart by competing ideologies. What is happening in Donetsk is not another popular uprising. A recent poll showed that less than 20 per cent of its citizens are in favour of uniting with Russia – the truth is that many of the ethnic Russians that live there chose to do so because they are only too aware of the realities of life in the neighbouring oblasts [Federal Russian Administrative Regions].'

Russian tanks may not be on the ground in East Ukraine as they are in Crimea, but Moscow nonetheless has to bear its share of responsibility for the events unfolding there.

'The onus on ensuring that any captured personnel or detained citizens in East Ukraine are treated responsibly would seem to extend to Russia. These are basic rights that an occupying power cannot derogate from. Yet in East Ukraine we have seen captured journalists, international observers and Ukrainian troops all paraded before the cameras,' says Vernon.

Malcolm Shaw QC agrees that assigning direct responsibility for the rising tensions across Ukraine may not be as clear-cut as in Crimea, but international law still offers precedents. 'Media reports indicate that Russia is engaged in efforts to destabilise the Ukrainian regime by exploiting local ethnic tensions. It is clear law that intervention in the internal affairs of one state by another may still amount to aggression under the UN definition.'

In support Shaw points to a International Court of Justice (ICJ) decision in 1986, which upheld a claim by The Republic of Nicaragua against the US. The claim was that the US had violated international law by supporting the Contras in their rebellion against the Nicaraguan government, and by mining Nicaragua's harbours.

Analogue agency

The key issue facing Ukraine now is not whether Russia has breached its international obligations, but what can be done about the fact that it has done so. Leaders in Berlin, Brussels, London and Washington may be unified in their condemnation of Russia's actions, but there is no suggestion of any military response.

'A recurring question is "who enforces international law?" There is a big difference between being in breach and being held accountable. The sad reality is that the bigger and more powerful the aggressor, the more likely they are to get away with it,' says Shaw.

There is little chance of a UN rebuke because Russia is a Permanent Member of the Security Council. What remains, then, is numerous countries' attempts to exert soft power through diplomacy and the application of limited economic sanctions. So far, sanctions have targeted Yanukovich and his inner circle, as well as the holdings of a number of advisers close to Russia's President Putin (see feature, *Guilty until proven innocent*, page 19).

Foreign investors want good governance and the rule of law, which was fundamentally what the protesters in Maidan were also demanding'

Neil Williamson
Director, Emerging Law

For some, such a situation merely strengthens the call to look again at the practicality of key international institutions. Three of the five Permanent Members of the UN Security Council – the US, China and Russia – do not recognise the jurisdiction of the International Criminal Court. The make-up of the Security Council itself is more reflective of the world order at the end of 1945, rather than at the beginning of the 21st Century.

'There is the sense that the UN is an analogue agency in a digital world. It has done nothing about the situation in Crimea, it is watching events in East Ukraine from the side lines and has not intervened in Syria, despite the clear human rights violations occurring in all three,' Vernon states.

Dr Irina Paliashvili, Co-Chair of the CIS Forum at RULG-Ukrainian Legal Group and an Advisory Board Member for the IBA's Law Firm Management Committee is clear: 'The guarantors of Ukraine's territorial integrity: the US, the UK and France must get much more serious about fulfilling their international-law commitments to Ukraine by all available means'.

Legal certainty

Lawyers in Ukraine are understandably more focused on events in the here and now, which includes considerable analysis of the legal situation that exists in Crimea.

'Ukraine's renewable energy sector had previously seen a lot of interest because of very favourable regulatory and legislative inducements. But we have clients who seem to have lost everything in Crimea now – the government took a clear decision that power units on the Peninsula are no longer subject to a green tariff and Russia is unlikely to pay any compensation,' says Rehbock.

It is well known that under Yanukovich corruption was rife and Ukraine was not an easy place for foreign investors to conduct business. The degree of political and economic uncertainty that is now perceived to exist across the country seems to be prompting even those investors comfortable with high levels of risk to put on hold any plans they might still have.

'Foreign investors want good governance and the rule of law, which was fundamentally what the protesters in *Maidan* were also demanding – they were fed up with the corruption and self-serving behaviour of the Yanukovich regime. Investors will be focused on the forthcoming Presidential elections and whether a leader will emerge who can tackle corruption and bring political stability to the country,' says Neil Williamson, a director at London-based Emerging Law, who has strong links to the region.

Lawyers are doing their best to help clients make sense of the situation as it unfolds. However, the truth is that across parts of Ukraine the legal status of property and even people is uncertain: Kiev still recognises Crimea's citizens as Ukrainian.

'Even clients that are able to find buyers for their Crimean assets face difficulties. The company register in Simferopol no longer functions, so it is impossible to get clear title. For all intents and purposes business across the Peninsula is on hold and where in any event Russian law now applies,' says Bilak.

His fear is that Crimea may turn into another Northern Cyprus – a territory recognised only by the occupying power and which nobody can objectively call an economic success.

'Alongside the legal issues clients want to understand the reputational issues of doing business in Crimea – how might any expanded international sanctions affect business interests

UKRAINE'S BUSINESS BROKERS

Mikhail Fridman

Born: 1964, Lviv, Ukraine

Business interests: Banking; oil; telecoms

Estimated wealth: \$17.5bn

Influence: Together with fellow billionaires German Khan and Alexei Kuzmichev, Fridman shares control of Alfa Group, Russia's biggest financial and industrial investment group. In 2013, with billionaire partners Viktor Vekselberg and Leonard Blavatnik, he sold a 50 per cent stake in joint oil venture TNK-BP to state-owned oil company Rosneft for \$28 billion. In 2011 Alfa-controlled telecom provider VimpelCom became the sixth-biggest telecom company in the world. Alfa also has a stake in Russia's second-biggest retailer, X5.

Rinat Akhmetov

Born: 1966, Donetsk, Ukraine

Business interests: Football; finance; metals; mining

Estimated wealth: \$12.2bn

Influence: Wealth reportedly built around coal and coke investments in Donetsk. Founder of SCM Group, one of Ukraine's leading financial and investment businesses, which includes METINVEST, Ukraine's largest private business and the Russian-language newspaper Segodnya. Owner of Ukraine's most successful football club, Shakhtar Donetsk, and London's most expensive private property, One Hyde Park. Former member of the Ukrainian Parliament and Governor of Donetsk.

German Khan

Born: 1961, Kiev, Ukraine

Business interests: Finance; oil; telecoms

Estimated wealth: \$11.3bn

Influence: Together with fellow billionaires Mikhail Fridman and Alexei Kuzmichev, Khan shares control of Alfa Group, Russia's biggest financial and industrial investment group. He now oversees the operation of Alfa-owned LetterOne Holdings, which holds its foreign assets and handles foreign acquisitions.



they have there? It may actually be better for some clients to re-domicile their business in mainland Russia.'

Regional impact

Concern over events in Ukraine is not restricted to the country itself. Lawyers elsewhere in the region are alive to the potential knock-on effects of any wider instability.

'The view you take of the rights or wrongs of events in Ukraine and Russia's role in them clearly differs depending on whether you are looking at things from a western or eastern European perspective. Within Ukraine both sides have clearly received outside help,' says Jörg Menzer, Managing Partner of Noerr in Bucharest, Romania, and Co-Chair of the IBA European Regional Forum. 'But I do not doubt that US and Asian investors, for example, may well now be spooked by what is unfolding and will rein back any immediate plans.'

In recent years Ukraine has attracted investment that would otherwise have gone to EU countries such as Hungary and Bulgaria because both wages and manufacturing costs are cheaper. But this sentiment may now change.

'Aside from the relative production cost differences, a market of nearly 50 million people should be attractive in its own right. But regional investors now state that they are more willing to absorb higher operating costs if it means they can operate in a more stable

market. Ukraine is also still not a member of the EU, despite the desire of many in Kiev for it to be so,' says Menzer.

He also questions the practical impact of the sanctions targeting the Yanukovich and Putin inner circles. 'There is no rush of investors coming out of Russia and little fear of engagement with Russian business. I see

'The reality is that the sanctions imposed by the West have been very limited and are yet to act as any sort of deterrent on Russia's key decision-makers'

Jörg Menzer

Managing Partner of Noerr in Bucharest, Romania, and Co-Chair of the IBA European Regional Forum

the same levels of investment there as this time last year. The reality is that the sanctions imposed by the West have been very limited and are yet to act as any sort of deterrent on Russia's key decision-makers.'

Viktor Pinchuk

Born: 1960, Kiev, Ukraine

Business interests: Finance; manufacturing; media

Estimated wealth: \$3.1bn

Influence: Founder of Interpipe, one of Ukraine's leading pipe, wheel and steel producers, and London-based international investment and financial advisory company EastOne Group. Pinchuk is the owner of four Ukrainian TV channels and the country's biggest-selling newspaper, Fakty i Kommentarii. Formerly a member of the Ukrainian Parliament, he is married to Olena Pinchuk, the daughter of the former Ukrainian President, Leonid Kuchma.

Valeriy Khoroshkovskiy

Born: 1969, Kiev, Ukraine

Business interests: Media; metals; retail

Estimated wealth: unknown

Influence: Previously owner of Ukraine's leading furniture manufacturer Merks, leading bank UkrSotsbank (sold to Viktor Pinchuk) and national broadcaster InterMedia Group (sold to Dmytro Firtash). Was previously head of FTSE listed steelmaker Evraz, owned by Russian billionaires Alexander Abramov and Roman Abramovich. Khoroshkovskiy has been a prominent politician in Ukraine holding posts including Head of the Security Service (USB), Minister of Finance and First Vice-Prime Minister. He is reported to retain numerous business interests and to be one of Ukraine's richest people.

Dmytro Firtash

Born: 1965, Bohdanyvka, Ukraine

Business interests: Banking, fertiliser production, gas, media, metals

Estimated wealth: \$500m

Influence: Founder of DF Group, which controls interests in the natural gas, fertiliser and titanium industries. Formerly co-owner of RosUkrEnerg (a subsidiary of Gazprom) which held the monopoly on the import of Russian natural gas, and now owner of InterMedia Group, Ukraine's leading broadcaster.



Source: IBA and Forbes

Power and influence

The hope in Ukraine is that while Crimea may be lost, the tensions that have been stoked in the country can be reduced. The Presidential elections in May will be a crucial test of the success of the reforms already underway.

The IMF has delivered the first \$3.19bn tranche of a promised \$17bn loan to Ukraine, and the EU has promised a further \$15bn in development finance – matching the amount originally promised by Russia to Yanukovich last November – while the US has committed an additional \$1bn to Ukraine.

'The IMF conditionality is driving a certain amount of change, but most is being driven from within. We have a new more transparent Procurement Code and the Government has already begun to roll back the power of the state and to decentralise administrative decision-making,' says Bilak.

Polish advisers are already in Kiev helping to formulate a new Constitutional model, he adds. 'Decentralisation is the issue most Ukrainians identify as key to the country successfully moving forward. Federalism, cultural diversity and language are a long way down the list of most rational peoples' priorities. The new Government is facing resistance in some quarters, but it comes predominantly from those that most benefitted under the previous regime and who probably still do.'

From a legal and business perspective gaps do now exist, but efforts also need to be made to counter the international media's portrayal of the depth of tensions within the country, some have stated.

'The honest truth is that 95 per cent of people's lives in Ukraine are unaffected by what you see on the news. There are flashpoints, notably in parts of Donetsk, but these are isolated events. The country is not about to split in two,' asserts Wolfram Rehbock, who is based in Kiev. 'Ukraine doesn't want it, the West doesn't want it and I don't believe Russia truly wants it – Crimea may have been strategically important, but there is no advantage in absorbing East Ukraine.'

For Dr Irina Paliashvili 'day-to-day life means staying on a high alert and taking an active part in the transition processes that are happening in our country. We have been witnessing fundamental changes', she argues, 'ordinary citizens no longer wish to tolerate lawlessness and corruption, no longer accept "business as usual".'

President Putin, for his part, does seem to be downplaying any military ambitions, despite

the continued presence of Russian troops on the border of East Ukraine, and the desire of some in East Ukraine for closer ties with Moscow. Some commentators are convinced, however, that international pressure still has to be applied. Sanctions may yet discourage US and EU companies from doing business with key Russian holdings. Further, it is not possible to simply let Russia get away with the annexation of Crimea, even if much of Central and Eastern Europe remains reliant on its oil and gas.

'Day-to-day life means staying on a high alert and taking an active part in the transition processes that are happening in our country'

Dr Irina Paliashvili

Co-Chair, CIS Forum at RULG-Ukrainian Legal Group; Advisory Board Member, IBA Law Firm Management Committee

'Putin is clearly troubled by the apparent weakening of Russia's sphere of influence but is in the fortunate position of being able to use the country's substantial cash reserves to go on the offensive, at least for the time being. But there is the sense that if you had fallen into a coma in the 1970s and just awoken, the policies being employed by Russia are not that different from Soviet times,' says Vernon.

The sad fact is that Crimea may well be a lost cause, despite the clear illegality of its annexation. 'The issue of how much influence Russia can continue to exert over Ukraine has yet to be resolved, but my sense is that for the majority of people in the country life goes on,' says Menzer. 'And whether Moscow likes it or not, Ukraine has now signed an association agreement with the EU and the trade and economic aspects will almost inevitably follow.'

Scott Appleton is a freelance journalist. He can be contacted at scootappleton@hotmail.com

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As tensions between Russia and Ukraine trigger travel bans and asset freezes, *Global Insight* reports on the secretive world of sanctions where the normal rules of justice and accountability have been turned on their head.

Gennady Timchenko has felt the full force of America's economic might in recent months. The co-founder of oil trading company Gunvor Group is assumed to be a member of Russian President Vladimir Putin's inner circle. On this basis, America not only imposed sanctions on the billionaire in March, but subsequently targeted 14 businesses connected to him, including his Luxembourg-based investment vehicle Volga Group (see box: **OFAC's Russia and Ukraine sanctions**).

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The businesses' relationship to the conflict may well be oblique. But the US is not obliged to prove direct involvement. Timchenko's web of assets, worth an estimated \$15bn, are seen as valuable leverage simply because of his assumed ties to the Kremlin – and suspicions his companies harbour Putin's private funds. Indeed, the reasons supplied by the US were typically vague: the entities were targeted because of their involvement 'or significant risk of becoming involved, in activities contrary to the national security and foreign policy interests of the US'.

From a government point of view, dealing with money flows is one of the most effective ways of dealing with the underlying issue, be it terrorism or arms trafficking or international adventurism'

Homer Moyer

Miller & Chevalier partner; former General Counsel of the US Department of Commerce; Vice-Chair of the IBA Rule of Law Action Group

In contrast, no companies have been targeted by the European Union, and all listed individuals have alleged involvement in the crisis. While such relative restraint is largely due to concerns about potential damage to the Russia-dependent European energy sector, this is not the only factor. Unprecedentedly, legal considerations have also played a significant role. 'We in Europe are bound to having an obvious connection to Crimea – ie, the offence that is at the base of the sanctions,' German Chancellor Angela Merkel said in March. 'That's a different legal situation from the US.'

Such concerns are not misplaced. Unlike US sanctions, measures implemented by the EU have been increasingly overturned in court over recent years. For those used to complete autonomy in matters of economic statecraft, the rulings have come as an unwelcome shock, undermining the delicate balance of justice and security traditionally controlled by government.

Yet for people targeted unfairly or in error, the balance has long felt skewed. Asset freezes and travel bans imposed by the Council of the European Union (the 'EU Council'), US Office of Foreign Asset Control (OFAC) and United Nations Security Council (UNSC) have historically been imposed with minimal explanation for maximum effect. The systems provide very little information

about the processes behind blacklisting decisions, and the evidence relied upon, while means of challenging those decisions are severely limited.

Even at the EU level, where the courts are starting to hold decision makers to account, many believe there is still a long way to go. 'Essentially, sanctions are a quasi-criminal measure that prevent you from doing anything with your assets anywhere in the EU,' says Peters & Peters head of business crime Michael O'Kane, who has represented dozens of sanctioned individuals and businesses in the EU courts. 'Imposed in a mostly opaque process, there is little oversight and the complete absence of a recognised evidential threshold. If you get to court, you're lucky if you get a hearing within two or three years. In the meantime, your business is destroyed, your personal life is destroyed, your reputation is destroyed. In terms of justice, it's woeful.'

Yet, as defence budgets shrink and the appetite for sanctions grows, it is not just those on blacklists who are bearing the brunt. Increasingly complex regulations and hefty fines for non-compliance have had widespread repercussions for the public and private sectors alike, lawyers have told *Global Insight*. Over the past six months, Peters & Peters has taken on more clients whose bank accounts have been closed than they have over the past decade, according to O'Kane, with growing numbers of lawful transactions denied. 'You have to deal effectively with wrongdoing, but banks are becoming incredibly risk averse and there are knock-on effects,' he says. 'Some aid agencies are now unable to get goods into Syria or Somalia. There are levels of compliance hysteria out there that are completely unjustified.'

Global jurisdiction, but no court

While public sympathy for billionaires thought to have a hotline to the president might be limited, blacklists extend far beyond the rich and powerful. UNSC, EU and OFAC sanctions are imposed on thousands of individuals and companies across the world for a wide range of activities, from terrorism and nuclear proliferation to the undermining of democracy and human rights.

The fundamental problem, according to barrister Philip Moser QC, who has won several Al Qaeda delisting cases at the European Court of Justice (ECJ), stems from the decision in the 1990s to start sanctioning individuals rather than states. 'You're using the might of the state against one person, so you have this core imbalance,' he says. 'It's a new idea under international law [...]. The concern with this strange new world is that we've created a global jurisdiction without a global court to control it.'

This 'strange new world' began with noble motives. The appalling humanitarian consequences of the Iraq sanctions in the 1990s, which decimated the country's economy and caused a widespread food and health crisis, prompted a global backlash.

OFAC's Russia and Ukraine sanctions

Members of Putin's inner circle

Gennady Timchenko, co-founder of Gunvor Group and owner of private investment vehicle Volga Group.

Arkady Rotenberg and Boris Rotenberg, businessmen who have reportedly made billions of dollars in contracts for Gazprom and the Sochi Winter Olympics awarded to them by Putin.

Yuri Kovalchuk, the largest single shareholder of Bank Rossiya and the personal banker for senior Russian officials, including Putin.

Igor Sechin, President and Chairman of Rosneft, Russia's leading petroleum company.

Sergei Chemezov, Director General of the State Corporation for Promoting Development, Manufacturing and Export of Russian Technologies High-Tech Industrial Products.

Russian officials

Dmitry Kozak, Deputy Prime Minister.

Dmitry Olegovich, Deputy Prime Minister.

Sergei Ivanov, Chief of Staff of the Presidential Executive Office.

Igor Sergun, head of Russia's military intelligence service (GRU) and Deputy Chief of Staff.

Vladimir Kozhin, Head of Administration under the President.

Victor Ivanov, Director of the Federal Drug Control Service.

Sergey Naryshkin, Chairman of the Government Duma of the Federal Gathering.

Former Ukrainian officials

Viktor Fedorovich Yanukovich, former President of Ukraine.

Sergey Tsekov, former Vice Speaker of Ukraine's parliament, responsible for facilitating the referendum that led to Russia's annexation of Crimea.

Crimean separatists

Viktor Medvedchuk, leader of pro-Russian organisation Ukrainian Choice and friend of Putin.

Sergey Valeryevich Aksyonov, self-declared Prime Minister of Crimea.

Vladimir Andreyevich Konstantinov, Acting Speaker of the Crimean Parliament.

Pyotr Zima, former head of the Security Service in Crimea.

Banks and companies

Bank Rossiya, the personal bank for senior officials of the Russian Federation.

InvestCapitalBank and SMP Bank, controlled by Arkady and Boris Rotenberg.

Stroygazmontazh (SGM Group), a gas pipeline construction company owned or controlled by Arkady Rotenberg.

Volga Group, designated for being owned or controlled by Gennady Timchenko.

Aquanika, Sakhatrans, Avia Group, Avia Group Nord, Stroytransgaz Holding, Stroytransgaz Group, Stroytransgaz, Russia-based or holding companies, designated because they are owned or controlled by the Volga Group and Timchenko.

State-wide sanctions were unfair and had a disproportionate impact on the general population, it was argued, and should be replaced by 'smart' sanctions focused on people and entities.

Nowadays, targeted sanctions are used almost exclusively. At the UN level, there are currently 14 sanctions regimes, each overseen by a separate committee. Most relate to a specific region, covering Iraq, Côte d'Ivoire, Liberia, the Democratic Republic of the Congo, Sudan, North Korea, Iran, Eritrea, Somalia and Libya. However, the majority of names – 409 out of 754 – appear on the two transnational terrorist lists, for those with alleged connections to Al Qaeda and the Taliban.

With the exception of the Al Qaeda list, anyone sanctioned can only be delisted with the consensus of all 15 committee members. No evidence is provided for the listings and no records are held of meetings. Anyone who believes they have been unfairly targeted can send their objections to the committee – and wait. There is no hearing, no disclosure, no appeal.

The same used to be true of the Al Qaeda list. After 9/11, the US added hundreds of names with minimal due diligence and almost no opposition. However, in 2008 a controversial Saudi Arabian businessman, Yassin Abdullah Kadi, not only challenged the core framework of the UNSC's sanctions system, but the entire legitimacy of its mandate as global arbiter of peace and security. Accused of illicit dealings with Osama bin Laden, who he admitted to meeting in the 1980s, Kadi was placed on the OFAC and UN Al Qaeda blacklist in October 2001, the latter of which was automatically implemented by the EU. For years, he was viewed as a terrorist by 193 countries, unable to access funds or travel. Without a remedy available at the UN level, he took his case to the ECJ – and won. The ruling was groundbreaking: all EU terrorist sanctions, even those implemented automatically following a UNSC resolution, had to follow basic principles of fairness, and be based on solid reasoning and 'substantive' evidence.

Forced into a corner, the UNSC in 2009 created the Office of the Ombudsman, which could receive and assess petitions for delisting: a remarkable achievement for a system historically unaccustomed to supervision or control.

Since 2011, ombudsperson Kimberly Prost has had the power to make recommendations for delisting that are binding unless all committee members disagree. Incredibly, since this date she has recommended the delisting of 40 out of 49 petitions she has received: a staggering 81 per cent. To-date, none of her recommendations have been refused by the committee.

The figures are impressive, but unsettling. Prost is clearly undertaking her job effectively and independently, but her success underlines in stark terms the fallibility of the system. Assuming her assessments are correct (she is only able to base her judgments on evidence provided by member states), approximately 15 per cent of the people on the Al Qaeda register were listed in error. The register currently lists 211 individuals and 61 entities, many of which have been there for more than a decade. If the other 13 blacklists were similarly flawed, 71 people would currently be facing global asset freezes and travel bans in error.

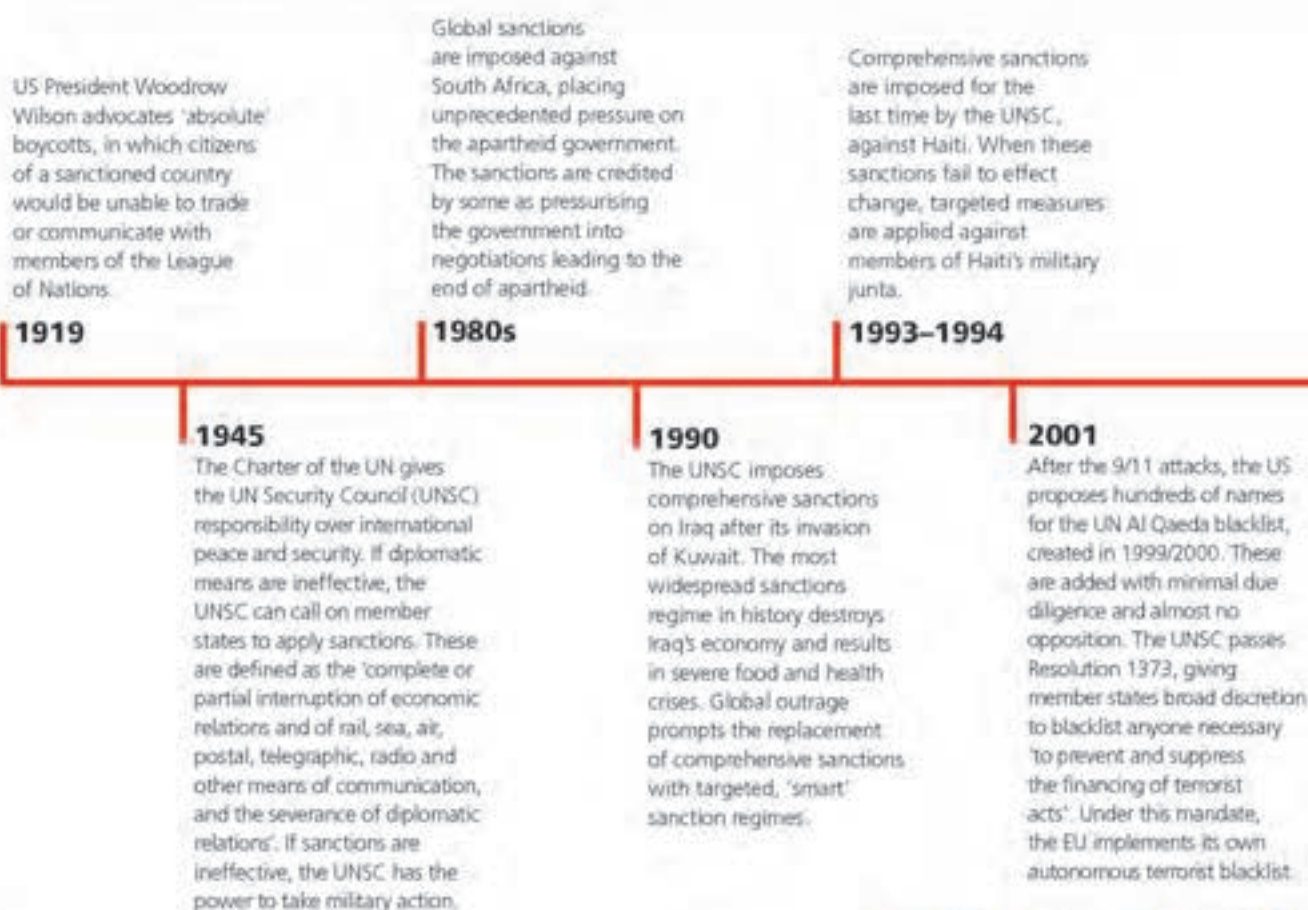
Indeed, those who have investigated the listings process reveal a surprising lack of due diligence. 'My biggest surprise was that the sanctions committees are not deliberative bodies,' says Thomas Biersteker, former Director of the Watson Institute for International Studies, whose reports on UN sanctions have led to a series of reforms, including the Office of the Ombudsperson. 'Evidence is rarely discussed. The chair will say that the following designations have been proposed and ask if there is any reason to oppose them. If not, the designations stand.'

The non-deliberative nature of the process

'has raised concerns that the regime is open to misuse as a means of targeting individuals and entities in order to advance national political goals essentially unrelated to Al Qaeda', according to Ben Emmerson, UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, in his September 2012 report to the UN General Assembly. Emmerson's criticisms go further: the ombudsperson system, while a step in the right direction, must be overhauled to bring it in line with 'minimum international standards' of due process, he says. Prost's reports remain confidential, he points out, and she cannot compel states to disclose evidence.

Yet, as Prost tells *Global Insight*, the issue is far from black and white; due process can be a moveable feast. 'It is one of the fundamental questions: what is a fair process in this very special context?' she asks. 'The kinds of protections you have at criminal proceedings are far different from what you'd get an administrative proceeding [...]. But I think the fundamental components are the same, and we're getting those through my process: that you should know the case against you and have a chance to answer that case.'

SANCTIONS: A BRIEF HISTORY



Security vs freedom

While Kadi himself has joked about the personal impact of being blacklisted – ‘I have [even] been accused of playing golf with Tony Blair,’ he said in a November 2013 interview – the potentially destructive consequences of such allegations and the frustration of his predicament can hardly be overstated. For 12 years, until winning his final appeal in July 2013, he and his lawyers were forced to grapple blindfolded, never informed

of what he was supposed to have done or what evidence was held against him.

Defence officials may protest – and vehemently have done – but for the ECJ, the line between the ‘anxieties of the many and rights of a few’ was very much askew. The point in the *Kadi* case was not innocence or guilt, the court stressed, but that some form of redress must be provided. ‘The fact that the measures at issue are intended to suppress international terrorism should not inhibit the court from fulfilling its duty to preserve the rule of law,’ the EU court’s Advocate General Poiares Maduro wrote. The lack of a forum to answer the allegations, he said, ‘is anathema in a society that respects the rule of law’.

Since *Kadi*, the ECJ has grappled with how to apply the new principles to non-terrorist sanctions regimes. Overall, 60 cases have gone to court to-date, 14 of which have related to terrorism and 28 of which have concerned Iran and nuclear proliferation (see box: **Blazing a trail**). While over 80 per cent of the Iran cases have proved successful – perhaps because, unlike some sanctions regimes, they involve a specific allegation of misconduct that is easier to refute – the others have enjoyed mixed success.

‘It is one of the fundamental questions: what is a fair process in this very special context? The kinds of protections you have at criminal proceedings are far different from what you’d get an administrative proceeding’

Kimberly Prost

UN Al Qaeda sanctions ombudsperson

The UN raises concerns about the lack of redress for individuals placed on the terrorist blacklists. Two years later, a ‘focal point’ is established to act as a mailbox for sanctioned individuals making delisting requests.

2004

The *Kadi* ruling prompts the creation of the UN Office of the Ombudsperson, an unprecedented acceptance of oversight and accountability by the UNSC. Sanctioned individuals and entities can contact the ombudsperson, who will examine their case and make recommendations for delisting to the Sanctions Committee.

2009

The US and EU impose their toughest sanctions against Iran’s banking and energy sectors. Several large banks are hit with massive fines ranging from \$3m to \$700m after attempting to circumvent the measures, resulting in reluctance to engage with the country at all.

2011–2012

2008 / 2010

Saudi Arabian businessman Yassin Abdullah Kadi challenges the core framework of the UNSC’s sanctions system by winning his case against his EU terrorist blacklisting at the European Court of Justice. The ruling states that all EU terrorist sanctions, even those implemented automatically following a UNSC resolution, have to follow basic principles of fairness and be based on solid reasoning and ‘substantive’ evidence.

2011

Targeted sanctions are imposed against former Libyan dictator Muammar Gaddafi and his associates during the Libyan revolution.

2012–2013

Egypt and Tunisia propose dozens of individuals from the Mubarak and Ben Ali regimes respectively for the EU asset freeze list based on the opening of corruption investigations. Targeted individuals challenge their listings at the ECJ, with mixed results. A series of Iranian banks and entities are delisted following ECJ rulings (See box: **Blazing a trail**).

Blazing a trail

Along with the groundbreaking Kadi case, which led to the UN creating the Office of the Ombudsperson to oversee Al Qaeda-related sanctions, the following lawsuits show the swift development of sanctions case law at the Court of Justice of the EU.

People's Mujahadeen of Iran

The People's Mujahadeen of Iran (PMOI) case was highly significant, setting the precedent for the Kadi ruling in 2008. In June 2002, the PMOI was placed on the EU terrorist list. In December 2006, the EU Court of First Instance (CFI, now the EU General Court) ruled its inclusion was unlawful. The PMOI was subsequently relisted twice and delisted twice, being permanently removed from the list in December 2008. The case was the first successful legal challenge against terrorist blacklisting in the EU courts and forced the Council of the EU to reform its procedures. The Court declared that a 'statement of reasons' must be provided to everyone on the list and must be based on 'serious and credible' evidence, which cannot be hidden from the court due to confidentiality concerns. The Kadi rulings applied the same rules to all sanctions, including those implemented automatically from UNSC resolutions.

Bank Mellat and co

Between December 2012 and February 2013, the General Court annulled the EU sanctions against three Iranian banks – Sina Bank, Bank Mellat and Bank Saderat – stating there was insufficient evidence supporting claims that it had supported and facilitated Iran's nuclear and ballistic missile programmes. In September 2013, the Court halted sanctions on seven further Iranian companies: Persia International Bank, Bank Refah Kargaran, Export Development Bank of Iran, Post Bank Iran, Iranian Offshore Engineering & Construction Co, Iran Insurance Company, Islamic Republic of Iran Shipping Lines (IRISL), Khazar Shipping Lines and Good Luck Shipping. The companies were sanctioned for their support of nuclear proliferation activities, but the Court determined that the Council of the EU lacked sufficient evidence and based its reasoning on 'unsubstantiated allegations'. The Council is appealing the judgments. In June 2013, the UK Supreme Court quashed Britain's sanctions on Bank Mellat, Iran's largest private bank, stating they were 'irrational'. In February 2014, the bank filed a claim for \$4bn in damages at London's High Court. If successful, the case could open the floodgates to damages claims from other unlawfully sanctioned entities across Europe.

Carter Ruck partner Guy Martin, who represented Kadi, is hopeful the rulings might mark a change in how EU sanctions are implemented. 'The same principles that were established in the Kadi case will apply to Ukraine,' he says. 'One hopes the EU has learnt its lesson and will start being more rigorous with the evidence and reasons they supply.'

Despite Merkel's comments, however, there has been little indication of such rigour to date. Like those at the UN, blacklisting decisions by the EU Council are rarely debated and can be based on little more than unsubstantiated printouts from websites, says Martin. 'Sometimes it seems the EU just rubber-stamps proposals from member states without subjecting the underlying evidence to any proper scrutiny. These can be based on the weakest of rumour or hearsay without any substantive basis at all.'

Leading EU sanctions barrister Maya Lester QC, who also represented Kadi, agrees. Abuse of the decision making procedure is particularly problematic when sanctions are aimed at the alleged misappropriation of funds by former leaders, she says. 'We saw it with Egypt and Tunisia after the Arab Spring, and more recently with Ukraine. It can be the new guard versus the old guard. Regimes in partnership with the EU have in the past sent across the names they want included and they go on the EU list two days later. It's incredibly easy. It can just be

'The fact that the measures at issue are intended to suppress international terrorism should not inhibit the court from fulfilling its duty to preserve the rule of law'

Poiares Maduro
Advocate General at the
European Court of Justice

on the basis of the opening of an investigation, which could be totally spurious.'

In a response provided to *Global Insight*, the EU Council denied that sanctions decisions were 'based on hearsay' or 'without any substantive basis at all'. It stated: 'The Council will discuss listing proposals in relation to the criteria for listing applicable to the sanctions regime concerned and in relation to the information or evidence available to the Council for underpinning the listing, in line with the standards set by the EU courts [...]. Substantiation and sufficient legal

soundness are constant themes in sanctions discussions in the Council.' All meetings must be held in private, the Council added, 'due to the political sensitivity of these issues'.

The EU Council rarely overturns a listing on request, meaning the vast majority of cases end up in court. But the ECJ's newfound judicial zeal is hardly a due process panacea, lawyers say. An average case lasts around two to three years, with no interim relief. Costs can run into hundreds of thousands of pounds, with under 50 per cent recoverable, while claims for damages have so far proved unsuccessful.

A further concern is secret evidence. At present, there is no provision for classified material in court, prompting complaints from states who say they are unable to argue their case. Under new proposals, judges could review such material, but the applicant and their lawyer could not. While some see this as an acceptable compromise, others are unconvinced. 'In the UK, there are special advocates who can represent claimants and make submissions,' says Lester. 'It is not the best system, but it's fairer. It's very difficult to answer allegations when you don't know what they are.'

However, answering such allegations is arguably more problematic in the US, where judicial claims against OFAC sanctions are rare. Cases that reach the courts are often dismissed following a motion by OFAC or, if the claim is valid, settled early by OFAC through a delisting. No applicant has ever won a case on the grounds that OFAC's information was flawed. US lawyers representing sanctioned individuals say this is due to judges' historical deference to national security agencies, as well as OFAC's low standard of evidence: a test of 'reasonableness', far below the criminal standard of beyond reasonable doubt.

OFAC sees the situation differently; judicial deference is not unfounded, it stresses, but is due to OFAC's 'airtight' cases and the robustness of its internal legal review, which involves lawyers from both the Treasury and Justice Department. Evidence packages often comprise 90 or 40-page memoranda, it says, with 100-plus pieces of evidence from multiple sources.

Outside the courts, the only way to get delisted is to write to the Director of OFAC directly. Yet the process is far from easy. Discussions on who to sanction are held in closed meetings and very little of the evidence is made public. Petitioners are therefore obliged to counter evidence they haven't seen, inverting the traditional standard of proof, and there is no time limit for OFAC's reply. Costs can also prove prohibitive, rising to millions of dollars with no prospect of damages. 'It's very much a one-way street,' says Steptoe & Johnson sanctions specialist Edward Krauland, based in Washington DC. 'The target has to try to learn as much as they can about why they're on the list. It can be extremely difficult; it's principally done

on paper; it's rare to get meetings; there's no deadline; there's no structured process.'

OFAC strongly contests that it lacks transparency. It releases 'at least enough unclassified material to tell the story [...] and explain why a person has been designated', according to a US Treasury official speaking to *Global Insight*. 'If we don't

'You're using the might of the state against one person, so you have this core imbalance. It's a new idea under international law. The concern with this strange new world is that we've created a global jurisdiction without a global court to control it'

Philip Moser QC

have enough unclassified material to explain why the person has been designated, we do not move forward. For every designation, we come out with a statement of case, which can be in the form of a fact sheet or press release.'

Every delisting request is carefully considered, according to OFAC. Last year, 200 people were removed from the 6,000-strong 'Specially Designated Nationals (SDN) and Blocked Persons List', it points out, most because they withdrew from the sanctioned activity. 'Sanctions are not designed to be punitive, they are designed to change behaviour,' says the official. 'So the more dynamic the list is, the more it serves its ultimate goal [...]. People see this is not a forever thing and it encourages others to come in and say, listen, I've severed my bad behaviour.'

Critics concede that OFAC may be as rigorous and fair as its officials maintain. The concern, however, is that without greater transparency and an independent agency to assess its actions, its claims of robustness cannot properly be judged. For OFAC specialist Erich C Ferrari, founding partner at Ferrari & Associates, OFAC's lack of disclosure is frustrating and unnecessarily obstructive. 'I believe, and so have a few different courts, that they can provide unclassified summaries of what is contained in classified evidence, as well as the unclassified memorandum underlying the designation immediately upon the

designated party requesting a reconsideration,' he says. 'They can also allow counsel with the appropriate clearances access to the classified evidence, just as they would in a criminal case.'

Despite being delisted by the EU and UN, Kadi remains on the OFAC terrorist blacklist. For his lawyers, this is evidence of US hostility to evolving norms of justice and due process in the security sphere; for many inside that sphere, it is an acceptable price to pay for the maintenance of global law and order. Interestingly, Prost is unconcerned about the decision to ignore her delisting recommendation. 'The US might have information that they use domestically and there are all sorts of other factors,' she says. 'I respect entirely each state's decision on domestic listings.'

Risk vs restraint

Blacklisted individuals and entities are not the only ones impacted by the lack of transparency surrounding sanctions. Banks and corporations across the world must contend with an ever-expanding array of asset freezes, travel bans and trade restrictions, with limited guidance – and minimal sympathy when things go wrong.

OFAC rules prohibit business with any company over 50 per cent owned by a sanctioned person, but provide no list of such companies and very little assistance on disclosure and due diligence requirements. European rules are even murkier. EU guidelines suggest a ban on dealings with companies in which listed individuals have a 'significant interest', but declines to define what this means.

'Compliance is now far more burdensome than you could ever imagine,' says Nigel Kushner, Chief Executive at W Legal, based in London, who advises EU businesses on their sanctions obligations. 'It's not sufficient to check that counterparts aren't on the sanctions list; you can't do business with any company with ownership rights or control. But there are no set definitions. It plays havoc for exporters, who have no idea what due diligence is necessary.'

Without explicit guidelines, companies are being forced to draw their own shaky line between risk and restraint. Getting the line right is of particular concern as sanctions increase against Russians and Ukrainians with ownership stakes in vast numbers of business operations across the world. 'There are lots of situations arising where ownership is not clear and companies are taking a conservative view,' says Krauland. 'Unless they can confirm lack of ownership or interest, they are taking action.'

The 'chill factor' is particularly acute in Iran, where extensive US sanctions effectively force countries to choose between doing business with Iran's banking or energy industries or accessing the US financial sector. The measures have

driven Iran's economy to the brink of collapse. Following a rigorous clampdown by US regulators on sanctions busting – five UK banks (Barclays; HSBC; Lloyds; RBS; Standard Chartered); Swiss bank Credit Suisse; French bank BNP Paribas; Netherlands bank ING; Intesa SanPaolo of Italy; and US bank JP Morgan have faced fines ranging from \$3m to \$700m – corporations are now shying away from any kind of business with the country, even that which is unquestionably legal.

'We saw it with Egypt and Tunisia after the Arab Spring, and more recently with Ukraine. It can be the new guard versus the old guard. Regimes in partnership with the EU have in the past sent across the names they want included and they go on the EU list two days later. It's incredibly easy'

Maya Lester QC

'Even smaller fines can damage a company's reputation, as it could be seen as doing business with illicit actors and supporters of terrorism,' says Judith Lee, Chair of Gibson Dunn's International Trade Practice Group, based in Washington, and an officer of the IBA's International Sales Committee. 'The result of these fines is that companies are very sensitive to any transactions that could violate sanctions regulations – and indeed are sensitive to any transactions that, while not technically violating such regulations, might appear inappropriate.'

Those that continue trading with Iran will have a tough time staying on the right side of the law, according to Slaughter and May partner Nigel Boardman, who represented Standard Chartered Bank in its \$667m settlement with the US over sanction violations. 'We'll see a lot more because the rules are so difficult to police,' he says. 'Every payment goes through a filter that has thousands of names on it. But Iranian shipping lines change the names of their vessels all the time, and if you get it wrong you've breached the law.'

According to Paul Lomas, former head of Freshfields general industries group and the global commercial disputes team, part of the problem is the growing power of US regulators. Institutions have to strike deals with regulators on flimsy evidence due to the expense and potential reputational damage of battling the case out, he says. 'You need to punish wrongdoing, but the current obsession with ever larger fines on ever slimmer evidence takes no account of the impact on behaviour or the economy. If people overcompensate for risk, we chill legitimate behaviour.'



While some may question the alleged weakness of US regulators' case against the banks – many of which had been found to have wilfully removed information from wire transfer statements to avoid reference to sanctioned states – it is clear the fines are packing a heavy punch. Ironically, however, while much of the world is retreating from Iran due to fear of US reprisal, American exports are on the rise. Agricultural, medical and humanitarian goods are all permissible under licence, and US banks have no problem accepting payments for such products, according to Kishner. 'US banks will happily receive money indirectly from Iran for US exporters,' he says. 'But banks outside the US are closing accounts of anyone who simply has an Iranian sounding name because they are afraid of the US. So there is a definite imbalance.'

In 2010, it was revealed that the US had granted around 10,000 licences to its own companies, permitting billions of dollars in business with blacklisted countries. Most of the licences were permitted under licence exemptions, but some may question how vital Wrigley's gum and the American Pop Corn Company are to the beleaguered populations of Iran and Sudan. When questioned on the merits of popcorn as a form of humanitarian relief, food products export manager Henry Lapidus reflected that its fibres could potentially be 'helpful to the digestive system' – though conceded this may be 'pushing the envelope'.

Indeed, while vast numbers of ordinary people are affected, and potentially destroyed, by sanctions, those with wealth and power can find convenient loopholes. The likes of Timchenko simply move assets or sell shares before US and EU sanctions are imposed. Meanwhile – despite the enveloping 'chill' – some businesses are known to employ a complex array of circumventing measures to avoid sanctions laws, often through regulatory-light regions such as Dubai, comparable to sophisticated tax avoidance schemes.

'There's lots of side-stepping,' says leading corporate crime barrister Jonathan Fisher QC, who advised one of the sanctions-busting companies in the UK's Serious Fraud Office's investigation into alleged sanctions breaches and corruption in relation to the UN's Oil for Food programme. 'You can't deliberately circumvent, but the line between committing a criminal offence and staying on the right side of the law is a thin one.'

While the sprinkling of sanctions against Russia may have helped pull Putin back from the brink in eastern Ukraine, lawyers contacted for this article suggest the role they played was minimal. Indeed, without hitting the country's energy and banking sectors, and replicating the widespread economic devastation inflicted on Iran – dragging Europe down in the process – the belief is that little could be achieved. 'Sanctions

are basically leverage on how much economic power you have,' says Cian Murphy, sanctions specialist and head of graduate studies for law at Kings College London. 'If you are sanctioning a powerful state like Russia, the efficacy of sanctions as a tool is severely hindered.'

Gaining legitimacy

While an assessment of the overall effectiveness of sanctions is beyond the scope of this article, they can arguably serve a useful purpose, bridging the thorny gulf between words and warfare [see timeline]. It is not for corporations unilaterally to decide to bypass sanctions laws due to 'over-burdensome' compliance regulations, nor for terrorists and money launderers to clog up the courts with spurious claims about abuse of process. As Miller & Chevalier partner Homer Moyer, former General Counsel of the US Department of Commerce and Vice-Chair of the IBA Rule of Law Action Group, points out: 'From a government point of view, dealing with money flows is one of the most effective ways of dealing with the underlying issue, be it terrorism or arms trafficking or international adventurism.'

Yet serious flaws in procedure, oversight and guidance clearly need attention. Without fairer mechanisms, the legitimacy of sanctions is severely undermined. If the process is abused and the wrong people targeted, states and companies are less likely to support the system – a system that relies on multinational cooperation to be effective. Indeed, a dash of humility on the part of current world powers may be wise, as China and fellow emerging nations grow in stature and start fashioning impactful sanctions regimes of their own.

Absolutist ideas of due process and open justice may be problematic in the craggy terrain of international security and terrorism. But certain fundamental reforms are long overdue: clearer rules and standards of evidence; swifter and more transparent administrative redress; independent assessment of cases; and full disclosure of unclassified material, with sensitive documents disclosed to a court or special advocate.

In a book to be published later this year, Biersteker proposes the innovative idea of establishing a separate body at the UN level to deal exclusively with terrorist sanctions in the mould of the International Atomic Energy Agency. The world powers are unlikely to be ready for such a step, he concedes – but never say never. 'When we initially broached the idea of reforms in 2006, nobody thought we'd get as far as we did,' he says. 'If you don't articulate the idea, it will never happen.' ☐

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Crises highlight energy dependency concerns

Unrest in Latin America and Eastern Europe has highlighted the interdependent nature of globalised markets, particularly when it comes to energy and natural resources.

RUTH GREEN

The current turmoil in Ukraine continues to dominate the headlines in Europe, but the ripple effect has been felt much further afield. 'The crisis in Ukraine has once again shown a close correlation between extreme political volatility and energy markets,' says Pablo Alliani, Chair of the IBA Section on Energy, Environment, Natural Resources and Infrastructure Law and senior partner at Alliani & Bruzzon Abogados in Argentina. 'Globalisation has interconnected the energy markets in such a manner that a crisis of this sort in any part of the globe will affect the whole world, regardless of any distance.'

For Alliani, there is cause for concern much closer to home: in Venezuela, where civil unrest and political demonstrations continue. 'Venezuela's role as one of the region's leading oil producers means that a crisis in the country would have regional and international ramifications if the oil flow were disrupted,' he says.

Although protests have been concentrated in the country's main cities, far away from key production centres such as the Orinoco Belt, Lake Maracaibo and Monagas, the disorder threatens to destabilise the global energy market further. 'In this respect,' Alliani adds, 'even if the oil industry remained insulated, prolonged unrest could severely affect

Venezuela's economy, with major consequences for its key trading partners.'

Fears of turmoil

There are concerns that the trouble could even affect oil shipments made as part of the Petrocaribe oil alliance, an energy initiative launched by former president Hugo Chávez to provide crude oil to Caribbean countries at discounted prices.

Some, however, argue that the impact on Petrocaribe will be minimal. 'I do not believe members have any incentive to opt out of Petrocaribe, nor that the unrest will cause more countries to withdraw,' says Elisabeth Eljuri, secretary of the IBA Oil and Gas Law Committee and head of Latin America at Norton Rose Fulbright in Caracas. 'However, some worry that Venezuela will be unable to maintain its financial support due to its unbalanced and unsustainable economy.'

Alliani notes that some of the smaller Caribbean states could have grounds for concern. 'The threat of any change to the Petrocaribe repayment terms is especially frightening for small islands that are heavily reliant on Venezuelan oil,' he says. 'Without Petrocaribe shipments, they will be forced to turn

to the open market, where they will pay the going rate without the long-term financing option.'

Meanwhile, as the uncertainty continues in Ukraine, a country which historically has relied heavily on Russia for much of its gas and transports around 60 per cent of Russian gas exports to the EU, there are growing concerns that unrest could cause a widespread European energy problem. 'Whilst a range of alternative options exist with the potential, perhaps in combination, to alleviate any potential gas supply crisis, Europe does not have an immediately implementable plan for dealing with any significant disruption in supply from Russia,' says Anna Nerush, an associate in Morgan Lewis & Bockius' business and finance practice.

'The crisis in Ukraine has once again shown a close correlation between extreme political volatility and energy markets'

Pablo Alliani

Chair, IBA Section on Energy, Environment, Natural Resources and Infrastructure Law (SEERIL) and senior partner, Alliani & Bruzzon Abogados, Argentina

It is difficult to gauge how likely Russia is to repeat the gas suspensions that wreaked havoc across Europe in 2006 and 2009. Jack Sharples, a lecturer at the European University of St Petersburg, argues that all the indications are there. 'The state-owned, wholesale importer of gas into Ukraine, Naftogaz, is heavily indebted to Gazprom, Russia's state-owned gas exporter,' he says. 'Naftogaz hasn't paid for the gas it imported in March, let alone the gas it imported in April, and owes Gazprom more than US\$2.2bn. The political unrest in Ukraine is undoubtedly contributing to the failure of the Ukrainian government to get a handle on the situation.'

But, as Naftogaz and Gazprom continue to disagree on a revised contractual price for the gas, the problem persists. And with Ukraine's annual consumption of gas estimated to be as much as 55bcm, the country may need to start looking elsewhere for gas.

Help may be at hand though, with Germany energy firm RWE set to supply up to 10bcm of gas per year to Ukraine from April this year and Slovakia recently agreed to reinstate a disused pipeline to supply the country with 3bcm of gas a year.

At present, Nerush believes that Europe is unlikely to turn its back on Russian gas altogether. However, the Ukraine crisis may prompt a number of countries to think seriously about diversifying their existing energy sources. 'We are already seeing a rise in the debate over fracking and production of non-conventional gas and an increased interest in coal and nuclear sources of energy,' she says.

Shale gas revolution

Sharples, however, doubts a European shale revolution will be on the cards. 'Since European states have higher levels of population density, a different system of land ownership and property rights, and a high level of concern about the environmental impacts of shale gas production, most experts seem to agree that a repeat of the American 'shale gas revolution' in Europe remains unlikely,' he says. 'While concerns over the reliability of Russian gas deliveries to Europe via Ukraine are stimulating interest in shale gas production in Europe, the commercial and environmental conditions remain far from optimal to its development.'

Many would have thought a rethink might be necessary when the news broke in May that after ten years of negotiations Russia's Gazprom had finally inked a 30-year deal with China National Petroleum Corp to supply 38bcm of gas, starting in 2018. Although the move will transform China into the world's second-largest importer of Russian gas, Sharples says the deal will have a minimal impact on Russia's gas relations in Europe.

'The major effect of the Gazprom-CNPC deal is symbolic, insofar as it shows that Europe is no longer the sole large-scale export market for Russian gas,' he says.

'There is no physical infrastructure connection between western and eastern Russia, so Gazprom will not be able to play Europe and China off against each other. Also, the investment in new gas production in Yamal has already been made, so investment in the development of gas production in Eastern Russia will not prejudice the development of gas production intended for delivery to Europe.'

Although Eastern Europe and Latin America face very different energy challenges, infrastructure is one obstacle the two regions have in common. 'There is a distinct lack of infrastructure on both sides of the Atlantic,' says Nerush.

Eljuri agrees that infrastructure may be the biggest single challenge facing Venezuela's energy market in 2014. 'Numerous massive upstream investments in the Orinoco Belt will only be successful if the proper infrastructure is put in place. The investment climate is tense and thus, structural problems will not be solved in the short term.' That said, she adds that Venezuela is still expected to become the biggest oil seller to China in 2014.

For Alliani, institutions, not resources, are the answer to Latin America's energy problems. 'The region must develop institutions that maintain productive dynamism and generate resilience to external shocks. And rather than being modelled on foreign experiences, those institutions must reflect the local characteristics of each country.'

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Energy focus: the

Concerns over dwindling natural resources and energy security in the EU have intensified the global debate about fracking. Following the Conference of the IBA Section on Energy, Environment, Natural Resources and Infrastructure Law in Berlin in April, *Global Insight* speaks to leading experts about the key issues in regulation, practice and policy.

HANNAH CADDICK AND REBECCA LOWE

Hydraulic fracturing – the extraction of shale gas by blasting underground rocks with a mixture of sand, chemicals and water – is nothing new. There have been ‘fracked’ wells in operation worldwide for decades, with countries at varying stages of test exploration. But as natural resources decline and concerns over energy security and the environment heighten, the debate about fracking has intensified. While disagreement between the activist and corporate spheres is fierce, leading environmental lawyers from both camps agree on one key point: that unified, simplified regulations are urgently needed to clear up confusion for businesses and close loopholes for potentially damaging practices.



future of fracking



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Russia's energy grip

The escalating conflict between Russia and Ukraine means energy security has climbed to the top of Europe's agenda. Russia currently provides approximately a third of Europe's oil and gas, and many countries are looking to fracking as a means of escape from its energy grip. Ukraine signed a 50-year fracking agreement with Chevron last November, and Poland has issued more than 100 shale gas exploration concessions – albeit with mixed returns.

'The opportunities associated with fracking are significant and can be a financial windfall to a region,' says Brian Bradshaw, a partner at

Morgan Lewis & Bockius and Chair of the IBA Oil and Gas Committee. 'The natural resources that can be recovered from fracking operations are sufficient to permit countries that are currently importing natural gas to greatly curtail imports or even begin to export.'

Pro-fracking sentiment is far from unanimous, however. Several countries, including France, Germany, Bulgaria, Romania, Luxembourg and the Czech Republic, have imposed fracking bans or moratoriums on the grounds of environmental concerns such as groundwater contamination, CO₂ emissions and methane leakage.

Climate change and policy

Conor Linehan, Head of Environment & Planning Group, William Fry, Dublin, and Regional Representative Europe, IBA Environment, Health and Safety Law Committee



'The EU is doing a good job of assessing the suitability of its existing suite of environmental controls and deciding what additional controls are needed.'

However, by the EU's own assessment, shale gas in Europe has the potential to meet only up to ten per cent of the EU gas demand by 2035. Whether that very modest level of contribution to the energy mix justifies the deployment of an active technology that as a significant environmental footprint needs really careful consideration.

The climate change problem is now so urgent that the shale gas issue should be seen primarily in terms of climate policy and from that perspective it is inconsistent with the EU's otherwise progressive climate policy.'

Central and local response needed

Lee Paddock, Associate Dean for Environmental Studies and lecturer in law at George Washington University, US, and member of the SEERIL Academic Advisory Group

'The response to hydraulic fracturing needs both a central and a local focus. Some issues such as noise, localised air emissions and community disruption are appropriate for local governments to address. Others – such as well drilling standards, chemical use and disclosure, wastewater management, greenhouse gas emissions and standards for diesel emissions – require more expertise and more uniform application, and are therefore best suited for centralised government.'

Many of the environmental issues with fracturing can be ameliorated by good regulation such as in the work of the Center for Sustainable Shale Development, new EPA regulations related to fracturing and existing EPA regulations that apply to diesel engines, and state laws and regulations in Illinois, Colorado, California, Texas (for well-drilling standards) and New York (draft regulations).'

'If you could control all the pollution and leakage of methane then in theory you would have a fuel that produces only half the amount of CO₂ as coal,' says James Thornton, CEO of ClientEarth, a legal organisation dedicated to environmental activism. 'But the concern is that there are in reality lots of problems with it.'

Thornton concedes energy security is an important consideration for many countries, however. In Poland, ClientEarth is devising a set of minimum environmental criteria to make the technology as clean as possible, he says. 'They are saying that, whatever happens elsewhere, they will have to start fracking if they are to move away from coal without having to rely on Russian gas.'

A regulatory jungle

Currently, there are no EU laws directly addressing fracking. Instead, the process is controlled by a series of environmental rules already in place, including those tackling water pollution, hazardous waste and emissions.

In December last year, a legally binding EU directive was defeated following heavy lobbying from pro-fracking members, including the UK, Poland and Hungary. Instead, a set of non-binding recommendations were published, and members were asked to produce a public 'scorecard' by June, stating which rules have been implemented. If the results are unsatisfactory, the European Commission may push for new legal rules next year.

'The EU does not have the power to ban fracking,' says Thornton. 'But what it can do – as with air pollution – is put European conditions on it.'

Conor Linehan, Head of Environment & Planning Group at William Fry, session Chair at the SEERIL conference and European Representative for the IBA Environment, Health and Safety Law Committee, believes the EU is doing a good job. 'Well before the emergence of any serious discussion of fracking in the EU, it already had in place a comprehensive and wide-ranging set of environmental regulations that are applicable to fracking.'

But Matthew Townsend, head of the London Environmental and Regulatory Law Group at Allen & Overy, says the lack of cohesion generates perplexing compliance issues for both clients and regulators, creating a strong barrier for entry. 'We have myriad regimes potentially applicable to onshore fracking activities and shale gas exploration, none of which were designed with those activities in mind,' he says. 'It's a major headache for developers to navigate their way through what

According to the Canadian Association of Petroleum Producers, shale gas wells can produce natural gas for up to 30 years without having to be hydraulically fractured again

'When [the US Clean Water Act] was written, people were thinking about big companies discharging waste water into rivers, not pumping chemicals underground into aquifers'

James Thornton
CEO, ClientEarth

can only be described as a regulatory jungle. To have a unified, simplified system would be a very good thing.'

Clearer, more unified regulations would be welcomed by environmental parties. Thornton believes that regulatory gaps mean many companies can 'get away with murder'. Taking the US as an example, he explains: 'The [US] Clean Water Act is the big law designed to protect water, but it was not designed for the problem of fracking. When it was written, people were thinking about big companies discharging waste water into rivers, not pumping chemicals underground into aquifers.'

He adds: 'Companies need certainty for their investment, and this can sometimes be good for the environment too.'

The Colorado story

While the US may be leading the charge in fracking technology, regulations governing the practice are far from coherent. One US state, however, is ahead of the game. Scott Anderson, partner at Hogan Lovells, told attendees at the session on hydraulic fracking at the IBA Biennial SEERIL Conference in Berlin that Colorado has 'the most comprehensive fracking-related oil and gas regulations' in the US.

'Colorado has a well-developed set of fracking regulations, which have been adopted over the last six years,' says Professor Don Smith, Editor of the IBA *Journal of Energy and Natural Resources Law* and Director of the Environmental and Natural Resources Program at the University of Denver (US) Sturm College of Law. Arguably a more compelling factor in Colorado's development, Smith believes, was the state's 'historic step' to address 'oil and gas development-related air emissions by becoming the first in the nation – and perhaps the world – to regulate methane emissions, a potent greenhouse gas'.

'The "Colorado story" provides an inspiring blueprint for the Obama Administration,' Smith adds. 'It may well provide an equally inspiring blueprint for much of the world.'

Making the technology as clean as possible
James Thornton, CEO, ClientEarth

'The UK is in some ways ahead with the Climate Change Act, which is a model piece of legislation. With the issues fracking poses, could we seriously increase the amount of gas produced by fracking without violating the Climate Change Act? One of our ambitions is to try to get a similar form of governance passed at European level.'



Mineral rights and ownership

Brian Bradshaw, partner at Morgan Lewis & Bockius, Houston, US, and Chair of the IBA Oil and Gas Committee

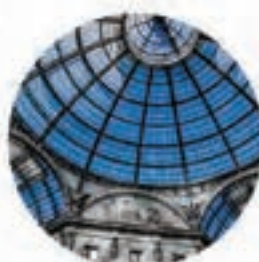


'In European countries that do permit fracking (eg, Poland and the UK), there is still political pressure to limit or curtail the operations. Because the minerals are state-owned, but the activities are performed on

the surface, there is not much interest from the local community in having oil and gas operations. In contrast, minerals rights in the US are often owned by individuals. These individuals benefit directly from the extraction and sales of the oil and gas. As a result, fracking is much more prevalent in the United States.

In the EU and the US regulation is predominantly at state level. In the EU, because minerals are owned by the state it would be very difficult to envision a regime that would allow a different state to regulate or authorise the extraction of minerals in a given state without its express authorisation. In the US, while the federal government are considering additional regulations to address concerns regarding fracking, it will also remain largely a state-by-state issue.'

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Environmental concerns

One of the primary environmental concerns, particularly in the US, is pollution of the water supply. 'There are a lot of extremely toxic chemicals that are used when you pump the water into the rock in order to break it,' says Thornton. 'People get upset by the idea of mini earthquakes, but water pollution is a real issue. You don't want to pollute an aquifer for 1,000 years.'

Speaking to *Global Insight* in a recent interview, Bianca Jagger, Founder and Chair of the Bianca Jagger Human Rights Foundation and worldwide campaigner for human rights and environmental protection, agreed. 'Water is critical for our survival. Why would we endanger our water sources?'

However, Bradshaw believes that many of these concerns have been 'unfounded'. 'There is no documented case in the US of contamination of ground water from fracking operations,' he says. Most of the cases, rather, have focused on nuisance or trespass, 'but causation has been very difficult to prove'.

There are also serious worries about so-called 'fugitive emissions', mainly from leakage of methane. 'If a significant amount of methane is released and those releases are not controlled by new regulations, then the fact that burning natural gas emits less CO₂ may be offset by the methane emissions, which is a more powerful greenhouse gas,' explains Lee Paddock, Associate Dean for Environmental Studies and lecturer in law at George Washington University, and member of the SEERIL Academic Advisory Group.

Colorado's regulations are some of the first to tackle the issue of fugitive emissions, but, according to Thornton, a report from the US Environmental Protection Agency, commissioned by the US Congress and due to be published later this year, may show methane emissions are higher than fracking operators are claiming.

'Many of the [environmental] concerns associated with fracking have so far been unfounded'

Brian Bradshaw

Morgan Lewis & Bockius; Chair of the IBA Oil and Gas Committee

Shane Freitag, Chair of the IBA Water Law Committee and Co-Chair of the Energy Markets Group at Borden Ladner Gervais, Canada, chaired the session on hydraulic fracturing at the IBA SEERIL conference in Berlin. He believes fracking can be a success provided strong mitigation policies are in place. 'If you break it down to its fundamental level, fracking,

Professor Don Smith, editor of the *IBA Journal of Energy and Natural Resources Law*, and Director of the Environmental and Natural Resources Program, University of Denver Sturm College of Law



Natural gas and renewable energy

'Natural gas can work hand-in-hand with renewable energy. In electricity production, natural gas can be "ramped" up or down depending on the intermittence of renewable energy. That is, if the wind drops or the sun goes behind a cloud, then a very quick surge of power is needed to briefly fill in for the renewable energy that has been lost for the moment. Coal can't provide this quick power because it takes a long time to ramp up and down and wastes huge amounts of energy in the process.'

Regulation in the US

'Historically in the US oil and gas development has been regulated at state level. It has only been in the relatively recent past that the federal government, primarily through the actions of the EPA, have come into the discussion. The Obama administration are considering regulating methane but have not yet decided a way forward. Some think the new Colorado air regulations are the model the federal government should follow.'

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like any other extraction activity, has a potential impact on the environment, which arguably can be managed if best practices are followed.'

For some, the lack of credible information produced by vested interests on both sides of the debate has muddled the issue, doing little to allay concerns. It is hoped that the forthcoming EPA report will help clarify much of the misinformation.

'Fracking is a real concern everywhere,' says Smith. 'I think the reality is that the oil and gas industry has done a poor job of explaining what they are doing.'

One relatively unexplored issue, Thornton says, is the potential CO₂ produced by trucks transporting gas across Europe. 'The US already has a well-developed pipeline system in place for transporting natural gas, but that is not the case in the EU, so it will have to be transported by diesel truck. No one seems to have done this calculation and it needs investigation.'

Townsend, however, believes that 'there is sufficient scientific evidence that the risks are understood and can be managed effectively'.

Fracking, like any other extraction activity, has a potential impact on the environment, which arguably can be managed if best practices are followed'

Shane Freitag

Borden Ladner Gervais, Canada; Chair, IBA Water Law Committee

A matter of principle

In the words of Jagger, the lingering question for many is: 'Why fracking, when we could invest in renewable energy, which will not cause the same kind of damage?'

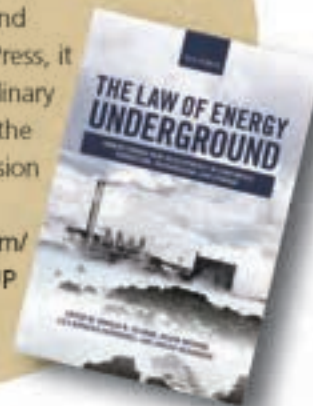
While Linehan believes the EU is working hard to address regulatory issues, he feels that ultimately there are bigger environmental principles at stake. 'The climate change problem is now so urgent that, as a matter of principle, the shale gas issue is one that should be seen primarily in terms of climate policy. From that perspective this is simply inconsistent with the EU's otherwise progressive climate policy.'

Townsend acknowledges the 'honourable concept' at the heart of the EU's 'precautionary principle', but argues that 'it needs to be balanced by countries' energy security needs and ability to look for alternative energy sources, which the Russian/Ukrainian issue has put into sharp focus'.

Freitag agrees. 'The question is whether or not societal benefits outweigh the risk,' he says. 'And presumably, given the number of wells that are continuing to be fracked, most people believe the benefits are greater.'

For many, the jury is still out, but fracking will remain firmly on the agenda of the world's leading energy lawyers for some time yet. ☺

The Law of Energy Underground: Understanding New Developments in Subsurface Production, Transmission, and Storage is the SEERIL AAG's latest scholarship text. Edited by Donald N Zillman, Aileen McHarg, Adrian Bradbrook and Lila Barrera-Hernandez, and co-published by Oxford University Press, it is a comprehensive and interdisciplinary study into the law applicable to the field of the production, transmission and storage of energy underground. See tinyurl.com/EnergyUndergroundOUP



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Bambari, 23 May 2014: rebels, armed with machetes, protest against French peacekeeping troops

Central African Republic: humanitarianism and international law under threat

As violence and attacks on humanitarian agencies continue in Central African Republic, the International Criminal Court must prioritise investigations and prosecutions against those responsible to prevent the situation spinning further out of control.

KAREN MACGREGOR

Central African Republic (CAR) is in turmoil. Over the past 18 months internecine violence has left countless thousands dead and an estimated 1.1 million people, about a quarter of the population, displaced from their homes.

The conflict has its roots in religious rivalry between minority Muslims, who make up about 15 per cent of the population and are mainly in the north-east of the country, and majority Christians (making up about 80 per cent of the population). But the situation cannot be simply characterised: regional economic

rivalries and criminal opportunism are also at work. Séléka, a loose coalition of Muslim-dominated rebel gangs, briefly held the ascendance and seized control of the capital Bangui and, consequently, the government, in March last year.

Séléka's control was brutal, scarred by extrajudicial executions and other rights abuses, and prompted the creation of the mainly Christian *anti-balaka*, meaning 'anti-machete' – self-defence militia comprising mainly rural youths armed with a motley arsenal of shotguns, machetes and spears.

Under intense international pressure, Séléka surrendered power and a new interim government was announced in January, with the former mayor of the capital Bangui, Catherine Samba-Panza, as interim president in name, but lacking a governing infrastructure.

The violence has taken place despite the presence in CAR, a former French colony, of some 7,000 African Union, French and the European Union peacekeepers.

Wanted for war crimes

To complicate matters, Uganda also has more than 4,000 troops in CAR, pursuing the Lord's Resistance Army, whose leader Joseph Kony and four other top commanders are wanted by the International Criminal Court (ICC) for war crimes and crimes against humanity. And Chadian troops serving with the African Union forces were, according to a Human Rights Watch report earlier this year, complicit in assisting Séléka leaders implicated in the torture and killing of civilians.

In April this year the United Nations Security Council, deeply concerned about both the deteriorating security situation and the escalation of ongoing human rights abuses into full-blown genocide, approved the establishment of the 12,000-strong Multidimensional Integrated Stabilization Mission (MINUSCA) in CAR, with a mandate until 30 April 2015.

Despite its mineral wealth and natural resources, CAR has long been in a state of dysfunction, plundered in turn by colonial France and successive home-grown despots, and landlocked by neighbours who themselves are institutionally fragile: Chad, Cameroon, Congo, the Democratic Republic of Congo, South Sudan and Sudan.

Although it became independent in 1960, CAR's first multiparty democratic elections were held in 1993, since when election has alternated with *coup d'état* with metronomic regularity.

Séléka forces have been responsible for serious human rights abuses, including massacres, rapes, executions, torture, and the burning of hundreds of villages.

Following the successes of the *anti-balaka*, retribution was swift, with mosques burned down, at least 100 Imams executed and, since January 2014, several massacres of Muslims resulting in more than 1,000 deaths – what Amnesty International has described as genocide and 'an exodus of historic proportions' with most Muslim families fleeing CAR.

Amnesty describes the fighting in the western part of the CAR as 'the ethnic cleansing of Muslim civilians' and has been harshly critical of the international community's response to the crisis. It notes that peacekeeping troops have been reluctant to challenge the *anti-balaka*, and slow to protect the threatened Muslim minority.

Nigeria-based Razak Atunwa, Africa Regional Officer for the IBA Human Rights Law Working Group, highlighted a Human Rights Watch (HRW) report of 3 April 2014 that exposed the lawlessness of both *anti-balaka* and Séléka in perpetrating gross violations of human rights. 'The report states that the peacekeeping force has been largely ineffective,' he tells *Global Insight*. Further, Amnesty International found peacekeeping forces had 'acquiesced to violence in some cases by allowing abusive *anti-balaka* militias to fill the power vacuum created by the Séléka's departure'.

In the past few months there has been a resurgence of Séléka activity in CAR with a chilling new emphasis. In the most recent violence it appears that humanitarian agencies, such as Médecins Sans Frontières, or Doctors Without Borders (MSF), have been deliberately targeted. These organisations work to ensure that the fragile web of health and nutrition services remains operating in a country where formal government infrastructure is virtually non-existent and about half of the population is in need of aid to survive.

In April, 22 civilians, including three MSF workers, were killed in an attack on Boguila Hospital. MSF has managed the 115-bed hospital in Boguila since 2006, and administered primary and secondary healthcare to an estimated population of 45,000 living in the region.

'The tradition, enshrined in international law, of allowing neutral humanitarian interventions to assist both the military and civilian casualties of armed conflict, is under pressure'

International law under pressure

In protest against this culmination of a series of attacks against its workers and a lack of condemnation from CAR's transitional government, MSF briefly suspended its normal operations – it has 300 international staff and 2,000 CAR staff in the country – confining its work to emergency care.

Such attacks on health workers are not only a phenomenon in CAR, notes HRW and the Safeguarding Health In Conflict Coalition. The tradition, enshrined in international law, of allowing neutral humanitarian interventions to assist both the military and civilian casualties of armed conflict, is under pressure.

A joint report released in May records that hundreds of health workers have been attacked in dozens of countries undergoing conflict or civil unrest. The attacks include the killing of 70 polio vaccination workers in Pakistan and Nigeria.



Bambari, 22 May 2014: an armed barricade is established near a French army base

'Clearly the attacks on humanitarian agencies are in breach of the Fourth Geneva Convention of 1949,' Atunwa tells *Global Insight*. 'However, it has increasingly become the trend in such internal armed conflict for humanitarian laws to be disregarded. This is because the participants are largely ignorant of the Geneva Convention or its applicability to them.'

The Enough Project, set up to end genocide and crimes against humanity, authored a report in May this year that identifies a number of relatively modest interventions – scaled against the backdrop of vastly expensive and so far most ineffectual large-scale international peacekeeping efforts – that might make a difference.

The Enough Project suggests a 'bottom-up' peace process, where experienced mediators work with each individual armed group through local negotiations, to counter the decentralised nature of the conflict in CAR. The UN, World Bank and international donors such as the EU should assist in rebuilding the justice system and 'prosecute those most responsible for the violence'. This should include the illicit wildlife and natural resource trade that has funded both the Séléka and the *anti-balaka*.

Further, the ICC should 'prioritise investigations and prosecutions' against those most responsible for the violence, 'including those involved in sexual violence and economic criminal activity'. The UN Commission of Inquiry on CAR should

coordinate investigations into violations of human rights and humanitarian law, while the UN panel of experts on CAR should recommend targeted sanctions for those involved in the illicit trade of natural resources.

Enough Project's report also calls on the UN, EU and other donors to send advisors to help the government 'deliver basic state services such as functional hospitals, schools, police judges, tax collection, and general state administration'.

Atunwa believes the Enough Project's approach offers a way out of a seemingly intractable conflict. 'A coordinated investigation of human rights abuses by both sides is pivotal. Firstly, it will send a signal to perpetrators that the international community will under no circumstances condone such atrocities. Secondly, it will serve as deterrence to all sides to desist from any further acts of such kind. Finally, it will aid in the reconciliation process if victims are rest assured that justice will be done on their behalf.'

As so often is the case in civil conflict, proposals for resolutions are far more easily formulated than implemented. It is only when the protagonists of violence see themselves under threat – through 'prickly' peacekeeping, a shift in fortunes or a prospect for a future role – that a road to peace may be negotiated. ☺

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



Justice at last for



Photo: Fiona Lloyd Davies ©

Chilean exiles

A recent landmark decision from the Americas' highest human rights court brings long-overdue hope that victims of torture in Latin America can obtain swifter and better access to justice.

NEIL HODGE

Almost two-and-a-half decades after the end of Augusto Pinochet's dictatorship in Chile, during which 200,000 Chileans were forced into exile and over 38,000 survived torture, the Inter-American Court of Human Rights (IACHR) has upheld the right to reparation for an exiled Chilean torture survivor. This is understood to be the first time the Court – the highest human rights court for the Americas – has decided such a case.

The coup that brought Pinochet to power took place on 11 September 1973. Leopoldo García Lucero was arrested five days later. He spent over a year in several concentration camps and was routinely tortured, which has left him permanently disabled. He lost most of his teeth, his face was disfigured and his spine was seriously damaged. On 12 June 1975 García Lucero was expelled from Chile by ministerial decree and has been living in London with his wife and his three daughters ever since.

In his claim, 80-year-old García Lucero argued that no one has ever been prosecuted or punished for his arbitrary detention and torture, and that Chile did not initiate an investigation into his case until 2011 – 38 years after the event and 20

years after the state became aware of the facts. He also claimed that the pension he had been receiving from Chile (arising from the loss of his job during the dictatorship) was insufficient to cover his needs in exile, and that he and his family have been unable to benefit from the health and education reparation programmes available to torture victims in Chile.

Justice for victims of torture

With help from London-based organisation Redress – a human rights group that seeks to end torture and bring justice for survivors – he took his case to the Inter-American Commission on Human Rights in 2002. The case was then transferred to the IACHR in 2011.

In its judgment at the end of last year, the Court ordered Chile to continue and finalise a criminal investigation 'within a reasonable time' into the alleged human rights violations suffered by García Lucero between his arrest in 1973 and his expulsion in 1975, and to pay him £20,000 in compensation for moral damages caused by the 'excessive delay' in opening an investigation into his case, noting that 'at least 16 years, 10 months' had passed since Chile first learnt of the facts, sometime before December 1994, and when it started to investigate in 2011, which was 'incompatible' with his disability and age.

According to Redress, it is the first time the Court has decided the case of a living survivor of human rights violations under Pinochet's dictatorship, and in particular, one subject to torture and forced exile. 'We welcome the judgment,' says Carla Ferstman, director of Redress, 'as it recognises that torture survivors in exile today still have the right to justice and reparation, despite being outside of the country and regardless of the passage of time. The judgment offers some hope to the many who may find themselves in the same situation. These are particularly vulnerable victims who have been denied justice for many years.'

The Court urged Chile to provide adequate funding to cover the costs of García Lucero's

'García Lucero and his family should feel proud that they have secured [...] a reaffirmation from an international court that delays in rectifying atrocities and violations of law are a blight on our global conscience'

Ross Ashcroft
Chair, IBA Human Rights Law Working Group

treatment in the UK for continuing medical and psychological ailments, given that the UN Committee against Torture – which monitors countries' implementation of the UN's Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – had encouraged Chile to enter into cooperation agreements with countries hosting Chilean torture survivors to ensure they receive the necessary medical treatment. The Court also reiterated that Chile should provide 'adequate, effective and prompt reparation' to torture victims, as well as making it possible for victims to challenge the reparation measures already in place domestically.

should be accessible for those living abroad.

Human rights groups have welcomed the Court's decision. 'This is a positive ruling. The Chilean state must now ensure that García is able to see those who tortured him face the courts,' says Guadalupe Marengo, Americas programme deputy director at Amnesty International.

Ferstman believes that the case is significant because it is the first real torture case to go before the IACHR for Chile. 'There have been other cases about the Pinochet era but it is the first case to deal with the provision of remedies for victims of torture,' she says.

According to Ferstman, 'the judgment deals with the particular circumstances of the 200,000

'We welcome the judgment as it recognises that torture survivors in exile today still have the right to justice and reparation, despite being outside of the country and regardless of the passage of time'

Carla Ferstman
Director, Redress

Furthermore, the IACHR said that the country's Decree-Law No 2.191, the so-called 'amnesty law', should not constitute an obstacle to investigating the facts in García Lucero's case or prevent other victims from obtaining justice – a stance the Court has taken previously.

Chile's amnesty law was promulgated on 18 April 1978 by the then military junta, and grants amnesty to 'all persons who committed, as perpetrators, accomplices or conspirators criminal offences [...] between 11 September 1973 and 10 March 1978, provided they are not currently subject to a trial or convicted'. The legislation – which has not been removed from the Chilean legal system, and remains in force despite what the IACHR has previously stated in other cases – has effectively legitimised and legalised impunity in Chile for crimes against humanity during the dictatorship and thereafter, say lawyers. Other countries in the region, such as Brazil and El Salvador, still have amnesty laws to protect the military from prosecution, while Argentina and, more recently, Uruguay, have removed similar decrees.

Chile must comply

Chile must now comply with the judgment within a year, and publish a summary of it in the Official Gazette. The full judgment should also be made available (for one year) on an official website that

people forced into exile. García came to the UK with his family and because of his injuries he never learned English and led an isolated life. He also didn't get the necessary health and medical support for his injuries. While Chile has put together a programme for survivors of torture living in Chile, it doesn't benefit those that are not living there as García Lucero is excluded from these benefits. This judgment said that Chile had a responsibility to deal with the consequences of this: Chile is responsible for García being in the UK, so Chile is responsible for ensuring that he has access to healthcare and support.'

Ferstman believes that the judgment is interesting in several other respects. 'At the time that these events took place, Chile was not part of the American Convention on Human Rights which means that the Court did not focus on the crime of torture because it did not have a responsibility under the Convention. Instead, the judgment focused on the failure of Chile to deal with the continuing impact of the torture that took place following the 1973 coup. The financial award deals with the continued denial of justice rather than the fact that torture occurred,' she says.

Furthermore, Ferstman points out that the judgment also recommends – but does not force – Chile to enter into cooperation agreements with other states that are holding Chilean exiles. For example, the judgment says that Chile should actively locate and consider providing the same

reparation as awarded to García Lucero to other victims of torture living abroad, rather than just waiting for claimants to come forward.

'The victims of torture under the Pinochet regime are now in their 60s or older and they cannot wait another 10–15 years for Chile to deal with their cases in its own time. We are hopeful that this judgment will improve the chances of reparation of other victims of torture throughout South America too,' says Ferstman.

Hans Corell, Vice-Chair of the Council of the IBA Human Rights Institute and the agent of the Swedish Government before the European Court of Human Rights between 1983–1994, says that 'the most important lesson from this judgment for Chile and for other states under the jurisdiction of the IACHR is that states must not delay opening investigations into facts that relate to torture or other grave crimes even if these acts were committed at a time that does not fall under the jurisdiction of the IACHR *ratione temporis*'.

'This duty arises the moment the state is made aware of the alleged crimes,' says Corell. 'Such investigation must be conducted and concluded within a reasonable time in the ordinary jurisdiction, based on the domestic norms that will allow those responsible to be identified, prosecuted and punished, as spelt out in paragraph 220 of the judgment and paragraph 7 in the decision.'

Corell adds: 'The judgment is rational and well-written and it makes it very clear what the responsibilities of the state are in terms of investigating torture claims. While each torture

case before the Court will be judged on its own merits, it is fair to assume that the conclusions that the IACHR has drawn here about the length of time it has taken to investigate this case will be applicable to other countries in the region if they have also been slow to conduct similar investigations.'

'The most important lesson from this judgment, for Chile and for other states under the jurisdiction of the IACHR, is that states must not delay opening investigations into facts that relate to torture'

Hans Corell
Vice-Chair, IBAHRI

However, some lawyers have mixed feelings about the wider ramifications of the IACHR decision. Juan Méndez is UN special rapporteur on torture and visiting professor at the American University Washington College of Law, as well as an ex-officio council member of the IBAHRI. He welcomes the decision, and believes the Court's request that a summary of the judgment be made available to exiles around the world 'is an interesting new development'. However, he does not feel that the judgment will have a strong impact on the responsiveness of states in the region to speed up any criminal investigation.

He says: 'The fact that the IACHR is focusing on torture cases and is shining a light on the lack of action by some states to bring cases to court quickly should be seen as positive. But in terms of the judgment itself there is little that is new or will pose states any real concerns. The reparation figure is a nominal fine really and is unlikely to lead to a flood of claims.'

Pablo Pejlato, a lawyer at *Asociación por los Derechos Civiles* (ADC), a non-governmental organisation based in Argentina, and a junior lecturer on public international law and human rights at the University of Buenos Aires School of Law, also does not believe that the judgment has much impact for the successful prosecution of historic human rights abuse cases either in Chile or elsewhere in South America.

'The key issue about this ruling is that it criticises Chile for its delay in investigating the case, and awards the claimant damages for that – which is essentially a fine. I, therefore, don't



September 1973: a Chilean soldier stands guard over prisoners in Chile's National Stadium, which served as a detention centre where thousands of people were kept during Pinochet's dictatorship

think that it has much impact for the rest of South America, though it is important that the Court continues to punish countries for their reluctance to proceed properly,' he says.

Mauricio Salas, partner at law firm BLP in Costa Rica, says that the *García Lucero* judgment is certainly a 'first' in several respects. 'In and of itself, a favourable ruling in this forum constitutes moral reparation for the claimant and other victims of abuse and neglect,' he says. 'But I would hesitate to consider it a landmark decision in terms of IACHR jurisprudence. The rationale of the ruling is not reversing or expanding prior interpretation,' adding that 'a large burst of follow-up claims is unlikely'.

Salas says that one of the ruling's more substantive issues relates to Chile's amnesty law. 'Although this was not a determining issue in this case, the Court recalled its decision in *Almonacid Arellano v Chile* [concerning a Chilean school teacher who was executed by the army in the days following the 1973 coup] whereby it affirmed that this decree lacks legal effect as it is contrary to the Inter-American Convention on Human Rights and cannot represent an obstacle for the investigation and punishment

of those responsible to human rights violations in Chile,' he says.

Overall, however, Salas believes that the judgment is not extraordinary. 'In *García Lucero*, the reparation order by the Court is precisely for delay and omission to internally investigate torture,' says Salas.

'Delay cases, or failure to investigate cases, are not unknown in the IACHR. The ruling builds upon prior precedent concerning the obligation of a state to investigate torture cases. The Court not only states that this investigation must be done immediately after learning of such cases, but that even if there is no claim, there is a state obligation to investigate. This standard comes from older precedent such as *Gutiérrez Soler v Colombia* and *Velez Loor v Panama*,' he adds.

Landmark for Latin America?

These two rulings have helped clarify countries' duties with regards to torture cases, as well as the line that the IACHR will take in future human rights violations cases. In 1994, Wilson Guterrez Soler was detained and tortured by police officers,



Fiona Lloyd-Davies ©

as well as a private individual, in Bogotá, Colombia. One of the key components of the case was that there had been a lack of proper, detailed forensic medical examinations to verify the victim's torture claims. The IACHR subsequently concluded that states are under the obligation to investigate, to identify and to judge the people responsible for torture and other forms of ill-treatment and that they should follow international norms of human rights law and standards to ensure proper medical examinations are carried out to help torture victims bring prosecutions.

Jesús Vélez Lóor was an Ecuadorian national who was arrested by Panamanian police in November 2002 for entering the country without appropriate documentation. With no legal representation or awareness of the proceedings against him, he was sentenced to two years imprisonment, but was deported back to Ecuador in 2003. Vélez Lóor later testified that while imprisoned, he was subjected to tear gas, burns, sexual abuse and beatings resulting in a cracked skull. Although he reported his torture and the Panamanian Office of Foreign Affairs initiated an investigation, Panama made no further efforts to investigate his abuse.

In its first case addressing the vulnerability of irregular and undocumented migrants, the IACHR ruled against Panama in November 2010 saying that all migrants, irrespective of migratory status, must be guaranteed due process of law and full 'enjoyment and exercise of human rights'. The Court also ruled that Article 67 of Panama's 1960 Decree Law No.16 – which allows punitive sanctions for violation of the country's migration laws – is incompatible with the Inter-American Convention to Prevent and Punish Torture when used as a basis for arbitrary incarceration.

While some lawyers may not see the García Lucero case as a landmark ruling, others see the judgment as a positive step. Juan Manuel Gutiérrez Bartol, assistant lecturer in human rights law, law and religion, and ethics at the University of Montevideo, Uruguay, says that 'it is not the first time that the Court has ordered a state to investigate human rights violations under Latin American dictatorships, and it will probably not be the last. The compensation for moral damages is also likely to encourage other living survivors to bring their case to the Court'.

However, he adds that while Chile is obliged to comply in totum with the decision, 'it is arguable if this decision should be followed in similar cases regarding other states'.

Ross Ashcroft, chair of the IBA's Human Rights Law Working Group, says that 'although he fears he will not see those who committed the atrocities directly brought to justice, García Lucero and his family should feel proud that they have secured something far more valuable for the regional and international human rights narrative, and that is securing a mandated transparency by the Chilean

government in rectifying the atrocities, and a reaffirmation from an international court that delays in rectifying atrocities and violations of law are a blight on our global conscience'.

Camila Urbina Escobar, project leader at human rights organisation Makaia in Colombia, believes that the judgment is important as a precedent in strengthening human rights in Latin America. 'In Colombia there are thousands of people who have been tortured or exiled and this judgment perhaps gives more hope for them that they can bring a claim against the Colombian government for reparations and that the Inter-American Court will uphold it,' she says.

Escobar believes that the Court took a very 'pragmatic' approach in its judgment. 'The Court effectively focused on the denial of healthcare and rights of support than explicitly on the torture itself,' she says. 'Torture cases take a very long time to progress, so this judgment may make some access to justice easier for torture victims throughout Latin America,' she adds.

However, while such rulings may give hope to torture victims throughout Latin America that justice may be possible, Escobar says that enforcing the IACHR's judgments can be another matter.

'Several countries in the region have a mixed record with regards to complying with the Court,' says Escobar. 'Colombia's record is not as good as it should be, and Venezuela is getting a bad reputation for opting out of some aspects of human rights judgments that they do not agree with. The Court's enforcement mechanisms can be seen as weak, which means that countries can circumvent these rulings, or only apply the parts they agree with,' she adds.

In fact, Chile itself may not uphold all aspects of the García Lucero ruling. According to Ferstman, Chile has said that it will comply with the judgment with respect to reparations, but it remains unclear whether the country will comply with all the other recommendations.

Indeed, South America has had a chequered history with regards to prosecuting and effectively enforcing human rights violations, particularly those relating to torture. But changes are taking place: more countries are at least reviewing their amnesty laws and the legal mechanisms that may make it difficult to prosecute military personnel. Furthermore, it is increasingly apparent that the IACHR is ready to pronounce on torture cases if they cannot be resolved domestically. Given that approximately one-third of IACHR judgments handed down since 2009 have involved claims of torture, the García Lucero ruling is further evidence that torture is an issue of continuing concern for the Inter-American system. ☺

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Sir David Baragwanath: it's how you play the game

His distinguished career, as Queen's Counsel and judge of the High Court and Appeal Court of New Zealand among various high profile positions, now sees Sir David Baragwanath take on the Presidency of the Special Tribunal for Lebanon, the first international tribunal to adjudicate on terrorism as an international crime.

ANNE MCMILLAN

Arriving home from work, Judge Baragwanath appears athletic and much younger than his years, seeming more like a senior QC in his elegant three-piece pinstripe suit than a renowned national and international judge. Penetrating eyes, which can appear both welcoming and stern, gaze steadily from a rugged face topped by

distinguished silver-grey hair. But the man who, minutes later, perches himself on a leather camping stool in the spare room seems much less forbidding.

David Baragwanath is discussing his work at his apartment in The Hague the evening before he and his wife, Susan, set off early the next morning to drive across Europe to

Switzerland where they will spend time skiing with their family. Leaning against the wall, glass in hand, Baragwanath ruefully eyes the papers strewn across the desk and the back-room clutter. 'Susan will kill me for bringing you in here!' He chuckles as he takes a sip from his glass. He's good at putting people at ease.

'A lawyer without history or literature is a mechanic, a mere working mason, if he possesses some knowledge of these, he may venture to call himself an architect'

Sir David Baragwanath
quoting Sir Walter Scott

Sticking to his guns

Nevertheless, a determination to adhere to what he believes to be right, regardless of whether it might be inconvenient or unpopular, is clear, for example, in his history of championing Maori rights. And there are other principles for which he has fought, such as the promotion of economic and social rights and his push for greater government accountability under the Official Information Act. This is to name only a few of his battles for the law to be used as an instrument for justice. As the archives of the New Zealand press attest, numerous articles have been published on Baragwanath's decisions and their ramifications.

Now more than ever, as he navigates tricky waters as President of the Special Tribunal for Lebanon (STL) and Presiding Judge of its Appeals Chamber, his experience and determination will without doubt serve him well. Richard Goldstone, the first Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia and Honorary President of the IBA Human Rights Institute, believes he's more than equal to the task. 'He has a well-earned reputation as a judge and a staunch supporter of human rights and their protection,' says Goldstone. 'The STL is fortunate indeed to have recruited him as its President. It is a difficult and complex task and I can think of no one better suited to the position.'

Ambassador Hans Corell, former Legal Counsel of the United Nations and Vice-Chair of the IBA Human Rights Institute, was involved in the establishment of all existing international

criminal tribunals except the STL. He says Baragwanath is a 'highly inspiring acquaintance to make for several reasons'. Prominent among them was Baragwanath's track record in dealing with Maori rights. 'His experiences must be invaluable for dealing with the broader question of the treatment of indigenous peoples around the world,' says Corell.



The Tribunal, which has the important job of investigating and prosecuting those who assassinated former Lebanese Prime Minister Rafiq Hariri in 2005, as well as a number of others, also has to deal with its own unique character and the circumstances under which it was established. For instance, the Tribunal recently considered a defence challenge to the legality of its establishment under a UN Security Council resolution.

Nine out of ten judges, from both the trial and appeals chambers of the STL, decided they had no jurisdiction to consider the issue. Judge Baragwanath gave a dissenting opinion. He felt that the Tribunal should not shy away from accepting jurisdiction, even if over hearing arguments on the delicate issue of its own legality. The alternative would be to leave the defence with nowhere to take their case. He says of this decision, 'I considered it was my duty in terms of the Rule of Law' to make a determination. Baragwanath ultimately determined that the Tribunal had indeed been validly set up.

As for the future, Judge Baragwanath is deeply committed to seeing the Tribunal complete its work as the first to prosecute terrorism as an international crime. He even hopes the STL may be a forerunner for an international tribunal for terrorism along the lines of the International Criminal Court.

Most immediate for Baragwanath is his hope that the STL's work will help to increase respect for the rule of law in Lebanon, and by extension the troubled region in which it finds itself. As Lebanon faces a new wave of bombings, including renewed political assassinations, it seems an optimistic ambition. But Judge Baragwanath's philosophy is not grounded in negative thinking: you fight for justice, no matter what the odds, just as you fight hard in sport.

This sporting life

Coming from a culture that reveres sport, Baragwanath enjoys the competition and adventure that almost any physical challenge can offer. He sailed around the bays of Auckland as a child and, at Oxford University, he revelled in rowing. But it was rugby at which he excelled as a front-row forward, a position requiring strength and skill in equal measure. He was a formidable talent, easily making it into the first XV.

But injury put paid to any ambition to take rugby further. It may seem at odds with the eminent jurist he is today, but photographs from earlier times of a young man in rugby kit reveal the hardy ruthlessness that Antipodeans

are renowned for bringing to the sports field and beyond.

David Baragwanath remains an enthusiastic sportsman, especially enjoying skiing, which is perhaps why he sometimes feels constrained by the hours spent at a desk that judging requires and looks forward to launching down the piste. It is one of the many common

'The STL is fortunate indeed to have recruited him as its President. It is a difficult and complex task and I can think of no one better suited to the position'

Richard Goldstone

*Prosecutor of the International Criminal Tribunal for the former Yugoslavia;
IBAHRI Honorary President*

interests he shares with his wife, though he readily concedes 'she is the better skier'.

While he may count Montaigne's *Essays* and Robert Ryan's *On Politics* among his favourite books, Baragwanath is also a man of action. He draws parallels between the physical and intellectual demands of sport and the law, both fields of endeavour that he says require dynamism, quick thinking and a thirst for challenge. He not only sees connections between activities which at first glance seem as alike as chalk and cheese but also has a broad vision of life and responsibility. This is perhaps not surprising given his upbringing.

Judge Baragwanath describes his parents in a characteristically precise manner as 'good people – not prissy, pious or pompous'. And the intimation is that these are traits he both admires and aspires to. He adds, tongue-in-cheek, 'my selection of parents I take particular credit for'. His mother, Eileen, was a Welsh teacher who sustained his father, The Very Reverend Owen Baragwanath OBE. A well-known minister and Chaplain Commandant to the New Zealand Military Forces, his colourful and engaging sermons packed churches and earned him invitations to the US and the UK to speak. Judge Baragwanath describes his father as someone with 'a considerable world view' who had his 'nose pressed to the overseas window'.

Not surprisingly, it wasn't long before the young Baragwanath found himself out in the

As well as Queen's Counsel and judge of both the High Court and Appeal Court of New Zealand, Baragwanath has served as Presiding Judge of the Court of Appeal of Samoa.

From 1996 to 2001 he was President of the New Zealand Law Commission and in 2011 was awarded a knighthood for services to the Court of Appeal of New Zealand. David Baragwanath's place in his country's legal history is assured – as defence counsel he argued, and won, the cases which reinstated the 1840 Waitangi Treaty protecting the rights of the indigenous Maori population of New Zealand. These were landmark victories with profound implications for New Zealand society and for Baragwanath himself.



world, arriving at the hallowed grounds of Oxford University on a prestigious Rhodes Scholarship to Balliol College in 1964. His first tutorial with Donald Harris QC brought home the imperative of always forming one's own opinion. He developed a fascination for travel, which included playing second fiddle to his wife's textile project with female HIV victims in Laos over a period of four years.

The experience of being an outsider looking in on an unknown world has served him well. Given the responsibility of applying the law in, and for, such diverse cultures as the Samoan, Maori or Lebanese, he appreciates that the first duty of a judge is to understand 'not only the statute, but society'. That understanding encompasses everything, from the law through to arts and cuisine. He nominates his three favourites as 'a New Zealand barbecue, an English roast, and everything Lebanese'. In fact, he says jokingly, 'I'll happily sit down to anything not triple!' The impression is inescapable that this applies as much to the courtroom as the dining room.

A defining moment and a chance to make history

At the tender age of 24, Baragwanath made his debut in the New Zealand High Court. And this one case clearly sticks out in his memory, a case that, more than any other, shaped his future as a lawyer and judge. Prosecuting a

Maori man who was fishing clams on a New Zealand beach, he won the case and at the time felt the thrill of success: 'I am a sportsman and I like winning!' But as he later came to realise, it was a pyrrhic victory.

The case had seemed straightforward enough: it had long been settled law that the fishing rights of the Maori people, said to be enshrined in an 1840 document called the Waitangi Treaty, were unenforceable. But were the earlier decisions right? Had they taken into account the history and purpose of the Treaty? These were questions Baragwanath later felt he had not asked himself and, as a consequence, he had not brought the right answers to the courtroom. It was his job as prosecutor to be a reliable guide to the judge and, in retrospect, he feels he failed. He should have dug deeper. Judge Baragwanath says that he made a 'grave error'. However, it seems he also learnt that, for him at least, the law was more about justice than winning.

More than two decades later – in a denouement worthy of a Hollywood film – he was given the chance to right the wrong and make history in the process. In remarkably similar circumstances, Baragwanath defended, in the Court of Appeal, the fishing rights of the Maori man's tribe, the reverse position to that he had taken over 20 years earlier. It was a curious twist of fate, even more so when Baragwanath won again.

This apposite symbolic victory was the icing on the cake of David Baragwanath's indefatigable

effort to defend Maori land rights. Three years earlier, Baragwanath had won a case that reinstated the Waitangi Treaty as an integral part of New Zealand law. Its impact was felt far and wide. Maori rights across vast swathes of land were now protected. As Justice Robin Cooke (later Lord Cooke), then President of the Court of Appeal and widely regarded as the country's most eminent jurist, said at the time: 'This case is perhaps as important for the future of our country as any that has come before a New Zealand Court.'

However, powerful economic interests were at work and tensions had been stoked. When the New Zealand Government later tried to sell off land to state corporations, the sales were blocked by the Treaty. Some New Zealanders, resentful of the financial claims subsequently pursued by the Maori, partly laid the blame at the door of 'innovators' like Baragwanath. Writing in the New Zealand press, author Agnes-Mary Brooke accused those who campaigned for greater recognition of the legal force of the Waitangi Treaty 'of advancing the interests of activist minority groups at the expense of the majority'.

'He has a unique ability to draw together from a wide range of experience [...] in order to resolve problems in areas where there is otherwise little guidance'

Justice Paul Heath
Member of the New Zealand Law Commission

Settling the issues of the rights of indigenous people has been a controversial and hard-fought issue for individuals and groups around the world, from Australia's Aborigines to Native Americans. Each society must take its own path to justice, but there is no doubt that as far as New Zealand is concerned David Baragwanath's contribution has been pivotal.

Julian Miles QC has assigned a prominent role in this fundamentally important national issue to Baragwanath, saying that 'much of the jurisprudence in the Maori land cases was due to David's ideas'. Baragwanath does not seem to mind if his determination to see justice done made him unpopular in some quarters. He is adamant that the law is there

to protect everyone equally: 'The law and the constitution are the right not of lawyers and judges but of the whole community.'

The fine art of judging

At the same time, Baragwanath's expansive perspective meant that he became well-known in New Zealand courts for the colour he brought to his judicial decisions, drawing from works of history, philosophy, economics and literature. While acknowledging the comment was of its time, he quotes Sir Walter Scott: 'A lawyer without history or literature is a mechanic, a mere working mason, if he possesses some knowledge of these, he may venture to call himself an architect'. But perhaps Baragwanath's reputation says more about his 'wide view of the law' than his broad education.

Baragwanath also drew from an unusually large reservoir of jurisprudence, citing cases from multiple jurisdictions in an era when international law was often derided in national courts. A former colleague from the High Court and fellow member of the New Zealand Law Commission, Justice Paul Heath, put it neatly when he observed that David Baragwanath 'has a unique ability to draw together from a wide range of experience [...] in order to resolve problems in areas where there is otherwise little guidance'.

Appreciation of Judge Baragwanath's approach to the law, and those engaged in it, has been widespread. On Baragwanath's retirement from the New Zealand Court of Appeal, a former student, Max Harris, took the time to write a paper reviewing his career. What stood out to Harris was the time that Baragwanath was prepared to spend helping others, especially students. Harris noted with surprise an occasion when, before a lecture he was about to give at the University of Auckland, Baragwanath had spent more than an hour with him, a student, 'despite the fact that he had never heard of me'.

Harris goes on to describe Baragwanath as 'creative and adventurous', someone who had the big picture, 'a vision of the law'. This included an unshakeable belief that economic and social rights, often regarded as the poor relation of civil and political rights, should be better protected. Baragwanath's attempts as a judge in the High Court of New Zealand to develop the right to education and to housing through common law were ultimately rejected by the Court of Appeal. Nevertheless he may have partly achieved his aim, as Harris observes: 'Justice Baragwanath has initiated a dialogue in many fields of the law about the future path of the law, and the principles that ought to guide lawmakers...'

He has opened the doors; it remains for others to pass through them.

In terms of commitment to equality it is not surprising to learn that the Baragwanaths are a team. Susan, a former school head, founded a highly successful 'second-chance' school in New Zealand for teenage mothers who had missed out on education. Hailed as an innovative model, it not only led to several similar schools opening in New Zealand but was subsequently copied in other countries. Her work in education and with the New Zealand Parole Board has paralleled her husband's drive for social justice and earned her an honorary doctorate and an Eisenhower Fellowship.

Baragwanath credits his wife with possessing in greater measure the quality he rates most highly in a judge, namely being a good listener and having 'acuity', as he describes it: the intuition and talent for 'reading other people's thoughts'. It's not surprising then that the judge who made the most

impression on him from other side of the Bench was Justice Robin Cooke: 'You knew your argument would always be understood and given consideration, that he would get to the high ground of a case, leaving behind the dips and hollows'.

'Much of the jurisprudence in the Maori land cases was due to David's ideas'

Julian Miles QC

Baragwanath bristles when asked about the greatest compliment he has ever received. 'I'm not going into that', he declares with such finality that even a particularly dense counsel would realise the point is not to be pursued. Nevertheless, it is striking how regularly words like 'integrity' and 'decency' are used of Baragwanath by those who know him well. Justice Heath wrote, 'he is someone with a high work ethic and of complete integrity, whom I can best describe as an intelligent, conscientious and dedicated man whose primary desire is to do public good'. The sentiments expressed by those he has mentored, such as Max Harris, echo those of his contemporaries: 'the values of "dignity and decency", which Justice Baragwanath has suggested lie at the core of parts of the common law, also underpin his own character'.

It's a character that bodes well for the future of the Special Tribunal on Lebanon. Nevertheless, to describe the effort required he calls upon one of his favourite sources of inspiration, and quotes the Queen of Hearts in Lewis Carroll's *Alice in Wonderland*: 'My dear, here we must run as fast as we can, just to stay in place. And if you wish to go anywhere you must run twice as fast as that.'

At this stage in his career there is much to reflect upon and much yet to do. But on this winter evening in The Hague, he is firmly grounded in pre-holiday preparations, anticipating a pleasant drive across Germany, seeing his granddaughter and the rush of cold air on his face as he skis in the Swiss Alps with friends. The year ahead will, as always, bring challenges, ideas and experiences. For Judge Baragwanath, if you are not 'expanding, you are shriveling', and, whatever you do in life, you must approach it with 'fire in your belly' or there just isn't much point. Sitting on the sidelines is not going to win the game. ☺





Alibaba listing raises questions for Hong Kong exchange

The Hong Kong stock exchange's refusal to grant Alibaba an exemption to its strict listing rules has forced the Chinese company to pursue a New York IPO, reopening the debate over what constitutes appropriate corporate governance for a listed entity. How Hong Kong reacts could define its future.

STEPHEN MULRENAN

After almost a year of talks with Hong Kong regulators and stock exchange officials, Alibaba Group announced to the world in March that it would pursue an initial public offering (IPO) in the US. At a stroke, the decision wiped out almost US\$300m in anticipated advisory fees for Hong Kong's banking community, not to mention the resulting loss in trading volumes and prestige.

While the US capital markets celebrate the forthcoming arrival of one of China's e-commerce champions, believing this IPO cements the country's position as the dominant market for technology companies, the loss of Alibaba – which was widely unexpected – has come as a huge blow to Hong Kong.

Beyond the obvious financial cost, Alibaba's loss of patience with Hong Kong's regulators has

come at a time when choppy equity markets and weak debuts for newly listed floats have left the city struggling to attract new offerings.

Fourteen out of 16 recently listed companies have fallen below their debut prices while, in contrast, China's securities regulator continues to unveil a plethora of preliminary listing prospectuses. Most recently, Chinese pork producer WH Group scrapped its proposed Hong Kong IPO, having already cut the size of the deal – and delayed pricing – due to weak demand.

Market commentators have suggested that Alibaba may sell a 12 per cent stake in itself, which could result in an offering of more than US\$18bn, based on a speculated market valuation of around US\$150bn.

Hong Kong hasn't hosted an IPO of more than US\$4bn since late 2010. With the Hang Seng Index down about 5.2 per cent so far this year, the loss of Alibaba has added to a growing sense of anxiety over the future of this proud harbour city.

Further, the city is currently reminded, on a daily basis, of the challenge it faces as it attempts to evolve from being the entry point to China, to being the exit point for Chinese capital and enterprises with increasingly global ambitions. One form the reminder takes is a prominent marketing campaign, displayed across the city, promoting a series of South China Morning Post (SCMP) seminars entitled 'Redefining Hong Kong'.

That the Hangzhou-based company did not was mostly due to its reluctance to amend its dual class share structure, which allows its founder and senior executives (the company has 28 'partners' in total) to nominate most board members, despite holding minority stakes.

Most internet companies have a multiple-tier stock structure that allows a small number of people to control the company's fate. The US permits such arrangements, which explains how Facebook founder Mark Zuckerberg and Google co-founders Larry Page and Sergey Brin were able to keep control of their companies following their respective IPOs.

But the Hong Kong stock exchange – run by operator Hong Kong Exchanges and Clearing Ltd (or HKEx) – does not allow share classes with different voting rights.

'Alibaba highlighted a fundamental difference in philosophy between the US and much of the rest of the world,' says London-based Debevoise & Plimpton corporate partner Kate Ashton, who sits as Co-Chair of the IBA's Capital Markets Forum. 'The US believes that disclosure is adequate for corporate governance issues like these. So it's possible to have two classes of shares with different voting rights. But this can be anathema to other parts of the world.'

Not that the objection came from the HKEx itself. With Alibaba at least partially located in Hong Kong, with many of its senior executives based there, the HKEx was desperate to lure the tech company to list on its exchange, as it seeks to diversify its stock-hold away from Chinese financial and property companies.

Led by determined chief executive Charles Li, the HKEx drafted proposals for a raft of listing rule changes that would have

'Alibaba highlighted a fundamental difference in philosophy between the US and much of the rest of the world'

Kate Ashton

Partner, Debevoise & Plimpton; Co-Chair, IBA Capital Markets Forum

Corporate agenda

Hong Kong had always been Alibaba's – and the Chinese authorities' – preferred listing venue and, towards the end of last year and beginning of this, many legal commentators were convinced that the e-commerce titan would ultimately bow down to the demands of the city's regulators.

accommodated Alibaba's IPO. But these were rejected by the city's financial regulator, the Securities and Futures Commission (SFC), which felt that Alibaba's structure violated Hong Kong's strict one-share-one-vote principle, and that any changes should not be dictated by the company's listing agenda.

Alibaba certainly had an agenda. Having already missed a late 2013 listing deadline, executives at the company grew increasingly frustrated as the stocks of other tech rivals surged – principally those at Facebook, Google,

'Stock markets should keep in mind cultural concerns, the history of their own local markets, and the possible reaction of other markets in the event that exemptions are granted'

Caroline Berube
Managing Partner HJM Asia Law & Co;
Senior Vice-Chair, IBA Asia Pacific
Regional Forum

Tencent and Baidu – while the likes of JD.com, Weibo and other competitors closer to home pressed ahead with their plans to go public.

While the public consultation process of reviewing local listing rules dragged on in Hong Kong, the tech-heavy Nasdaq Composite index jumped 34 per cent, with many investors increasingly confident that tech companies in the US and elsewhere are profiting from smartphone users.

Guangzhou-based HJM Asia Law & Co managing partner Caroline Berube, who is Senior Vice-Chair of the IBA's Asia Pacific Regional Forum, says it is difficult to criticise the HKEx from a legal perspective, as it rejected Alibaba's requests based on HKEx legal requirements. 'But from a commercial/business perspective, it may be relevant at some point for the HKEx to review their requirements, allow room for exceptions and reflect the competition that other markets provide as options for large companies such as Alibaba,' she says.

'Stock markets should keep in mind cultural concerns, the history of their own local markets, and the possible reaction of other markets in the event that exemptions are granted.'

Horses for courses

Given that the US views itself as the natural 'home' for tech stocks, its accommodation of the dual class share structure should not come as a huge surprise.

Unlike in Hong Kong, the more disclosure-orientated approach in the US, combined with its culture of litigation, provides investors with what is deemed to be a necessary level of protection.

'Disclosure obligations are a must and should be similar in every market for the benefit of investors,' says Berube. 'Penalties in cases of breach of disclosure should be applicable in all markets.'

In contrast, Hong Kong is a city dominated by family run businesses and tycoons and has a higher-than-usual ratio of retail investor participation. Its rigid shareholding rules, with its one-share-one-vote guarantee, are designed to protect retail investor interests.

Some commentators question whether this continues to be the right thing to do. 'The SFC clearly applied the rules consistently, and has taken a firm stance on this,' says Ashton. 'But it could be argued that retail investors can think for themselves and should be given the same opportunities as institutional investors.'

Some have also been tempted to suggest that Alibaba's decision to pursue a US listing should be viewed as evidence of renewed confidence in New York IPOs on the part of Chinese companies.

Following a number of accounting scandals, many US-listed Chinese companies decided to go private through buyouts (also known as take-privates), as US regulators and investors turned hostile.

Listing in the US will certainly provide Alibaba with access to larger pools of money from investors with extensive knowledge of the technology sector, which could possibly further boost its valuation. But it will also bring with it a different level of scrutiny from US regulators and class action lawyers.

With the unique set of circumstances surrounding its efforts to go public, Alibaba is likely to be viewed more as an anomaly rather than heralding the introduction of a new era of Chinese IPOs in New York – with Chinese companies expected on the whole to continue to prefer a listing in Hong Kong, or China.

Initiatives

In an admission of just how big a blow the loss of Alibaba was, and in an attempt to ensure that such an episode is never repeated, the HKEx is embarking on a range of initiatives to position itself as a more competitive listing venue.

This includes introducing changes to sponsor regulations and a stricter disclosure

regime for companies seeking to list, as well as the recent announcement of a trading link with the Shanghai stock exchange: the Shanghai-Hong Kong Stock Connect scheme.

And, together with the government-appointed Financial Services Development Council, HKEx continues to review local listing rules with a view to accommodating future tech companies seeking to go public.

For example, some have suggested changing the listing rules on the Growth Enterprise Market (the Hong Kong version of the US Nasdaq, which is tailor-made for tech companies) to allow such companies to list with special shareholding structures.

When approached for comment, the HKEx issued the following statement to *Global Insight*: 'HKEx's Stock Exchange discharges its regulatory function generally on a confidential basis to preserve the integrity of its process and ensure that it meets its statutory obligation to maintain confidentiality with respect to regulatory information in its possession. It is therefore the Exchange's general policy not to comment on individual companies, individuals, or cases.'

However, chief executive Li has repeatedly spoken about the need for the HKEx to be more responsive and competitive for 'innovative' companies. In response to media requests for comment earlier this year, he was quoted as saying: 'We have to consider possible changes where they might be necessary, with everything according to our due process. The Listing Committee's work on shareholding structures didn't start because of Alibaba and will not end now because of Alibaba. We need to ensure our markets continue to be relevant.'

This is the challenge facing not only the HKEx, but also the SFC. The extent to which they can join together to reach a compromise on a raft of initiatives and proposals to reform their listing regime will be decisive in securing the future of Hong Kong as a competitive financial centre.

'Charles Li is trying to 'update' HKEx regulations to reflect new trends and ensure that Hong Kong continues to be an attractive market in which to list for local and overseas companies,' says Berube. 'Investors have a more micro management approach and wish to protect their own interests, rather than those of the HKEx. But, at the same time, investors may lose a return on their investments if companies choose to leave the HKEx due to its strict rules, and fewer companies opt for a listing in other markets.'

Berube adds: 'Adapting HKEx regulations so that they are similar to other markets will help to attract future listings. The beneficiaries of that will be Hong Kong, the listing companies, and investors.'

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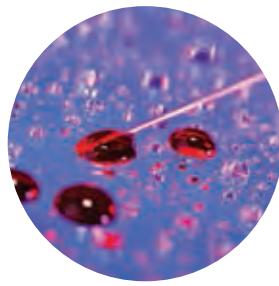
Caroline Berube

Managing Partner HJM Asia Law & Co;
Senior Vice-Chair, IBA Asia Pacific Regional Forum

The Chinese internet is increasingly the most important part of the Chinese economy, with Alibaba its leading commercial company. Like its closest domestic rival Tencent – whose purchase of WeChat recently pushed Facebook into acquiring Whatsapp – Alibaba has global ambitions. But it did not need a US listing to pursue them; Hong Kong must find a way to accommodate the next Alibaba if it wishes to remain relevant. ☺

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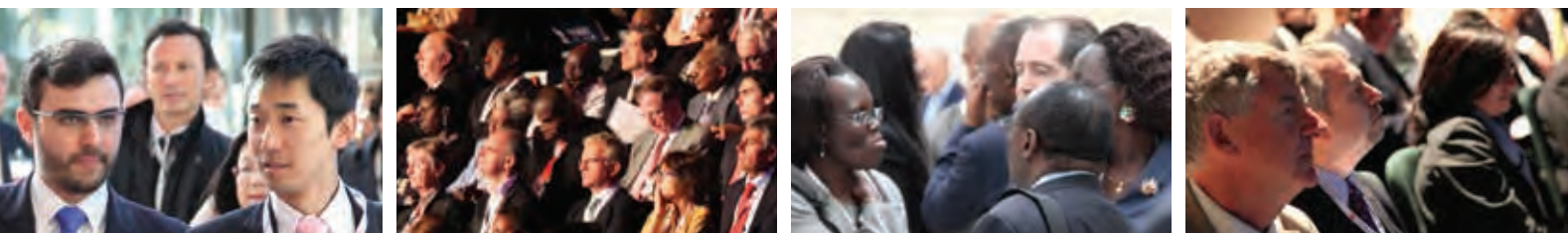
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