

IBA GLOBAL INSIGHT

June 2012



Iran: prince to pariah

Focus on Iran's suspected nuclear ambitions is entrenching differences and escalating tensions with potentially disastrous results

The African Development Bank's Kalidou Gadio speaks to Zeinab Badawi

Wholesale re-building after the financial crisis and resistance to it

Refugee crisis: the world's financial woes make a bad situation worse

Cambodia: controversy surrounding efforts to hold Khmer Rouge to account

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Kalidou Gadio is the General Counsel of the African Development Bank, one of the most influential institutions on the continent of Africa. In a wide-ranging interview, conducted by award-winning BBC journalist Zeinab Badawi, he discussed critical links between law and development, investment from China and fragile states.



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From the Editor



The Arab Spring that began in Tunisia in December 2010 triggered momentous change that continues to unfold across the Middle East. The sentencing of erstwhile autocrat Hosni Mubarak and the conclusion of presidential elections suggest Egypt may resume its leadership role in the region, remaking itself as a democratic country respecting the rule of law. Libya prompted relatively swift and decisive action, whereas Syria is presenting a similarly bloody but far more intractable challenge and one that is prompting calls to review Security Council members' legal obligations under the UN Charter (see **news analysis at ibanet.org**).

As this edition of *IBA Global Insight* went to press, Russia and China continued to stymie UN Security Council unanimity required for intervention in Syria. Concern over the consequences of such actions for fragile relations with and between Israel and Iran (see **Iran: from prince to pariah**, page 18) is significant. Russia's call for the ICC to investigate the legality of intervention in Libya also gives pause.

The tension between power politics and idealism - at the UN and elsewhere - is nothing new, of course. And, the ICC, marking its tenth anniversary with landmark convictions in the Thomas Lubanga and Charles Taylor cases, provides both a sense that this is an historic moment for the new and evolving system of international criminal justice, and hope that global justice remains a viable proposition (see **comment and analysis**, page 41). Indeed, while challenges remain, there are signs that a broader sense of international justice is emerging to shape the 21st century.

President Barack Obama's recent creation of the Atrocities Prevention Board as an early warning system for international human rights crises is an example (does it presage US ratification of the Rome Statute that created the ICC?) Notable, too, is growing recognition that the worlds of business and finance must take responsibility for human rights, made explicit in the most extensive response to the financial crisis so far, the Dodd-Frank Act (see **Behind Lubanga: the battle for gold in the Congo**, page 8), parts of which are set to come in to force imminently, despite widespread resistance (see **Dodd-Frank exchanges**, page 26). Given the impact of the financial crisis on human rights (see **Europe's downturn bodes ill for refugees**, page 43) such opposition is surprising and is likely to hinder the emergence of a more far-reaching and powerful sense of international justice.

James Lewis

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News

Nobel Laureate Joseph E Stiglitz announced as keynote speaker for IBA Annual Conference



The Nobel Laureate in Economics, Joseph E Stiglitz, has been confirmed as the keynote speaker for the opening ceremony at this year's IBA Annual Conference, to be held in Dublin from 30 September – 5 October 2012.

As former Chief Economist and Senior Vice-President of the World Bank between 1997 and 2000, a frequently cited expert and a renowned leading educator in economics, Mr Stiglitz's remarks will provide the audience with the latest thinking on the most salient issues of the day, including the global economy and the sovereign debt crisis.

Mr Stiglitz's work has focused on explaining the circumstances in which markets do not work well, and how selective government intervention can improve their performance. Policy analysts and theorists alike have adopted, as standard tools, the pivotal concepts of adverse selection and moral hazard, pioneered by the new branch of economics that Mr Stiglitz helped to create and which explores the consequences of information asymmetries, 'The Economics of Information'.

Currently, University Professor at Columbia University in New York and Chair of Columbia University's Committee on Global Thought, as well as Co-President of the Initiative for Policy Dialogue, Mr Stiglitz has also taught at the MIT (Massachusetts Institute of Technology), Oxford, Princeton and Stanford universities. Other prestigious positions held by Mr Stiglitz include: Chairman of the US Council of Economic Advisors (1995–1996); Chair of the Commission on the Measurement of Economic Performance and Social Progress which released its report in 2009; and by appointment of the President of the United Nations General Assembly, Chair of the Commission of Experts on Reform of the International Financial and Monetary System, which also released its report in 2009.

Mr Stiglitz's extensive curriculum vitae includes major contributions to the fields of macroeconomics and monetary theory, development economics and trade theory, public and corporate finance theory, and also to the theories of industrial and rural organisation, welfare economics and income and wealth distribution.

For further information and registration visit the IBA Annual Conference 2012 minisite at www.int-bar.org/Conferences/Dublin2012.

Sovereign wealth funds target India

PIA HEIKKILA

'Optimism' is the byword when it comes to economic growth in India. From the humble *kabadiwallah* up to the country's economics minister, Pranab Mukherjee, everyone still believes in India's growth story. And on the side-lines the sovereign wealth funds (SWFs) – those ever hungry beasts – are watching the Indian elephant amble along.

India's story has become huge for the SWFs. Take the Singapore-run SWF, Government of Singapore Investment Corporation (GIC), which recently opened an office in India. Or the world's largest SWF, the Abu Dhabi Investment Authority which, until now has invested in India largely through private equity funds, but now is reportedly hiring an India-based fund scout to look for real estate deals in the country. China and Australia are also scouting for targets in the subcontinent.

The country has been on the radar of many SWFs for some time, but only recently has it opened up to institutional investors who picked up on India's growth story. The global SWFs registered in India invested up to \$10bn in India last year alone, according to the Sovereign Wealth Fund Institute.

'Traditionally India has not been a great deal of interest to SWFs,' says Raj Bhatt, Chairman of the Mumbai-based Elara Capital, 'but because of changes in the global economy and growth opportunities presented in India, there has been an increase in interest.'

The recent regulatory changes have also fuelled the SWFs' interest. Last year a new takeover code was introduced by the Securities and Exchange Board of India (SEBI), which allowed SWFs to acquire a much larger stake in a local publicly listed firm without having to launch an open offer for the rest of the company. The new rule has given an even larger investment window to many SWFs working actively in India, experts note.

'These SWFs do not participate actively in day-to-day management activities and mainly act as passive investors; hence they refrain from taking higher exposure so as to invite SEBI's rule,' explains Amar Ranu, Senior Manager, Research & Advisory (Third Party Products) at Motilal Oswal Wealth Management. 'Many active SWFs like Singapore's GIC and Temasek Holdings, Malaysia's Khazanah, Abu Dhabi's ADIA and so on have major exposures in Indian stocks, and are likely to benefit from these changed regulations,' he added.

The Indian government is slowly waking up to the importance of SWFs and is keen to tap into these huge pools of wealth. 'The SWFs' interests match well with India's needs for capital for building up its infrastructure, energy and healthcare sectors, which require "patient" capital,' according to Richie Sancheti, Senior Associate in the funds team at the legal and tax specialists Nishith Desai Associates. 'These spaces should attract the SWFs' attention as they have capacity for a larger capital deployment opportunity matched with ability to generate higher returns.'

The Indian government is not known for its speedy progress but the country has, for a while, been considering the establishment of its own sovereign wealth fund as it continues to privatise energy and raw material assets. Local press reports have claimed that about a third of the proceeds from the sale of government equity would be placed in a state-owned SWF, and it could also leverage its equity to raise debt and to invest the cash for the common good.

New PPID Committee to tackle the Regulation of Lawyers and Compliance

The PPID has created a new committee to focus on the regulation of law firms and lawyers from the business lawyers' perspective and from an international viewpoint. This committee has been created after extensive discussion with the PPID officers and the officers of the Law Firm Management Committee. This new committee will be of particular interest to members who are already

active in the Law Firm Management Committee.

Commenting on the new committee, its Chair Stephen Revell said: 'I am really excited about this new committee – it meets a need that many members of the IBA have recognised for several years. This new committee will focus on the regulation of law firms and lawyers from the business lawyers' perspective

and from an international viewpoint.'

If you have any ideas for this committee or questions about its approach, please contact Stephen Revell at stephen.revell@freshfields.com.

The Regulation of Lawyers and Compliance Committee page of the IBA website can be found at: tinyurl.com/Regulation-Lawyers-Compliance.

Women in the law webcast

TOM MAGUIRE

On 26 April, the IBA hosted the 11th event in its webcast series, this time focusing on women in the law. Taking the form of a panel discussion, it featured high-ranking members of the legal profession: Helena Kennedy QC, leading barrister and human rights expert; Margaret Cole, former managing director of the UK Financial Services Authority's Conduct Business Unit; Elizabeth Barrett, Slaughter and May partner and former head of litigation; and Katie Ghose, chief executive of the Electoral Reform Society and former director of the British Institute of Human Rights. The discussion was chaired by BBC radio broadcaster Fi Glover.

The panel began by considering cultural attitudes towards women in law, with Helena Kennedy noting a 'battle with residual ideas that certain areas of law are better suited to men [...]' and commenting on initial reactions to her taking up criminal law rather than going into 'areas that were [considered] fine for women' such as family law.

The panel addressed the issue of the lack of women in senior positions despite the equality of numbers in the junior ranks of the profession. Discussion covered experiences of discrimination against women and its changing nature, in particular that it had become more subtle and in many cases subconscious. Margaret Cole said that she had seen it 'starkly' in the financial sector, and encouraged focus on diversity, stating that 'there has to be a conscious effort to

go for different people...[it is] absolutely critical for the future of our corporate environment.' Katie Ghose responded to criticisms of quotas or perceived problems with appointing on merit: '[...] the idea that there wouldn't be enough meritorious women out there to fill the handful of judicial posts in this country is a nonsense'.

The speakers commented on the perils of tokenism, with Elizabeth Barrett making the observation that: 'In order for people to be respected they need to be valued [...] is a "token woman" naturally going to encourage respect?' However, Helena Kennedy commented that often, in a situation with only a small number of women present in an overwhelmingly male environment, the women would prove themselves to be 'exceptional'.

Webcast viewers were able to submit questions to the panel in real time. This gave rise to varied topics including balancing the demands of family and work life with initiatives such as flexible working hours; to what extent women should be specifically helping other women to progress; how countries rate in terms of equality in the legal profession and the danger of grouping women as 'one homogenous lump', as Fi

Glover put it. The panel conceded that, in comparison to many places, the UK was favourably positioned for women practising law, and that campaigning had brought about change, but concluded that there was more to be done: 'Doing well, but a long way to go,' said Helena Kennedy in summary.

The panel went on to speak on their specialisms, with Margaret Cole discussing the UK's Financial Services Authority and regulation in light of the financial crisis. Katie Ghose and Helena Kennedy debated peer reform for the House of Lords.

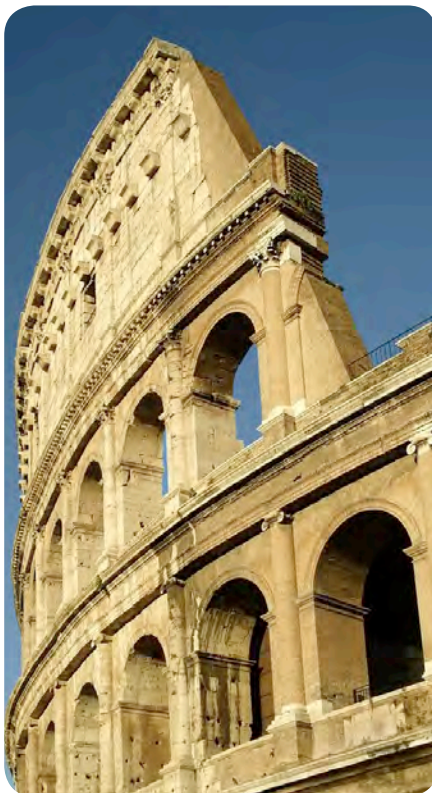
The hour-long event ended with the speakers addressing the issue of the law as it relates to Twitter and other social media. Helena Kennedy commented: 'The idea of being able to constrain new technology is a real challenge for law, and particularly when we're talking about freedom of expression and so on, so there are these clashes of legal principle.'

The webcast is available to watch at www.ibanet.org, along with previous IBA webcasts and other film content.



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IBA, OECD and UNODC Anti-Corruption Workshops roundup: Turkey, Italy and Moscow



The IBA, in collaboration with the Organization for Economic Co-operation and Development (OECD), and the United Nations Office on Drugs and Crime (UNODC), hosted three anti-corruption workshops in Europe. Held in Istanbul, Turkey (28 March); Rome, Italy (29 March) and Moscow, Russia (17 April), they were some of the best received to date.

Each was organised with the assistance of local supporters in each country. In Istanbul the IBA partnered with the Istanbul University Law School, in Rome the international oil company Eni S.p.A and in Moscow with the Russian Ministry of Justice.

The Rome workshop saw the largest attendance with over 100 legal professionals from firms in both Rome and Milan present. The Moscow workshop was held to commemorate Russia's accession to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Anti-Bribery Convention). Further information about Russia's accession to

the OECD Convention can be found at tinyurl.com/OECDRussiaAccession.

The workshops are designed to generate awareness of international corruption, outlining the complexities of the schemes lawyers and law firms often become involved in and of the sanctions incurred for involvement in corruption.

The workshops featured international experts from the OECD and UNODC and the IBA, as well as leading multinational law firms and corporations such as Dechert, Paul Hastings and KPMG. The experts introduced the international anti-corruption framework, exposing the risks and threats that corruption poses to legal professionals. They also explained the growing expectation multinational clients require of their external legal counsel to adhere to rigorous anti-corruption compliance standards and shared methods on how anti-corruption compliance standards may be met.

Following the success of the anti-corruption workshops held in South Africa in Johannesburg (15 February)

and Durban (16 February), the Law Societies of South Africa (LSSA) and Namibia (LSN), will assist us in hosting anti-corruption workshops for legal professionals in Cape Town and Windhoek on 24 and 25 October 2012 respectively. These workshops will be delivered to a select group of senior practitioners of the most relevant business law firms in these cities.

We will also be hosting our first regional workshop in Panama City, Panama on 6 December 2012, which will welcome legal professionals from Central America and the Caribbean including Antigua and Barbuda, Bahamas, Costa Rica, Dominican Republic, Honduras, Nicaragua, and others.

If you are interested in participating in this major global initiative, please contact Laverne Thomas, Legal Projects Administrative Assistant, IBA London, laverne.thomas@int-bar.org.

For further information on the IBA, OECD and UNODC Anti-Corruption Strategy for the Legal Profession, visit www.anticorruptionstrategy.org.

Behind Lubanga: the battle for gold in the Congo

REBECCA LOWE

The International Criminal Court conviction of Thomas Lubanga on 14 March highlighted the fierce power struggles that have ravaged the Democratic Republic of Congo (DRC) for decades. Yet, behind the abuses for which the region has become notorious, lies a timeless conflict: the battle for wealth and power. In DRC this means the battle for gold and other minerals.

It has long been known that profits from the gold industry fund and prolong conflict in DRC. Yet, while the problem of blood diamonds was tackled via the Kimberley Process, gold has proved more intractable. Almost untraceable, simple to melt down and easy to smuggle across borders, gold is not a straightforward substance to regulate.

Now, though, international efforts are gaining momentum. One proposal, due to take effect in June 2012, as part of the US 2010 Dodd-Frank Act, puts the burden on buyers: the law states that any public company sourcing gold from DRC or neighbouring regions must disclose far more information about its supply chain than those sourcing from elsewhere.

Critics of the law say it is a blunt tool that unfairly targets an entire geographical region. Supporters, however, claim it provides a strong incentive for the authorities to enforce good governance.

'This will affect the economy gravely,' says Kathryn Sturman, head of the Governance of Africa's Resources Programme at the South African Institute of International Affairs. 'It will affect small companies that do not have the means to find out where the gold comes from, and they will stop buying from the whole area.'

Sturman believes the Act will only have limited impact, pointing out that the biggest markets for gold are China and India, with much flowing through Dubai. Here, concerns about gold's possibly unsavoury heritage are yet to gain traction, and supply chains often remain unscrutinised.

Phil Clark, lecturer in comparative and international politics at the School of Oriental and African Studies, University of London, agrees. 'I think the impact of Dodd-Frank has been grossly exaggerated,' he says. 'They want you to



see it as a panacea for Congo's ills, but I think it is a very tiny component.'

Others believe the law could have a measurable impact. Jason Stearns led the UN Group of Experts on DRC, responsible for researching support of armed groups in eastern DRC, in 2008. 'Dodd-Frank could be successful because it could provide incentives to overcome conflict in the area,' he says. 'It has already incentivised local businessmen to lobby the government to take measures.'

'International companies are coming in and wrestling business from the artisanal mining groups,' says Clark. 'It's a little shady how they are capturing these gold concessions in the first place. Very few contracts have been made public.'

Indeed, a series of human rights scandals have hit industrial mining companies over recent years. In 2005, AngloGold Ashanti was accused in a Human Rights Watch (HRW) report of providing support for armed militia

'Due to take effect in June 2012, the Dodd-Frank Act puts the burden on buyers: the law states that any public company sourcing gold from the DRC or neighbouring regions must disclose far more information about its supply chain.'

Such lobbying is evidently having an effect. In September 2011, the Kigali government put in place a requirement for all mining operators to exercise due diligence, as defined by the UN Group of Experts and the Organisation for Economic Co-operation and Development. The World Gold Council also recently drafted global due diligence standards for its members.

Enforcement, being expensive and time-consuming, clearly favours large multinationals. Such companies are encouraged further by a government keen for investment and tax revenue. The rights of artisanal mining groups are therefore frequently overlooked, and trade is pushed underground. As foreign companies move in and undermine local livelihoods, there is a fear that conflict may flair up once again.

in return for security in the Mongbwala mining region. In response, the company told HRW the contacts had been 'unavoidable' and 'kept to a minimum'. It added: 'It is not the policy or practice of this company to seek to establish continuous, working relationships with militia groups in conflict zones.'

The challenge to combat conflict gold seems almost insurmountable. Until the DRC government improves security and combats corruption, the industry will remain semi-hidden underground. Until the eastern market improves due diligence, conflict-ridden supply chains will remain in place. And until industrial mines improve their relationships with local communities, tensions will almost certainly erupt into further conflict.

Human Rights News

International Criminal Court: the next chief prosecutor

REBECCA LOWE

Gambian lawyer, Fatou Bensouda, will take over as chief prosecutor of the International Criminal Court (ICC), replacing Argentine Luis Moreno Ocampo in June, after eight years as his deputy.

Bensouda, 51, was the overwhelming favourite for the position among the 120 United Nations (UN) countries that have recognised the jurisdiction of the Court. The final vote took place in December following a year-long search that involved a list of more than 50 candidates.

The ICC was established via the Rome Statute in 2002 to investigate the world's worst atrocities. It has jurisdiction to investigate war crimes, crimes against humanity, genocide and crimes of aggression, if countries are unable or unwilling to investigate themselves.

The Gambian lawyer received a strong endorsement from the African Union, despite its vocal opposition to Ocampo's leadership. All seven cases so far have involved African states, prompting criticism of neo-colonialism – compounded by the fact that neither the US nor China has signed up to the Statute. Bensouda, however, has remained unapologetic about the focus on her home continent, pointing out that four of the cases were referred by the countries themselves.

It is hoped that Bensouda will help raise the profile of the ICC, which has been beset with controversy since its founding. Unlike Ocampo, who has come under fire for his eagerness to court the spotlight, his deputy has taken more of a back-seat role. Following a spate of resignations by members of the ICC staff and an array of preventable set-backs to the first trial, which took six years to complete, it is Ocampo who has borne the brunt of the blame, while his African protégé has emerged relatively unscathed.

This is not to say that Bensouda is a wallflower: far from it. A woman of imposing stature and kaleidoscopic wardrobe, she is a calm, commanding presence, exuding easy authority. Having been raised among a large group of siblings by two mothers in a polygamous family in Banjul, The



Gambia, it is clear she knows how to fight to get her voice heard.

Indeed, her route to the top has not been an easy one. After beginning her career as The Gambia's first international maritime law expert, she spent the next 20 years rising up through her country's legal ranks. In 1998, she was appointed attorney-general and justice secretary of state, before moving to Kigali to work at the International Criminal Tribunal for Rwanda. Finally, in August 2004, she was elected to the ICC by a large majority of votes.

The move, she says, was a challenging one. 'Once you get here you realise that there are so many things that you are doing for the first time. Here we are investigating ongoing conflict situations, whereas ad hoc tribunals mainly take place after the conflict has ceased.'

Investigating ongoing conflict situations remains a pressing challenge for the Court. Ocampo came in for heavy criticism over his handling of the situation in Darfur, Sudan, which his office began investigating in June 2005. The following year, in a peer review of the Court, Louise Arbour, the UN High Commissioner for Human Rights, challenged Ocampo's failure to undertake research on the ground, claiming safety concerns had been overstated.

Bensouda defends her boss's decision. 'If they are saying that by not going to Sudan we cannot get our evidence, that is wrong,' she says. 'The Appeals Chamber has agreed with our evidence, so I think the Office's work has been totally vindicated.'

But what of the temporary collapse of the Court's first case? Originally the trial of Thomas Lubanga was due to begin in June 2008, but was halted after the prosecutor failed to disclose

material potentially beneficial to the defence. The former Congolese rebel leader came within a whisker of being freed, until a compromise was finally brokered in January 2009.

Bensouda urges people to bear in mind how young the ICC still is, and the significance of what it is trying to achieve. This is also her excuse as to why trials still take so long: only one so far (Lubanga) has reached a conclusion. 'Things are getting better. We have to be given the benefit of the fact that we had to set up an office, get the good people and start cases.'

On other potential flaws in the system, Bensouda is equally defiant, such as the equality of arms between the prosecution and defence. A recent IBA report outlined concerns about the relative lack of resources of the defence and recommended that 'serious consideration' be given to establishing the defence as an organ of the ICC.

Bensouda, however, disagrees. 'For me, equality of arms does not mean that if you have ten prosecutors, you have ten defence lawyers. What is important is that they have all the facilities they need to make a proper, rigorous defence, and I believe they have that.'

As the Court strives to protect its credibility and prove to the world that it can live up to its original mandate, it is hoped that Bensouda can provide fresh momentum to see it through the next decade. If nothing else, her passion and dedication cannot be doubted. 'One thing that doesn't go away at all is my love to help victims, to ensure that justice is done,' she says. 'That never goes away.'

This is an edited version of a longer article, which can be read at: tinyurl.com/IBAnews-bensouda.

Task Force on Illicit Financial Flows, Poverty and Human Rights – call for submissions



The IBAHRI's Task Force, brought together to analyse the links between illicit financial flows – and specifically the proceeds of tax abuse – poverty and human rights, is now seeking submissions from IBA members.

It is vital that the Task Force receives comments and views from as wide a variety of stakeholders and perspectives as possible. Submissions received will supplement the Task Force's consultation meetings and research. Respondents may be acknowledged in the final report, should they wish to be.

The IBAHRI has compiled a list of six questions related to tax avoidance, equitable taxation systems, poverty and human rights, to gather general attitudes and perspectives from the legal community.

1. Is poverty a violation of human rights under international law?
2. Does taxation have a role in development and the elimination of poverty?
3. Do tax avoidance abusive schemes and tax evasion constitute a violation of human rights?
4. Does the legal profession have a role in and responsibility for preventing tax avoidance?
5. What are the elements of an effective and equitable taxation system by countries seeking foreign investment (ie, host countries)?
6. Should tax havens be abolished or do they play a valuable role in the global economy?

Full details of the questions and information on how to submit your responses can be found at: tinyurl.com/IBAHRITaskForceQuestions.

Should you wish to provide the Task Force with an expert opinion and/or to be interviewed by the Task Force Rapporteur, please contact Shirley Pouget, Task Force Facilitator at shirley.pouget@int-bar.org.



Uganda activists sue government over oil production sharing agreements

SARAH AKANKWASA

The Ugandan government is in dispute with activists over its failure to disclose the contents of production sharing contracts with oil exploration companies operating in the country.

Uganda has at least five production sharing agreements (PSAs), which include those with UK-based Tullow Oil, Heritage Oil, and Ophir Energy. The country has discovered more than 2.5 billion barrels of oil in the country's Albertine Graben near the border with the Democratic Republic of Congo.

The reserves could grow to more than six billion barrels when the whole Albertine acreage is explored, according to Uganda's Ministry of Energy and Mineral Development.

Dickens Kamugisha, chief executive officer of the Kampala-based Africa Institute for Energy Governance, said that a group of civil society organisations, together with human rights body the Centre for Public Interest Law (CEPIL), have taken action in Uganda's constitutional court. They claim that clauses limiting access to information in the PSAs violate the Constitution of the Republic of Uganda, which guarantees access to information.

It is feared that the PSAs signed in Uganda do not represent the great deal publicly claimed by the government. Government figures indicate that the state will receive between 67.5 per cent and 74.2 per cent of total revenue. However, Credit Suisse analysis of Heritage Oil predicts government take to be lower: between 55 per cent and 67 per cent.

Civil Society Coalition Organisations (CSOs) are demanding that the constitutional court outlaws the confidentiality clauses in the PSAs. Kenneth Kakuru, lawyer for civil society organisation Greenwatch, said: 'According to our constitution, every citizen is entitled to information within the possession of the state, and it can only be legally withheld where disclosure jeopardizes national security or compromises individual privacy.'

However, in an exclusive interview, Uganda's junior energy and minerals minister Simon Dujuanga said that the government is bound by confidentiality clauses in the oil pacts, but remains committed to using oil proceeds to fund the country's development.

Read the full article at: tinyurl.com/IBAnews-ugandaPSA.

Human rights and parliamentarians in Uganda

In May the IBAHRI participated in a two-day regional conference convened by The Westminster Consortium (TWC) in Kampala, Uganda. The two-day conference entitled *Parliament and Human Rights: Strengthening the Tripartite Mandate of Parliament*, was attended by MPs and parliamentary staff from national parliaments across the region and aimed to strengthen their capacity to scrutinise and oversee human rights related legislation. Participants also discussed strategies, achievements, challenges and opportunities for national parliaments in fostering human rights. The conference follows the launch of the IBAHRI/TWC handbook on human rights and parliamentary strengthening at the East Africa Legislative Assembly in May 2011.

Human rights experts surprised by ECHR terrorism verdict

REBECCA LOWE



certainly be sent if convicted, would violate Article 3 of the European Convention of Human Rights, which prohibits torture and inhuman or degrading treatment.

Though life without parole is not banned by the Convention, there has been an increasing trend in Europe against it. Now only the Netherlands, England and Wales impose the sentence.

The ECHR determined that the sentences did not violate Article 3 because they were not 'grossly disproportionate' to the alleged crimes and they were not de facto irreducible because there were opportunities for early release – albeit remote ones. These included a pardon by president, a change in sentencing guidelines and a motion by the Director of the Bureau of Prisons.

Mark Drumbl, Director of the Washington and Lee University's Transnational Law Institute and a member of the IBA War Crimes Committee advisory board, described the judgment as 'well within the mainstream of international human rights law'. However, politics may have played a part in the decision, he said.

'The fact that the suspects were accused of terrorist crimes that targeted westerners, as opposed to, say, genocide against Rwandans, undoubtedly colours the approach of the judiciary. It is easier to be liberal in interpreting human rights when the victim populations that seek justice and need to absorb threats are far away.'

Read the full article at: tinyurl.com/IBAnews-ECHR.

Leading lawyers have voiced mixed feelings over the European Court of Human Rights (ECHR) judgment that five Islamic extremists can be extradited to the US to stand trial on terrorism charges.

The Strasbourg court ruled on 10 April that British nationals Abu Hamza, Babar Ahmad, Syed Talha Ahsan, Adel Abdul Bary and Khaled al-Fawwaz could serve life sentences without parole at an American 'supermax' prison without suffering a violation of their human rights. The judges decided they needed more information about the mental health of sixth suspect Haroon Aswat before reaching a decision.

Between them, the applicants

have been charged with an array of terrorist crimes, including providing support to terrorist organisations, taking hostages, and conspiracy to kill American nationals. Fawwaz was charged with 269 counts of murder.

'I was a little surprised by the verdict as I tend to feel that if locking someone up in solitary confinement for the rest of their life is not cruel and unusual punishment, or near it, then what is?' said Geoffrey Bindman, founding partner of civil liberties law firm Bindmans. 'There should always be the possibility of release.'

The applicants argued that being subjected to solitary confinement and life without parole at ADX Florence, where they would almost

Second round of human rights training for judges in Tunisia

In May 2012, the IBAHRI conducted the second round of judicial human rights training in Tunisia. The training is part of a project, organised in partnership with the International Legal Assistance Consortium (ILAC) and the CEELI Institute, which aims to train the

majority of Tunisian judges on human rights and judging in a democratic society over the next few months.

Training is based on the Arabic version of the IBA/UN leading training manual 'Human Rights in the Administration of Justice'. The second

training was delivered by a team of international facilitators, composed of: Justice Ivana Hrdličková, Appellate Court of Czech Republic; Matthias Kelly, QC, 39 Essex Street Chambers, London; and Ben Cooper, Doughty Street Chambers, London.

Global insight films

The IBA has an on-going commitment to providing high quality content giving insight from leading figures at the centre of current international legal and business issues. This content appears in print through the IBA's extensive suite of magazine, journal and newsletter publications, online and in film at ibanet.org, and on phones and tablets through iTunes.



Interview with US Ambassador-at-Large for War Crimes, Stephen Rapp, at the Hague. Ambassador Rapp discusses topics including the United States' engagement with the ICC.



Interview and Q&A with Peter Rees QC, Legal Director, Royal Dutch Shell. Topics covered include challenges facing the energy sector; the changing business of Royal Dutch Shell; the increasingly powerful role of General Counsel; and corporate social responsibility.



Bob Woodward, foremost journalist of his generation, speaks to IBA Director of Content, James Lewis about subjects including the Bush and Obama administrations.



African Development Bank General Counsel Kalidou Gadio discusses efforts to promote sustainable growth in the continent, critical links between law and development and addressing the problem of vulture funds. Mr Gadio was interviewed by international broadcast journalist Zeinab Badawi.



Ex-IBA President Fernando Pelaez-Pier interviewed Ivan Velasquez, auxiliary judge of the criminal chamber of the Supreme Court, Colombia. The interview focuses on Mr Velasquez' investigations into links between terrorist groups and members of Congress.



Gabriela Knaul, UN Special Rapporteur on the Independence of Judges and Lawyers, discusses her mandate; priorities including gender, China, Syria and MENA; and Zimbabwe among other subjects.



Russia's Deputy Minister for Justice, Yuri Lyubimov, speaks about his role, the liberalisation of global legal services and its impact on Russia, as well as development and changes in the Russian legal market.



Six leading M&A specialists took part in a panel discussion on the future of M&A, in Mumbai, in February 2010. The panellists were in Mumbai for the IBA's Globalisation of Mergers and Acquisitions – an Indian Perspective conference.



The IBA interviews David Liu of Jun He Law Offices, Shanghai. He spoke on developments in the Chinese legal market and banking system.



AlJazeera anchor Nick Clark interviews the then Egyptian presidential candidate, nobel laureate, international lawyer, Dr Mohamed ElBaradei on subjects including the Arab Spring and the rule of law in the Middle East and Iraq.



An exclusive interview with the Zimbabwean Prime Minister Morgan Tsvangirai conducted by IBA Director of Content, James Lewis, encompasses the power-sharing agreement with Robert Mugabe, the struggle to secure the rule of law, protecting the legal profession and engaging with the international community.



Afghanistan: the long goodbye, leaving a failed state crippled by corruption

Widespread corruption in Afghanistan ranks among the strongest factors determining the country's future. But, it appears that the United States and its allies are focused on an uninterrupted exit, fearing the potential for chaos if they meaningfully confront the issue.

SKIP KALTENHEUSER

America enters the frolic of summer through Memorial Day's more sombre gate. This day of remembrance of America's fallen finds the war in Afghanistan in its eleventh year. Though the numbers of US military fatalities in this war still lags far behind those of 9/11, their sad loss deepens with echoes of Vietnam. There are other casualties, of course, deaths of allies, horrific injuries both visible and hidden, and, of course, deaths and injuries of countless Afghans.


The recent G-8 Economic Summit at Camp David and the NATO summit in Chicago, both encircled by themes of diminished economic and military might, left an image of the war in Afghanistan as a straitjacket in search of an escape artist. Disengagement is coming, but it is still the long goodbye. America's loss of financial security has shackled its options, compromising security elsewhere in the world. The only certainty of outcome is that Afghanistan's breathtaking corruption will hamstring the most noble of goals and sacrifices.

During the drumbeat for the 2003 invasion of Iraq, I met with an Afghanistan-American

just back from his home country. I asked Nasir Shansab what he thought of George Bush's neo-cons, and their wordsmiths, conjuring weapons of mass-destruction. Beyond scepticism over White House claims, Shansab answered, 'If the US invades Iraq, Afghanistan is lost.' The US would become embroiled in a quagmire in Iraq, and the fleeting opportunity to evolve Afghan society with a just rule of law would vaporize.

Shansab knows the territory. His family, descended from Afghan kings, were lynchpins in the economy. In 1934, Shansab's father built a small hydroelectric plant in Kandahar, then a large one in Puli Khumir, as well as a textile factory with 3,000 employees. Other ventures included Afghanistan's largest industrial plant, in Golbahar, with 8,000 well-paid workers, an embarrassment to the Communist government and a ticket to a fast exit. Shansab took his family and fled in 1975. The big factory? Still locked up and deteriorating in a country that doesn't know what to do with it.

Shansab knows what corruption is doing to Afghanistan. In 2002, Shansab started planning to put the Naghlu hydroelectric plant, the



nation's largest, in good working order, providing inexpensive, clean, renewable power to a country desperate for energy. He figured he could accomplish this with \$30 million, incorporating a Russian company, Technopromexport (TPE) that built the dam in 1967 – Naghlu was built and financed by the Soviet Union. However, once Shansab, working with TPE, had their bid accepted by the World Bank, TPE cut Shansab out of the project, with the blessing of Ismail Khan the Minister of Energy and Water.

Warlords were put in charge of important posts by President Hamid Karzai, to buy their cooperation. It seemed a good idea at the time. Khan, with his own private army is among the most powerful. He landed his post with zero experience with energy. The initial millions paid out by the World Bank have little to show for themselves. And the World Bank has had little to say about it. As part of his own private 'Bleak House' of legal battles, Shansab ultimately prevailed against TPE in Swedish Arbitration (as designated in his contract), a ruling that cannot be appealed. But the World Bank declined to pay TPE's fees to Shansab's company. After a year's litigation in Afghanistan, Shansab got a court order blocking TPE's account in Kabul. According to Shansab, Afghan officials intervened, forcing the court to lift its order. Before he could act, TPE withdrew all its funds and sent them out of the country. So it goes with Afghanistan's rule of law and this is by no means atypical.

'How soon and how efficiently electricity will be flowing reliably throughout Afghanistan is a moot point. Today, Kabul, a city of five million, has no running water and no sewage system... The toxicity of Kabul's air continues to worsen. Power for the city is being purchased from Tajikistan. The international community, primarily the US, is stuck with the tab.'

Meanwhile, Khan's trajectory has been fascinating. In August of 2009 he was renamed as minister, but his reappointment was refused by reformers in Parliament. The Afghan constitution allows him to continue as acting minister for thirty days, after which Karzai must introduce a replacement to parliament. But Khan remained

acting minister until February of this year, when he was introduced to parliament again and this time approved. Dr Azizullah Ludin, Head of the High Office of Oversight and Anti-Corruption, has reported to the parliament that Minister Khan embezzled \$70 million. Despite his report, Ludin was dismayed to watch the parliament approve Khan's appointment. Regarding Ludin's allegations, Khan's supporters in Parliament challenged Ludin to have them proved in the courts, and complained that he was sully the reputations of other parliamentary members.

Concerns about Khan and his ministry surfaced soon after he took over the agency in 2004. Wikileaks revealed that US Ambassador Karl Eikenberry pressured Karzai to remove Khan from the position at the ministry, and described him as 'the worst of Karzai's choices.' Consultants hired to identify problems in the ministry estimated that corruption contributed to the loss of \$100 million or more each year from the country's electricity system that should go back to the Afghan government, according to reports produced for the US Agency for International Development (USAID). Huffington Post reported last year that Khan's financial disclosure statements, now required of Afghan officials, list two houses in Herat, a hotel, a garden and \$240,000 in cash. He reported a monthly government income of about \$3,650 and rental income of about \$3,000 a year. Khan has told the Associated Press news agency, when asked about corruption allegations, that there were not any widespread problems of corruption or mismanagement. 'No money is missing from the ministry,' he said. 'All the income goes directly to the bank.'

How soon and how efficiently electricity will be flowing reliably throughout Afghanistan is a moot point. Today, Kabul, a city of five million, has no running water and no sewage system. Bid documents required the hydroelectric plant to be completed by the close of 2010. It is not operative. Optimists look to operation of the dam by 2015, but never operating properly remains a fair bet. The toxicity of Kabul's air continues to worsen. Power for the city is being purchased from Tajikistan. The international community, primarily the US, is stuck with the tab.

Shansab's other cautionary tale is just as grand, and fresh off the kabob. In June of 2010, there was tremendous excitement over Pentagon memos on geological surveys, which built on Soviet geologists' charts, set aside in the panic of war. New high tech aerial surveys confirmed spectacular, diverse mineral wealth beneath Afghanistan's forbidding landscapes. Dreamers seized on the discoveries as the potential cure for many of Afghanistan's ills. They envisaged mineral wealth as the bedrock of a new economy, with well-paid jobs giving warring factions a stake



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in political and economic stability, as well as alternatives to growing poppies for opium. The potential value of untapped deposits was initially thought to approach a trillion dollars, some in the Afghanistan government give estimates triple that. In a nation with a loosely defined GDP of \$12 billion, it's no surprise that this stimulated hope.

Much of the publicity centred on exotic minerals like lithium, but the value of iron ore dwarfed all other contenders. Letters of interest in the Hajigak Iron Ore Mine were submitted in January, 2011, leading to 22 qualified bidders. Six final contenders submitted bids last September. One was a group Shansab put together that included a well-financed and highly experienced US mining company.

Now pause to consider Afghanistan's place on Transparency International's Corruption Perception Index. The latest survey examined 183 countries. Afghanistan managed a tie with Burma, just ahead of North Korea and Somalia, which tied for last. One assumes Afghanistan is closely observed by the government agencies of the US and other benefactors keeping Afghanistan's government afloat. Yet it's still in a race to the bottom. Last year a billion dollars disappeared from Kabul Bank, a significant slice of GNP. No one jailed, no one prosecuted. Official Afghanistan government stats state that in 2011, eight billion dollars in cash left Kabul just from the airport, in suitcases. Who knows how much really flew out of country, one way or another? How optimistic can we be for the country's future?

Out of this morass of corruption, what were the expectations for a coherent and fair bidding process for mining ore potentially worth hundreds of billions of dollars? Shansab regards Hajigak as the largest iron ore mine in Asia and the richest untouched iron mine in the world.

At a time when the US and its allies are strapped for funds, one might figure that the winning companies would have upfront obligations. For example, bid documents required bidders to have detailed technical plans backed up with a financial plan. Shansab notes that while all bidders speak of investing, not all had written commitments by a financial company that they have the funds. Shansab says that all bids promised to support the local population, but only his group included detailed architectural plans for a small township, including housing for office employees and engineers, as well as factory workers. Shansab's plans also included a 50-bed hospital, a school for a thousand students, a central sewage facility and water treatment plant, and a recreational centre with many amenities. His group was prepared to start immediately, and provided proof of financing to do so. Without conditions, Shansab's group committed to

starting not just mining operations but actually producing steel in forty-two months.

Shansab, examining the winning bids and press write-ups, felt that the winners were not going to contribute as much to the re-building of Afghanistan as he had undertaken to. He is, of course, bound to say that. But, to compound his frustration, his efforts to obtain some explanation from Afghan authorities, as well as from US agencies, as to how those companies could gain a lock on such incredible potential wealth without, in his view, making the same level of guarantees as to how much would be provided to Afghanistan, and when, has proved fruitless. He says the Afghan government was openly hostile to his enquiries. At time of writing the US Embassy hasn't responded to him either.

Do the US and its allies, seeking an uninterrupted exit from the stage, fear the chaos if they meaningfully confront corruption? Whatever the answer, it's a good bet there won't be legions of stabilizing mining jobs in the foreseeable future.

The questions over Afghanistan's governance that will probably never be properly answered continue to grow. In 2009, Shansab sent warnings to the State Department and White House that it was wildly premature to hold elections in August of that year. Instead, he urged a transitional, interim government until a leadership was developed that could resist warlords and better shepherd the rule of law into the courts and ministries. Unsurprisingly, the Afghans did not find the elections credible. Nothing's punctured their cynicism. While Karzai's cronies preside, most Afghans have no chance to become stakeholders in their country.

Many observers share Shansab's concern that, as the allies depart amid diminished spending, the economy will move towards collapse, followed by government. With no governing centre of gravity, Afghan soldiers will drift to their villages and tribes, seeking a strong warlord. Corruption so permeates the present government that, it will prove as determinative to Afghanistan's future as the invasion of Iraq. ☒

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View information on the IBA's work in Afghanistan here: tinyurl.com/IBAAfghan

Information on the IBA's Anti-corruption strategy can be viewed at: anticorruptionstrategy.org



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1953



1979



2009

Iran: from prince to pariah

Iran and the West have been sworn enemies since the Islamic Republic came to power in 1979. Now, the focus on Iran's suspected nuclear ambitions means that tensions have never been higher. Are the two sides irreconcilable, and could the escalation prove disastrous?

REBECCA LOWE

Howard Baskerville was no Islamic revolutionary. Yet, he is revered in Iran. Schools and buildings are named after him. Fresh flowers are found permanently on his grave. A bronze bust of him stands in the Constitution House of Tabriz, bearing the plaque: 'Howard C Baskerville – Patriot and Maker of History'.

The American missionary from Princeton University travelled to Tabriz to teach in 1907, but instead found himself leading a group of 150 nationalist fighters against the despotic Shah. Celebrated as a defender of democracy and civil rights, the young soldier was killed by a sniper eight days after his 24th birthday.

'The only difference between me and these people,' Baskerville is reported to have said, 'is my place of birth, and that is not a big difference.'

It is sometimes easy in the West to forget that the current diplomatic impasse with Iran is a very modern phenomenon. Since being cast dismissively into a tyrannical triumvirate with North Korea and Iraq in George W Bush's notorious 2002 'axis of evil' speech, the country has been reduced to a series of incendiary tabloid bullet points. Yet the US and Iran are far from natural antagonists. Beyond present-day hostilities lies a rich tradition of political and cultural ties, where democratic and Enlightenment ideals, reform and revolution, have flourished.

Since the 1979 Islamic Revolution, Iran has changed significantly. Ideological and political tensions have wrecked old alliances and entrenched differences. Yet despite its easy labels, Iran remains far from homogenous. It is, rather, a culture of contradictions, where modernity competes with conservatism, and theocracy with limited democracy. It is a society seemingly alien to the West – yet one that must finally be embraced if three decades of failed policy are to be overcome and the current nuclear stand-off resolved without a repeat of the disastrous misadventures in Iraq.

Blood and oil

The current gridlock in relations can be traced back to 1953: the year the US and British intelligence agencies orchestrated the overthrow of the democratically elected Iranian prime minister Mohammad Mosaddegh, following his nationalisation of the oil industry. An intervention of gross arrogance and imperialism, it was an act Iran has never forgotten, nor forgiven – and the perfect act to precipitate revolution. Nationalist sentiment quickly rallied against the authoritarian Western puppet Mohammad-Rezā Shāh Pahlavi, and in 1979 he was ousted from government by the exiled Ayatollah Khomeini, who heralded an end to corruption, sleaze and foreign interference.

From that day, the battle lines were drawn – quite literally. The following year Iran was invaded by Iraq, with US assistance, and forced into a long and costly war. Complaints to the Western-dominated UN Security Council achieved a muted response, and its illegal use of chemical weapons, which killed around 100,000 Iranian soldiers, was only condemned in 1988. It was not until 1991, three years after the end of the war, that Iraq was officially held responsible for the conflict.

Given this history, it is understandable that Iran's rulers have been reluctant to ally with the West. Yet why the West has remained so intransigent is a greater mystery. The Shia-dominated country shares many of the West's security concerns, harbouring a strong desire to defeat Al-Qaeda and the Taliban, and the people remain some of the most pro-Western in the region. After 9/11, Iran was one of the few Middle Eastern countries to express its solidarity with American victims, with thousands taking to the streets in candlelit vigils.

This was perhaps Washington's greatest opportunity to revive relations with Tehran, then led by reformist cleric Sayyid Mohammad Khātāmī.

Instead, the US appeared to fashion a nemesis for itself; a Hollywood villain to demonise; a 'rogue state' of 'evil' against which the enlightened ideals of the West could be compared and found superior.

It was not a new idea, of course; Khomeini referred to the US as the 'Great Satan' in 1979. Yet the Islamic Republic, one could argue, had some historical basis for its loathing and mistrust, and such an enemy served its political purposes well. 'The regime has fine-tuned its level of enmity with the US very precisely over the past three decades,' says Ali Vaez, director of the Iran Project at the Federation of American Scientists. 'There is enough to serve as the ideological glue that keeps the system together, but not enough to threaten its survival.'

What is clear is that isolation and antipathy have hardened the Republic's resolve. Since 1979, repression in the Islamic state has increased, with civil and political rights pushed into the shadows. Opposition to the state has been criminalised, while freedom of speech is severely restricted. The regime has become renowned for state terrorism, financing both Hezbollah in Lebanon and Hamas in Palestine, while President Mahmoud Ahmadinejad, who came to power in 2005, has declared he wants Israel 'wiped off the face of the map'.

To make matters worse, Iran may be able to build a nuclear bomb – a red line the West is not prepared to cross.

Nuclear narrative

Where nuclear weapons are concerned, intelligence agencies in the US, Israel and Europe seem agreed: Iran does not have a bomb, is not making a bomb and has not yet decided if it wants to make bomb. Many believe, however, that it has taken steps towards having the capacity to build one.

The current hysteria over Iran's nuclear ambitions could be deemed excessive. Tensions have arisen over Iran's refusal to cease uranium enrichment in line with a 2006 UN Security Council resolution (see box). The UN was called to act by the International Atomic Energy Agency (IAEA) after Iran failed to report two nuclear sites, Arak and Natanz, in the required time-frame in 2003 – a charge Iran refutes.

At first, the Iranian government agreed a deal with the EU-3 (the UK, France and Germany) whereby it would temporarily suspend enrichment and provide

greater access to nuclear sites. Yet in February 2006, nine months after Ahmadinejad came to power, Iran withdrew from the agreement, due in part to frustration at American demands that it give up its legal right to enrich on a permanent basis.

Nuclear experts disagree over how obstructive Iran has been since this time. According to the November 2011 and February 2012 IAEA reports, the Agency 'continues to have serious concerns regarding possible military dimensions to Iran's nuclear programme', after it uncovered evidence that Iran had carried out activities 'relevant to the development of a nuclear explosive device'. Iran has regularly denied access to its Parchin military site, it says, and has refused to discuss incriminating Agency intelligence.

Yet former UN weapons inspector Hans Blix, who led the IAEA from 1981 to 1997, believes that Iran

'They attacked Iraq because they thought they might have had WMD and now they are talking of attacking Iran because they think they might have bad intentions. It is a new category, but not one that exists under the UN Charter'

Hans Blix

Former UN weapons inspector and head of the IAEA, 1981 to 1997

has not been overly obstructive towards the IAEA, and has in fact gone 'far beyond' the duties of inspection owed under its IAEA safeguards regime. 'They did violate some safeguards, and should have reported things sooner,' he says, speaking exclusively to *IBA Global Insight*. 'But one must bear in mind that there is tremendous activity of sabotage by the US and Israel, and it is possible they were thinking that earlier reporting could have provoked such sabotage.'

Blix warns the IAEA to be wary of over-reliance on intelligence. 'There is as much misinformation around as there is information. The IAEA has said there is overall "credibility", but that is putting a bit of a stamp of approval on it [...]. I think if I was

Timeline of tensions

1951	1953	1970	1979	1980
Mohammad Mossadeq nationalises the oil industry, which is dominated by the British-owned Anglo-Iranian Oil Company. Britain imposes oil embargo.	The British and American intelligence services engineer a coup to overthrow Mossadeq. Authoritarian monarch Mohammad-Rezā Shāh Pahlavi takes over.	The US provides assistance and support for the Shah's nuclear energy programme.	The Shah is overthrown and Ayatollah Khomeini becomes the first Supreme Leader of Iran. Islamic militants take 52 Americans hostage inside the US embassy in Tehran in response to the US offering sanctuary to the Shah. The US imposes sanctions until the hostages are released.	Start of the Iran-Iraq war, which lasts for eight years.

doubtful, I would tell the countries themselves to place the evidence before the Board of Governors.’

Under the Non-Proliferation Treaty (NPT), ratified by Iran in 1970, members have the right to enrich uranium for peaceful purposes. A nuclear power plant needs around three per cent enriched uranium, a research facility around 20 per cent. Most of Iran’s stockpile is below five per cent, but it recently tripled its monthly production of 20 per cent uranium at its two enrichment sites, Natanz and Fordow, the latter of which Iran again failed to report to the IAEA in 2009.

From 20 per cent, it is just a short leap to the 90 per cent needed for weapons grade uranium, as most of the work has already been done.

At first, Tehran said Fordow would be used for the production of 3.75 per cent enriched uranium, but later it announced that the plant would be used for research. Then, in 2011, it said that it would use Fordow to produce uranium enriched to 20 per cent. In a February 2012 report, the Washington-based Institute for Science and International Security wrote: ‘That Iran was caught building the Fordow plant in secret, and since Iran has subsequently changed the DIQ [Design Information Questionnaire] for this facility three times, raises concerns that the plant was built in order to provide Iran with the ability to quickly and securely make highly enriched uranium in the event of a breakout to make nuclear weapons.’

David Albright, founder of the Institute for Science and International Security, was the first non-governmental inspector of Iraq’s nuclear programme in 1992. He is convinced that Iran has a weapons programme due to evidence he has seen relating to the 1990s and 2000s. For him, former IAEA director-general Mohamed ElBaradei – who has spoken of ‘six years of failed policy’ over Tehran and refused to condemn the regime during his tenure – was too cautious in exposing all the evidence against Iran due to fears of provoking another war.

‘It was an understandable concern, but that was a critical mistake that ElBaradei made, to link Iraq and Iran too much,’ says Albright. ‘He should have trusted the international process to use the information in a way that didn’t lead to war. He had a technical mandate, and he should have just done his job.’ Now, Albright says, the IAEA

is doing the job ElBaradei ‘should have done’, by publishing its concerns.

‘I wish this information had come out in 2009,’ he adds. ‘It would have been easier to deal with it, and Iran would have been much further back with its centrifuge programme.’

Wyn Bowen, Director of the Centre for Science & Security Studies, in the Department of War Studies at King’s College London, served as a weapons inspector on several UN ballistic missile inspection teams in Iraq in 1997–98. He believes Iran is engaged in a ‘hedging strategy’: attempting to get the capability for manufacturing a weapon, but stopping short of actually making a weapon itself. This is why it has successively opted in and out of agreements over the past ten years: first in 2003 with the EU-3, then again in 2009, regarding sending uranium out of the country to be enriched for a research reactor. ‘The Iranians are playing a canny game,’ he says. ‘I believe Iran is more than likely to be engaged in nuclear military activities that no-one knows about yet because they are keeping them deeply buried.’

Bowen’s suspicions are shared by much of the Western intelligence community. Greg Thielmann, senior fellow at the Arms Control Association, served as a top intelligence official at the US State Department until retiring shortly before the Iraq War over accusations the US had cooked its intelligence. According to him, the US believes that Iran had a weapons programme even prior to 1979, which was allegedly halted by Khomeini when he became Supreme Leader, and then restarted after the Iran-Iraq war. It was later revealed in a 2007 report, based on intercepted phone communications, that the programme had again been stopped in 2003, seemingly due to fears that Iran would be the next Iraq. ‘This was very big news, as we had recently said that Iran had an ongoing nuclear weapons programme,’ says Thielmann. ‘And then this intelligence report came out basically saying Iran had stopped the programme, which I believe actually averted war with Iran in the latter years of the Bush administration.’

For Thielmann, however, the key issue was less that the Iranians had halted the weapons programme in 2003, and more the fact that they had had a secret programme in the first place. ‘The Iranians took the headline and ran with it, ignoring the sub-headline, which was that they had lied to the IAEA for 18 years. In the meantime, they had worked hard at doing the

1984	1988	1989	1990	1995	1997
The US adds Iran to its list of countries that support terrorism (namely, Hezbollah), banning US foreign aid to Tehran and imposing export controls.	Iran accepts a UN-brokered ceasefire agreement with Iraq.	Ayatollah Khomeini dies. President Khamenei is appointed new Supreme Leader.	Iran and Iraq resume diplomatic ties.	US imposes comprehensive sanctions on Iran over its alleged terrorism and nuclear activities, banning nearly all business between the two countries.	Mohammad Khatami wins the presidential election with 70 per cent of the vote, beating the conservative candidate endorsed by Khamenei.



Iranian President Mahmoud Ahmadinejad visits nuclear installations in Natanz, 322km south of Tehran.

one most demanding thing in developing nuclear weapons, which is to develop the infrastructure to come up with fissile material for a bomb.'

Nuclear apartheid

Iran may be engaging in a 'hedging strategy', but it is some relief that it is beholden to the terms of the NPT. The treaty, which entered into force in 1970, gave all states the right to a civil nuclear programme, banned non-nuclear states from building weapons and committed nuclear states to making efforts 'in good faith' to disarm. Today, 190 countries are signatories; Israel, India, Pakistan and North Korea, however, are not – North Korea having withdrawn in 2003 – due to their belief that the treaty unfairly polarises the world and enshrines a system of global 'nuclear apartheid'.

The accusation is not without merit. For many, nuclear weapons are little more than a metaphor, significant only for what they symbolise: power, sovereignty, self-determination. To have a nuclear weapon is to have a golden ticket to the top table, and few want the nouveau riche crashing the party.

The West has successfully perpetuated the view that the world would be in mortal danger should certain countries get nuclear weapons, while such weapons are perfectly safe in their own hands. Despite the US being the only country to have launched a bomb, against Japan in 1945, it commonly adopts a scaremongering attitude, whereby less developed nations are depicted as unruly children who lack the requisite morals and

responsibility to have nuclear weapons of their own. 'In any contest in which one side is bound by the norms of civilised behaviour and the other is not, history is, alas, on the side of the barbarians,' said defence policy officer Richard Perle when speaking about the prospect of Iraq getting WMD in 1990. Similarly, Kenneth Adelman, a senior official in the Reagan administration, believed 'the real danger comes from some miserable Third World country which decides to use these weapons either out of desperation or incivility'.

Read Western media coverage and you would be excused for believing that Iran is run by such uncivil barbarians: megalomaniacal, unstable fiends who could easily allow a bomb to slip into the hands of Hezbollah, or fall on Tel Aviv. Yet the Iranian regime can be accused of many things – fundamentalism, oppression, despotism – but irrationality is not one of them. Both acts would entail such destructive retaliation that it would almost certainly spell the end of the Republic. Vaez puts it succinctly: 'The regime may be homicidal to its own population, but it is not suicidal.'

For David Rodin, co-director of the Oxford Institute for Ethics, Law and Armed Conflict, a key mistake by the West has been the message it has conveyed to the world about nuclear weapons. 'After Iraq, the message pretty clearly was that if you want to be free from intervention, what you ought to do is get nuclear weapons. And at the same time, the major states were signalling, as the UK did in its failure to give up Trident, that nuclear weapons give prestige, give you a voice.'

2002	2003	2004	2005
US President George W Bush describes Iraq, Iran and North Korea as an 'axis of evil', causing outrage in Iran. Russia begins construction of Iran's first nuclear reactor at Bushehr. An Iranian dissident group discloses the existence of two hidden nuclear sites, Natanz and Arak.	Thousands of students take to the streets in Tehran to protest against the conservative clergy. The IAEA gives Iran weeks to prove it is not pursuing an atomic weapons programme. Iranian human rights lawyer Shirin Ebadi becomes Iran's first Nobel Peace Prize winner. Iran says it is suspending its uranium enrichment programme and will allow tougher UN inspections of its nuclear facilities. The IAEA concludes there is no evidence of a weapons programme.	Iran signs a deal with the EU-3 to suspend enrichment and open its sites to full inspection.	Conservative presidential candidate Mahmoud Ahmadinejad wins the election. The IAEA finds Iran in violation of its safeguards agreements under the Non-Proliferation Treaty.

According to Blix, the aggressive rhetoric by the US, UK, France and Germany towards Iran has been unhelpfully ‘supercilious’ and ‘contemptuous’. To set an example and deflect accusations of hypocrisy, he says, nuclear states should be focusing their attentions on speeding up the disarmament process. Though the US and Russia have cut their warhead stockpiles by tens of thousands since 1945, they still have around 5,000 operational warheads each.

The US should also ratify the Comprehensive Nuclear-Test-Ban Treaty, Blix stresses: a treaty ratified by neither Israel nor Iran.

The West’s failure to abide by its disarmament commitments, outlined in the NPT and clarified in

able to maintain sovereignty in its territorial areas bordering Afghanistan and Iran.’

Unless the West addresses its perceived double-standards, mutual trust will surely prove elusive. Hypocrisy begets intransigence, and since 1979 has led to nothing but brick walls and bombast. ‘We need to be open-eyed about our own responsibilities from the past,’ stresses Rodin. ‘This does in no way vindicate some of the really morally pernicious things the Iranian regime has done, but when we look for solutions, we must be aware of the nuances too.’

Illegal warfare

Western hypocrisy is perhaps at its most acute when riding roughshod over the rule of law for the sake of political expediency – and, in recent discussions over whether to launch a military attack on Iran, ‘an important legal discussion has been missing’, says Blix. ‘People only say, is it sensible to attack Iran or not? And most people say it is not. But for us lawyers, it is significant that actually this would be a terrible setback for the interpretation of the UN Charter and the growing legal inhibitions against the use of armed force.’

Under the UN Charter, there are only two circumstances in which the use of force is permissible: in collective or individual self-defence against an actual or imminent armed attack; and when the Security Council has authorised the use of force to restore international peace and security. There is no basis in international law for expanding the concept of self-defence, as advocated by the Bush administration in 2002, to authorise ‘pre-emptive’ strikes against states based on potential threats from WMD – a doctrine yet to be squarely renounced by the Obama administration.

Policy-makers should also be aware of Article 56 of the 1977 amendment protocol of the Geneva Convention, says Blix, which outlaws destructive attacks on nuclear generating stations due to the risk of releasing dangerous radioactive material. Though the US, Israel and Iran have failed to ratify the protocol, some believe its provisions are recognised as customary international law.

‘They attacked Iraq because they thought they might have had WMD and now they are talking of

‘It is exceedingly rare to hear anyone question the underlying policy towards Iran. There is a very broad consensus politically on the sanctions’ policy remit’

Bill McGlone

Sanctions expert, Latham & Watkins

a 1996 International Court of Justice (ICJ) decision, is a ‘major problem’, according to Peter Weiss, president of the Lawyers’ Committee on Nuclear Policy. ‘It is now 13 years since the ICJ decision came down in The Hague, and it is perfectly clear to me and most of my colleagues that at the moment there is no serious intention on the part of the nuclear powers to comply with that obligation.’

For Weiss, there is no point proposing a nuclear free zone in the Middle East – due to be discussed in Helsinki later this year – until the nuclear powers show themselves willing to comply with the law. ‘If I was Iran, I would say, look at what you are doing with international law obligations. What do you want from us?’

If one was Iran, one may also point the finger at Israel and Pakistan: two aggressive nuclear states outside the NPT, but which, as allies of the West, cause little global concern. ‘Compared to Pakistan, any reasonable anxieties about Iran have to be a lot less,’ says Thielmann. ‘Pakistan is where many of the terrorist attacks originate, and Pakistan is not even

2006	2007	2008	2009
The IAEA reports Iran to the UN Security Council over its nuclear activities. Iran resumes enrichment at Natanz. The Security Council votes to impose sanctions on Iran’s trade in sensitive nuclear materials and technology.	The US announces tough new sanctions against Iran. A new US intelligence report claims Iran stopped its nuclear weapons programme in 2003.	Conservatives win over two-thirds of parliamentary seats in elections, but many reformist candidates are banned from standing. The Security Council tightens sanctions. The IAEA says Iran is still withholding information on its nuclear programme.	Ahmadinejad says he would welcome talks with the US as long as they are based on ‘mutual respect’. Khamenei tells anti-Israel rally that US President Barack Obama is following the ‘same misguided track’ in the Middle East as President Bush. Ahmadinejad wins the 12 June presidential election. Thousands take to the streets to protest about alleged vote-rigging, and at least 30 people are killed. Another uranium enrichment plant is revealed in Fordow, near Qom, and the IAEA passes a resolution condemning Iran for developing the site in secret.

attacking Iran because they think they might have bad intentions,' Blix says. 'It is a new category, but not one that exists under the UN Charter.'

There are also legal concerns surrounding nuclear weapons themselves. In its 1996 ruling, the ICJ found that 'the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law' – though it stopped short of saying nuclear weapons were illegal in every circumstance.

UK barrister Philippe Sands QC, however, believes it would be hard to make a legal case. During the ICJ hearing in 1995, he said of France, Britain, Russia and the US: 'These are the same states that pride themselves – with some justification – on their role in promulgating the rule of law, promoting human rights and preserving the environment. Yet when it comes to those very WMD that pose a greater threat to human rights and the environment than anything else imaginable, these states ask you to set aside that body of principles and rules so carefully put in place over the past 50 years.'

The Vancouver Declaration, signed by eminent experts in international law and diplomacy in March 2011, is in line with Sands' analysis, and urges states to accelerate moves towards non-proliferation. It states: 'It cannot be lawful to continue indefinitely to possess weapons which are unlawful to use or threaten to use, are already banned for most states, and are subject to an obligation of elimination.'

Collective punishment

If military action would be both illegal and politically unsound, what about sanctions? The US first imposed sanctions after the 1979 hostage crisis, but lifted them once the hostages were released. In the 1980s, Reagan declared Iran a state sponsor of terrorism, opposing international loans and signing a new embargo against Iranian imports. Comprehensive sanctions were imposed in 1995, both due to Iran's alleged nuclear programme and state sponsorship of terrorism, which restricted virtually all commercial trade.

Recently, the sanctions have ratcheted up: in 2010, Congress passed the Comprehensive Iran Sanctions, Accountability, and Divestment Act (CISADA), which expanded the categories of activities that could subject non-US firms to

sanctions, and which can prohibit foreign entities from using American banks if they do business with Iran. President Obama also issued an executive order in November 2011 that prevents foreign financial institutions from conducting oil transactions with Iran's central bank, which handles most of the country's oil payments.

In January, the EU strengthened previous sanctions by banning Iranian exports of crude oil and trade in gold, and placing sanctions on its central bank. Both the US and EU sanctions regimes come on top of a series of UN Security Council resolutions, imposed since 2006, which target Iran's nuclear and ballistic missile programmes.

'Targeted sanctions that weaken the government are good. But any sanctions that are detrimental to the people should be avoided'

Shirin Ebadi

Nobel Peace Prize winner and Iranian human rights lawyer

Taken together, it is perhaps the most stringent sanctions regime ever imposed on a country, and the extraterritorial scope of the US programme is unprecedented. 'It is my understanding that Iran is finding it very hard to do international financial operations of a normal kind,' says O'Melveny & Myers partner and sanctions expert Greta Lichtenbaum. 'There are now so many banks that don't want anything to do with them, due to reputational concerns or because they are concerned they will do something to benefit the nuclear industry there.'

The UN and EU sanctions imposed in 2010 were 'the most extensive and complex' that European businesses have ever had to comply with, according to Freshfields partner Sarah Parkes, who specialises in financial regulation. Though nominally targeted, so as not to harm businesses unnecessarily, their breadth and confusing overlap with US measures made due diligence arduous and expensive – resulting in many companies withdrawing from Iran altogether.

2010	2011	2012
Iran says it will send enriched uranium abroad for further enrichment under a deal agreed with the West, later reneging on the agreement. The Security Council imposes a fourth round of sanctions against Iran over its nuclear programme, including an expanded arms embargo. The US imposes unprecedented sanctions against eight senior Iranian officials for human rights violations.	Mass opposition demonstrations take place amid a wave of unrest across the Arab region. Iran announces the Bushehr nuclear power station has been connected to the national grid. The UN, US and EU impose tighter sanctions. The IAEA says it has uncovered evidence that Iran has carried out activities 'relevant to the development of a nuclear explosive device', but Iran denies the charges.	US imposes sanctions on Iran's Central Bank. Iran threatens to block the transport of oil through the Strait of Hormuz. Iran begins enriching uranium at its Fordow plant. The EU imposes an oil embargo on Iran. IAEA inspectors leave Iran after being denied access to the Parchin military complex. Iran and the permanent members of the Security Council plus Germany meet for nuclear talks in Istanbul, heralded as 'constructive'.

‘That raised an interesting conundrum,’ says Parkes. ‘The EU and UN introduced targeted sanctions, but businesses themselves have tended to impose more of a blanket ban. That may be consistent with UK and US foreign policy aims, but not necessarily with everyone in the UN and EU – and it could also have an impact on humanitarian aid.’

Despite the severity of the measures, there is yet to be any blocking legislation imposed by countries disinclined to fall under America’s ever-expanding jurisdiction. Unlike with Cuba, Iran, it seems, is expendable. ‘It is exceedingly rare to hear anyone question the underlying policy towards Iran,’ says Latham & Watkins partner and sanctions expert Bill McGlone. ‘There is a very broad consensus politically on the sanctions’ policy remit.’

The sanctions are evidently having an effect. Inflation in the country is now at 20 per cent and unemployment is soaring. Queuing at petrol pumps can sometimes take five hours. Indeed, the Iranians made clear at recent nuclear talks in Istanbul and Baghdad that the sanctions had impacted their decision to open discussions once more.

Yet for some the cost is too high. ‘Targeted sanctions are very useful, but when you have comprehensive sanctions, these become tools of collective punishment and I think they are actually counterproductive,’ says Vaez. ‘More than anyone else, they will hit the middle class in Iran, the ones demanding a better democratic system, while the Revolutionary Guards benefit from smuggling activities.’

Nobel Peace Prize winner and human rights lawyer Shirin Ebadi agrees. Having left Iran in 2009, she is now living in exile due to fear of arrest if she returns. ‘Targeted sanctions that weaken the government are good,’ she says, speaking exclusively to *IBA Global Insight*, via a Farsi interpreter. ‘But any sanctions that are detrimental to the people should be avoided.’ For example, she says, the West could target Iran’s 13 foreign language channels, which ‘broadcast its lies around the world’.

The nuclear programme, Ebadi stresses, is merely the product of the political ambitions of the regime; the people are generally opposed to it. ‘At the outset of the Islamic Revolution, the regime had one intention: to export the Islamic Revolution. That is why they created Hezbollah in Lebanon and started to influence the youth in the region. They want to become a role model for all the other Islamic states.’

For Ebadi, any nuclear talks must act as a stepping stone to address more urgent issues, such as civil and political rights. The situation, she stresses, is getting worse. There are now around 1,000 political prisoners, she estimates, and the Iranian government has not permitted visits by

the UN Human Rights Council since 2005. In October 2011 the special rapporteur presented 58 cases of human rights violations in his interim report, including provisions within the Islamic Penal Code that limit freedom of expression, criminalise opposition to the Islamic state, and discriminate against women, ethnic minorities and homosexuals.

‘The West is only focusing on the nuclear problem and neglecting human rights,’ Ebadi says. ‘I believe that in the next round of talks, they should demand that Iran cooperates with the UN and allows the special rapporteur on human rights to visit Iran, and make that conditional for removing the sanctions.’

With a weakening regime, beleaguered economy and ever-emboldening population of 30-somethings, the situation sounds hauntingly familiar. The Green Movement that drew millions onto the streets after Ahmadinejad’s 2009 re-election may have dwindled following a brutal crackdown – but who is to say that, buoyed by the success of its Arab neighbours, and fired by a legacy of protest and revolution, the nation could not rise again?

From diktat to debate

In March 2009, US President Barack Obama marked the Persian New Year festival of Nowruz with a message to the Iranian people. The US would refrain from ‘threats’ against the country, he said, and instead engage in discussion which was ‘honest and grounded in mutual respect’. It was a speech demonstrating political and cultural sensitivity, and marked a welcome end to the cocksure hyperbole of his predecessor.

Frustratingly little progress has been made since then. However, recent nuclear talks in Istanbul, between Iran and the five permanent members of the Security Council plus Germany – the first for 15 months – were heralded as ‘constructive and useful’, and perhaps provide some hope. The West has now declared itself willing to concede Iran’s legal right to uranium enrichment, while Iran seems open to greater transparency.

Whatever the future holds – bomb or no bomb, reform or regression – it is clear that a new policy towards Iran is needed if hostilities are to be overcome. And for some, the current round of negotiations is a welcome first step.

‘I think both sides have realised that for the diplomatic process to be successful, it needs to be give and take, and both sides need to compromise,’ says Vaez. ‘It took us a long time to get to this stage, but I think we have finally arrived.’ ☒

Rebecca Lowe is Senior Reporter at the IBA and can be contacted at rebecca.lowe@int-bar.org.



The background of the page is a stylized illustration of a construction site at night. A helicopter is in the upper left, casting a beam of light. Several cranes are visible against a dark sky with falling rain. In the foreground, the silhouettes of three people are shown, one holding a large sign. The overall color palette is dark with some highlights from the construction lights.

Dodd-Frank exchanges

Attempts to re-build the financial system have resulted in a flood of banking regulations, emanating from the US and elsewhere, and it's meeting with considerable resistance. Is the finance world right to push back?

JONATHAN WATSON

The so-called 'Volcker rule' is due to come into force in the US by 21 July 2012. Named after Paul Volcker, a former chairman of the Federal Reserve, it is designed to reduce banks' ability to take excessive risks by prohibiting them from trading for their own account, or making significant investments in hedge funds or private equity firms. It is one of the large number of reforms included in the Dodd-Frank Act, which was signed into law by President Obama in July 2010 as a response to the financial crisis.

There's just one small problem – the regulators whose job it is to implement the rule won't have finished drafting it by July. 'It is widely accepted that there will be no final regulation on the substance of the Volcker rule by the time the rule comes into effect,' says Margaret Tahyar, a partner at Davis Polk & Wardwell, a member of the firm's Financial Institutions Group and former Co-Chair of the IBA Securities Law Committee. 'It's a little odd. What we have is two layers: the first is the statutory text, which is written in very broad strokes, and the second is the proposed regulation. What we are looking to now is guidance from the regulatory agencies.'

Some guidance did arrive in April when regulators, led by the Federal Reserve, clarified

that banks would not have to comply with the rule by July. Although the rule is still due to come into force then, it contains a two-year compliance period, giving banks time to adjust to the new requirements. Ambiguous regulatory language had previously advised banks they had to be in compliance 'as soon as practicable' after July, despite the two-year period, but it has now been confirmed that banks will have the full two years to comply.

However, if Republicans hostile to the Dodd-Frank Act do well in general elections due to be held in November 2012, the Volcker rule could be killed before it is even implemented. Mitt Romney, the Republican candidate for the presidential election – also co-founder and head of private equity investment firm, Bain Capital – has pledged to repeal it if elected.

Wall Street fights back

Such uncertainty is typical of the painfully complex and drawn-out process of implementing Dodd-Frank. According to law firm Davis Polk & Wardwell, as of 1 May 2012, only 108 (27.1 per

cent) of the 398 total rule-making requirements mandated by the Act had been met with finalised rules, and rules had been proposed that would meet 146 (36.7 per cent) more. Rules had not yet been proposed to meet 144 (36.2 per cent) rule-making requirements.

Part of the reason for this is that legal challenges to the new rules have started to

'The purpose of regulation is simply to do what we can to make it less likely that past mistakes are repeated'

Roger McCormick

Visiting Professor, London School of Economics; IBA Financial Crisis Task Force

arrive in US courts. Wall Street banks and other financial institutions have brought a range of lawsuits challenging new rules on the basis of an alleged lack of cost/benefit analysis in their drafting.





The Dodd-Frank Wall Street Reform and Consumer Protection Act: key aspects

The Act:

- Creates Financial Stability Oversight Council to oversee financial institutions. Its purpose is to identify risks to US financial stability that may arise from ongoing activities of large, interconnected financial companies as well as from outside the financial services marketplace; eliminate expectations of government bailouts; and respond to emerging threats to financial stability.
- Overhauls existing regulatory system for the financial industry by creating several new regulators and altering the responsibilities of existing ones.
- Reforms securitisation. Key areas include credit risk retention, required disclosures, representations and warranties.
- Imposes a comprehensive and far-reaching regulatory regime on derivatives and market participants.
- Increases investor protection.
- Overhauls the regulation of credit rating agencies.
- Introduces Volcker rule prohibiting most proprietary trading by US banks and their affiliates, subject to limited exceptions, and restricting covered institutions from owning, sponsoring or investing in hedge funds or private equity funds.
- Requires new stock exchange listing standards, mandated resolutions for public company proxy statements, and expanded disclosures for all public companies soliciting proxies or consents.
- Requires the Financial Stability Oversight Council to make recommendations to the Federal Reserve on establishing heightened prudential standards for risk-based capital, leverage, liquidity and contingent capital.

Adapted from *The Dodd-Frank Act: a cheat sheet*, Morrison & Foerster

Last year, a US federal appeals court threw out new rules from the Securities and Exchange Commission (SEC) that had been intended to make it easier for shareholders to eject board members at listed companies. Judges sided with the US Chamber of Commerce and the Business Roundtable, an association of CEOs of major US corporations, who had opposed 'proxy access' measures that would force companies to bear much of the cost of proposing alternative candidates in boardroom elections.

And in April, two industry groups sued the US Commodity Futures Trading Commission (CFTC) to prevent the implementation of a rule requiring registration by mutual fund advisers. The lawsuit, filed by the Investment Company Institute and the US Chamber of Commerce, claimed that requiring advisers to mutual funds and other investment firms involved in commodity trading to register with the CFTC represented a reversal of a previous agency position and that the change had not been sufficiently explained to the public. The lawsuit alleged that the agency had failed to weigh the costs of the proposed regulation against its anticipated benefits.

'The Dodd-Frank Act represents the most comprehensive financial regulatory reform measures taken since the Great Depression'

The Dodd-Frank Act: a cheat sheet
Morrison & Foerster

Further challenges are pending from the International Swaps and Derivatives Association and the Securities Industry and Financial Markets Association, which lobby on behalf of derivatives traders including JP Morgan, Goldman Sachs and Morgan Stanley.

However, the enormous scope of Dodd-Frank means that it probably would have taken a long time to implement even without any legal challenges. An initial assessment of the legislation by Davis Polk concluded that it amounted to 'the greatest legislative change to financial supervision since the 1930s' and that it would affect every financial institution that operates in the US, many that operate from outside the US, and would also have a significant effect on commercial companies.

'There's a lot of very good policy in Dodd-Frank,' says Tahyar. 'But it is not a statute that

does things. It issues a series of instructions to the regulators to do things. It's a framework document.'

She believes that the key challenge is the 'impossible and uncoordinated' deadlines set by Congress when the legislation was enacted. 'There was a complete lack of reality around those deadlines and a complete lack of thoughtfulness on how things might be put together over time,' she says. 'It's only to be expected that those organisations who are having to live under or be involved in the process of building this new infrastructure are commenting heavily on the regulations and care deeply about them.' Over 16,000 comments were sent to the SEC on the proposed Volcker rule, for example – although many of these were form letters.

Taking the time to get things right and refusing to erect a sloppy system are more important than sticking to arbitrary deadlines, Tahyar argues. 'This is a huge new infrastructure build,' she says. 'It's worthwhile taking some time to do it and in many ways the regulators are wise to do that', she adds: 'a delay of several months or a year when you're putting together a system for 50 years does not really matter.'

Rage against the machine

The sheer scale of Dodd-Frank is difficult for the non-specialist to grasp. 'The regulatory reform in the US is so comprehensive that we have divided it up among ourselves just to survive', says Randall Guynn, head of the Financial Institutions Group at Davis Polk and a member of the IBA's financial crisis task force. Guynn has advised the six largest US banks on the impact of the Act.

He feels the regulatory burden in the US is becoming increasingly onerous. 'The proponents say it is worth it,' he says. 'The opponents think the costs far outweigh the benefits, and are particularly concerned that

the US is so far ahead of the rest of the world that we are creating a problem for ourselves and for others. At a recent conference that included many top US government officials, the distance was described as a Grand Canyon'.

Philip Wood, Special Global Counsel at Allen & Overy and another member of the IBA task force, is one of Dodd-Frank's harshest critics.

The amount of regulatory change which is off-target is huge. It is almost as if the legislators decided to use the opportunity to shoot on sight everybody that they did not like so that we have a sort of wild outbreak of random lawlessness as old scores are settled.'

Philip Wood

Special Global Counsel, Allen & Overy; IBA Financial Crisis Task Force

'A lot of the legislation was one long indignant rant,' he says. 'It's just full of rage.' In a paper published by Allen & Overy's Global Law Intelligence Unit and presented at a meeting of the Institute of International Finance, a global association of financial institutions, Wood draws attention to the vast amount of extra work it has created. 'Just learning all the proposed regulations to be spawned by the Dodd-Frank Act ... (likely to be somewhere between 10,000 and 15,000 pages) might well take an ordinary diligent student at least five years, never mind all the other countries which are now equally busy,' he writes.

According to Wood, we had a financial bubble and it is now producing a legal bubble. 'Altogether I count at least 1,000 proposals out there in all countries so that if we were to spend ten pages dissecting each of them, this work would run to 10,000 pages, never get written and never get read,' he says in the paper. 'People will get totally lost in all this intricate detail.'

Wood finds the content of Dodd-Frank every bit as alarming as the amount of paperwork it is likely to generate. 'Are the proposals relevant to mitigating the risk of the collapse of banking systems in the future?' he asks. 'This seems very

doubtful for many of them. The amount of regulatory change which is off-target is huge. It is almost as if the legislators decided to use the opportunity to shoot on sight everybody that they did not like so that we have a sort of wild outbreak of random lawlessness as old scores are settled.'

The politicians who gave their name to the Act are standing by their vision. After *The Economist* came out in opposition to the Act earlier this year, one of its co-authors, former Connecticut Senator Christopher Dodd, defended the legislation in the publication's letters page. He argued that nothing short of a comprehensive overhaul of the US regulatory structure would suffice. Repealing the Act would mean 'returning to a world where taxpayers bail out failing financial firms, predatory lenders and unscrupulous brokers prey on vulnerable homeowners, the public absorbs losses because of Wall Street's risky behaviour, and regulators are left in the dark, unable to prevent another global financial meltdown', he said.

Tribal not global

Outside the US, regulators have reacted to the financial crisis in many different ways. Germany, for example, has clamped down on naked short-selling; France is planning a financial transactions tax; and the UK looks as if it will implement the Vickers report and insist on some sort of firewall between investment banking and retail banking, although the details of that have yet to be determined. The coalition government's most decisive response to date has been to order the abolition of the Financial Services Authority (FSA), parcelling out its areas of responsibility between the Bank of England and the new Financial Conduct Authority and Prudential Regulatory Authority.

While the FSA has undoubtedly earned its share of criticism for the way it has acted (or failed to act) in recent years – in the British satirical magazine *Private Eye*, it is usually referred to as the 'Fundamentally Supine Authority' – many are underwhelmed by the UK's decision to reform its regulatory structure. 'The break-up of the FSA is a political move rather than a direct response to the crisis,' says Roger McCormick, a Visiting Professor at the London School of Economics and another member of the IBA

task force. 'When one looks at the downfall of the major financial institutions in the UK during the crisis, it's very hard to say this would not have happened if only we'd had a twin peaks regulatory structure as opposed to the universal FSA structure with the tripartite system in the background.'

'The financial crisis was a worldwide phenomenon,' says former managing director of the UK Financial Services Authority's Conduct Business Unit Margaret Cole, speaking during a recent IBA webcast. 'You couldn't really correlate what style of regulation, or structure of regulation there was in any particular country, whether it was an integrated regulator like the FSA or a twin peaks regulator like Australia or Canada, you couldn't definitely say one style of regulation worked and another one didn't.'

Having said that, McCormick does not think the reform will do any harm, and may even do some good. 'It's not a bad thing for the regulator to be shaken out of its complacency, which I had think had set in by 2000,' he says. 'Maybe this sort of shake-up will do some good, if only to make regulators less complacent than they had become.'

The Bank of England's governor, Mervyn King, admitted to this complacency in a recent lecture for BBC Radio 4. 'With the benefit of hindsight, we should have shouted from the rooftops that a system had been built in which banks were too important to fail, that banks had grown too quickly and borrowed too much, and that so-called 'light-touch' regulation hadn't prevented any of this,' King lamented.

The drive for a coordinated international approach that characterised the initial regulatory response to the financial crisis has now evaporated, McCormick says. 'You're now seeing a lot more "go it alone" initiatives where individual jurisdictions are simply deciding what's right for them even if others don't want to follow suit.'

Hendrik Haag, a partner in the Frankfurt office of Hengeler Mueller and the chair of the IBA task force, says this is not surprising. 'I never believed in a coordinated international



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effort because a lot of regulation is led by national politicians who want to be re-elected by their electorate, which is not international but national,' he says. 'So you have this debate about a financial transactions tax, for example, which keeps going back and forth and no one wants to introduce it on their own because it will drive business away from their financial centre. There is common ground in that many agree about the need to take a tougher course with the financial industry but what this means in detail varies from country to country.'

According to Wood, this is a big mistake. 'Legislators draft narrow national regulatory statutes only for themselves, as if we all lived in solitary prisons,' he claims. 'In particular, it makes no sense to break banks into bits corresponding to national boundaries. It ignores our interconnectedness, our interdependence. Tribalism is fine for football: it is not fine for our means of exchange or our banking systems. We are one planet now.'

'I can't really see why the taxpayer should be standing behind investment banking in the same way that it does behind retail banking'

Roger McCormick

Outside the US, governments and regulators have been more cautious about restricting the trading of certain kinds of products, McCormick says. 'If you prohibit naked credit derivatives trading in one country, it will simply move to another country. So it may turn out to be a futile gesture whose only effect is to deprive the government of revenue.'

Although derivatives, securitisations and poor practices by rating agencies do bear a large part of the blame for the crisis, McCormick believes that attempting to do away with them is not the right response. 'One simply has to accept that these things can be used for good or bad,' he says. 'We just have to be rather more rigorous as to how these financial instruments are put together, how they are used and how the risks involved are assessed.'

Protecting future generations

One of the provisions of Dodd-Frank requires large complex companies periodically to submit 'living wills' to regulators in the event of financial distress. Haag thinks this is an interesting area. 'Banks need to have a plan for what happens if they run into difficulties – how they can be

broken up easily, who is there to help the people take control of the organisation and how this is all going to happen,' he says.

Living wills are now a hot topic in Europe as well as the US as they will probably require some financial institutions to change the way they are organised, Haag says. This is because the departments and the various businesses within a bank do not necessarily reflect its corporate structure. 'In order to make a meaningful separation of the parts of the business that need to continue for the sake of the safety of the system, you need business units that can be easily separated from the rest,' he says. 'We don't have that yet.'

Although progress may be slow, tighter control of banks is inevitable as regulators seek to ward off another crisis. McCormick believes this is essential to minimise the risk that will inevitably be posed by future generations. 'The danger is that in a few years' time there will be a new generation that thinks things will be different this time and will not learn the lessons of the crisis,' he says. 'So we have to have new regulations in place.'

His view is that separating investment banking from retail banking in some way is desirable. 'I can't really see why the taxpayer should be standing behind investment banking in the same way that it does behind retail banking,' he says. Like many others, he also believes that more conservative capital requirements are needed. 'Those two things get us a long way towards meeting the problems that gave rise to the financial crisis,' he argues.

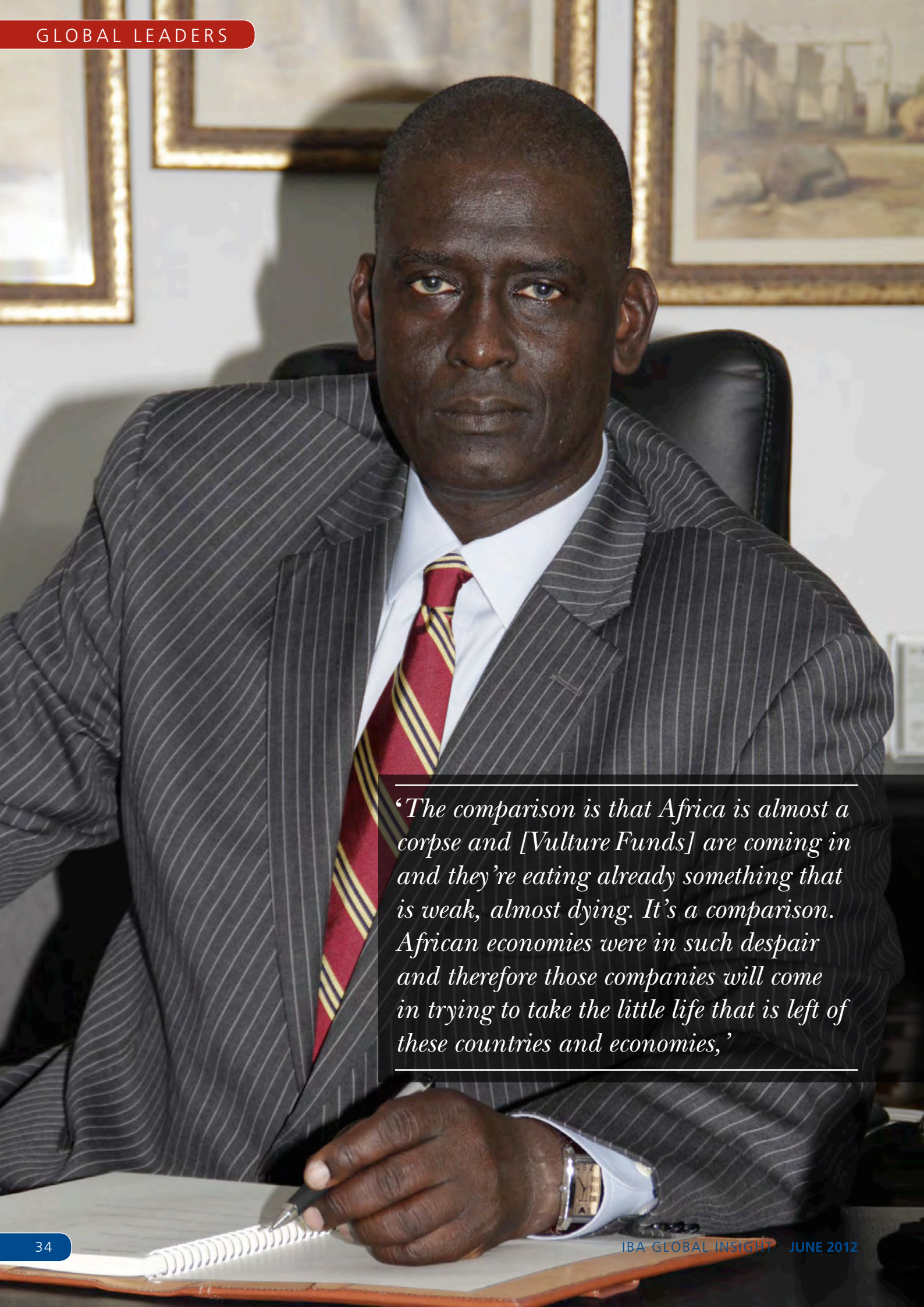
However, realistic and prudent levels of capital, while obviously needed, do not stop panic. 'In the 19th century and even into the 1920s, capital ratios were nearly twice what is now proposed,' Wood says. 'That did not stop bank crises, it did not stop the Great Depression.'

Many believe that because the banks behaved so badly in the run-up to the financial crisis, they have no right to complain about having to take their regulatory medicine. It's only fair that they should be punished for their mistakes. But punishment is not really the purpose of regulatory change. 'The purpose of regulation is simply to do what we can to make it less likely that past mistakes are repeated,' McCormick says. 'Banks are entrepreneurs, and we expect entrepreneurs to take risks. It's just that if banks get it badly wrong, the results affect everyone, and that's why they have to be heavily regulated. But the aim should be to correct a system that had got out of balance – not to impose some form of punishment.' ☒

Jonathan Watson is a freelance writer. He can be contacted at jwatson1@gmail.com



To view film of Margaret Cole, former managing director of the UK Financial Services Authority's Conduct Business Unit go to tinyurl.com/IBAFilms.



‘The comparison is that Africa is almost a corpse and [Vulture Funds] are coming in and they’re eating already something that is weak, almost dying. It’s a comparison. African economies were in such despair and therefore those companies will come in trying to take the little life that is left of these countries and economies,’

Global leaders:

Kalidou Gadio

General Counsel, the African Development Bank

Kalidou Gadio is the General Counsel of one of the most influential institutions on the continent of Africa. In a wide-ranging interview, conducted by award-winning BBC journalist Zeinab Badawi, he discussed critical links between law and development, investment from China and fragile states.

Zeinab Badawi: Just to set the scene, Kalidou, first of all: you, at the Bank, say you can't have economic growth, sustainable economic growth in Africa unless you do have the rule of law. So just point out to us this link between the two.

Kalidou Gadio: For the African Development Bank and I think for most of the institutions that are in the same business, it is quite clear that it is not possible to have economic development without some kind of rule of law. In the course of this discussion I will be giving you some examples of the types of specific action we are taking to show that link. Suffice it to say that for us rule of law is important; it is important for the businessman. Somebody investing in Africa needs to know in what environment he's investing, what kind of protection.

Rule of law is about security of transaction and if you don't have security of transaction, obviously the kinds of investments you receive are not the kinds of investments that are likely to produce economic development. So we are trying to improve, at the institutional level, the rule of law. And I will later on explain further which kinds of activities we are financing to improve just that.

ZB: Speaking broadly though, rule of law underpins good governance and good governance is vital to economic growth. But, what do you, at the Bank, say to governments in Africa when it comes to making sure that there's a better distribution of the country's wealth?

KG: First of all, we rate governments in Africa on a whole host of issues; how they manage public funds

is one of the criteria we use to allocate resources. Even in a country that is receiving concessional resources, part of the ability to get a lot of resources is they are compliant with a certain number of rules. And those rules – good governance is part of it, and good governance means minimum corruption, a much fairer and transparent process of allocating resources, public procurement. These are some of the issues that we take into account to leverage the resources we have.

So essentially, if a government would like to receive more concessional resources from the African Development Bank or the African Development Fund in particular, that government has to show that it is doing something about corruption. But we are not only in a passive role. We actually help the government do that by providing them the kind of institutional support to strengthen their fight against corruption.

ZB: But what if they say we don't need your help? If you do look at Nigeria, and I appreciate you can't talk about specific countries: it's Africa's biggest producer of oil, it's got the second largest economy in the continent after South Africa. So this is a country with a great deal of oil wealth and yet it's got all these people living in poverty. Another example I give you is South Sudan, for instance; since it signed the comprehensive peace agreement in January 2005 with Khartoum it has had \$17 billion mostly in oil revenue, and a population of about 9 million. That's about \$1,000 per year per capita, per person, and yet clearly when you look at South Sudan as a whole you don't see any evidence of that oil money. So what leverage does the AfDB have

on such governments that are rich in resources but are not tackling the problems of corruption in their country?

KG: Well, actually, most of the African governments, if not all, have never resisted working with the Bank in terms of improving some of the institutional issues. Because, for the African Development Bank, the approach is not [saying] ‘You have corruption and we want to help you fight against corruption.’ Instead, what we do is the following: we know certain countries lack basic legislation in terms of public procurement. It’s very important. Public procurement meaning essentially ‘how does the government buy goods and services; what are the rules that are used? What mechanisms are in place to make sure that that process is transparent?’ That

in business, for instance. Are these the kinds of policies that you try to back at the AfDB in countries right across Africa?

KG: Yes, we do. We strongly advocate... Because, as you know, we also signed with the World Bank, since you mentioned Zoellick earlier on, a treaty called Cross Debarment.

What it deals with is if, for any reason, a company or an individual is found to have committed certain types of activities that are prohibited... If, for instance, the World Bank decided a particular company has committed bribery or an act of corruption in South Sudan – since you mentioned South Sudan – the sanction that the World Bank would take will immediately have an effect. Maybe it will refuse to do business with the same company.



‘South Sudan, for instance; since it signed the comprehensive peace agreement in January 2005 with Khartoum it has had \$17 billion mostly in oil revenue, and a population of about 9 million. That’s about \$1,000 per year per capita, per person, and yet clearly when you look at South Sudan as a whole you don’t see any evidence of that oil money,’

Zeinab Badawi

has an effect on corruption and that’s what we do. We have technicians to provide them with the knowledge, the resources and the training to put in place those institutions. By doing so, we reduce corruption. We don’t just come to a country and say ‘you have corruption, we want you to do something about it.’

ZB: Because you know what people are saying, they want its oil riches and, of course, South Sudan has 70 per cent of the oil reserves that were in the whole of Sudan, when it was one country. People want it to go the way of Botswana when it comes to managing its natural resources, not the way of Nigeria. And we understand now that the government of President Salva Kiir has said it’s going to sign up to the Extractive Industries Transparency Initiative, EITI.

KG: Yes, which we support.

ZB: Which you support, and it’s also going to be trying to ensure that no minister can be involved

ZB: Kind of name and shame. And is that working?

KG: It is working, it has not been fully implemented yet because it was just signed a few months ago and we are in the process of putting in place resources, communications...

ZB: Why didn’t you do this sooner though? Because corruption’s been around for a long time in Africa and yet it’s just been signed a few months ago. Why didn’t you, why weren’t you more proactive?

KG: We signed a Cross Debarment a few months ago but we’ve been fighting corruption more than 20 years... I don’t know if we could eliminate corruption entirely. But again, I think the view of the African Development Bank is that we are institution building; we believe that if we have a government that has institutions that operate on the basis of rule of law, a government that has transparent, clear and publicly available information, we think that is the best way to fight corruption.

ZB: How else do you use the law as a tool for development at the African Development Bank because you have introduced, a couple of years ago, a very important facility called the African Legal Support Facility, ALSF, which helps African governments when it comes to commercial negotiations, working in jurisdictions with which they're not familiar. And has that been successful?

KG: It has, it is just starting, again. It has already financed five operations. The African Legal Support Facility indeed grew out of the need to address a very important issue, which is that in the past, but to a degree it is still continuing, some African governments have signed major transactions without being properly advised. And obviously if you do that you will face a problem in the event there is a dispute.

If I'm a particular bank here in England or France or in America and the government has defaulted, I can sell my loan to another individual. And those loans were sold at a fraction of their face value. Those who are buying those loans go and they recover, or at least try to recover, two, three, four, ten times the face value. And what we thought is we need to find a way for those African governments to fight those kinds of lawsuits.

ZB: You're talking here about what are called the vulture funds?

KG: Well, they're called vulture funds, it's actually a very strange expression. The comparison is that Africa is almost a corpse and they're coming in and they're eating already something that is weak, almost dying. It's a comparison. African economies were in such despair and therefore those companies will come in trying to take the little life that is left of these countries and economies.

ZB: But this is also a direct result of corruption at the level within the country...

KG: Yes, it could be, but not always. And I think most of it is a result of a lack of knowledge, of legal knowledge, ie, when you negotiate a contract you have to be properly advised. Because legal training is very important. And one of the things that I would like to talk about here is explain how it is important in Africa.

Because most African lawyers tend to concentrate on criminal justice, divorce and small claim types of activities when, in fact, lawyers have an extremely important role to play in economic transactions.

And the example of vulture funds is precisely the result of lack of adequate legal advice. If you're signing a major concession agreement, for those who are participating in this transaction it is

incredibly complex. It takes two, three years to negotiate; you have volumes, tens of volumes of documents with multiple items cross referencing each other. You need expert opinion to assist. Unfortunately, some of these transactions have been signed without that kind of advice and result in the imbalances mentioned.

So the African Legal Support Facility was supposed to do two or three things. One, help those countries to fight against the litigation in the Western world, because most of those contracts contain, again, a jurisdictional clause that means that in the event of a dispute the litigation takes place not in Africa but here in London or New York or elsewhere. Second, the African Legal Support Facility's mandate is indeed to provide education; it has already started.

ZB: And that's to make sure that these multinational corporations, not to put it too finely, don't rip off African nations where they are working on their natural resources?

KG: That's exactly what it is about; it is to provide a balanced negotiation, which actually is good for the companies themselves. Because, as you know, sometimes when there are coups, governments tend to renegotiate those contracts. So if they don't do it you have a legal insecurity, which is not good for business.

ZB: Prior to our discussion, in fact just picking up on this theme we're talking about here, we did have one question. What is the impact of corporations evading tax, with regard to the human rights of individuals in African countries, such as the right to development? And what can be done about this?

And that's essentially what we're talking about, to ensure that multinational corporations don't have deals whereby they may have tax concessions or other concessions that don't pay sufficient regard to the development needs of the country in which they're operating, when it comes to looking at natural resources that they may be exploiting.

KG: At the African Development Bank we have a provision in our agreement which says that essentially in order to benefit from a loan you have to have a legal presence in Africa. What it means is that you have to establish a company in Africa, so therefore have a tax number; you have to employ Africans; you have to pay tax in Africa. So we do not support... we do not provide financing to institutions that have no basis in Africa, that are incorporated elsewhere. They can have a parent company here in England or France or Germany or China but they have to have a legal presence in Africa.

And one of the reasons is the following: one, obviously if you are legally incorporated in Africa you should and do pay tax, employ individuals, workers. And therefore these are the kinds of measures and the rules that we have that allow us in fact to tackle the issues you're raising. And obviously, which is a lot more complicated is that which we call transfer pricing: if you have a major company in the Western world investing in Africa, generally also providing technical assistance. It could actually bill twice or three times the services and therefore, you know, rip off in fact the benefits because, as you know, tax is based on profits and you have profits after you have excluded your operating costs. So the operating costs will eat up most of the revenues to the extent that the profit is very minimal.

So these are the issues that are very complex. So one of the roles we have, and including my department, is that when we look at those deals we make sure those transactions are done in a fair and balanced way.

ZB: All right, so talking about the African Legal Support Facility, you say it's had quite a measure of success when it comes to looking at these kinds of commercial deals and so on but when it comes to the vulture funds, less success there.

KG: Well, what is difficult actually is simply that the country has not come to the Legal Facility for support.

ZB: And they need to because there's something like \$4-6 billion.

KG: We believe that some countries that are involved prefer for the time being to do it quietly, behind closed doors; we don't know why. What the Legal Support Facility would have done is give them the resources that allow them to negotiate, or in fact to fight those kinds of litigation. They're not doing it...

ZB: Because they're successful, the litigations are 99 per cent successful against the African countries.

KG: Against Africa, yes, because it's fairly complicated to litigate, because precisely the contract was already written and drafted in a way that favoured the banker.

ZB: So, any African country that is at the mercy of a vulture fund. Just spell out for us what the AfDB would like them to do, because it is quite a complex area this, and people listening may find it hard to follow.

KG: You know, from a legal point of view actually it's fairly simple. I mean, what we would like to do is that if you are a given African country, you have a vulture fund issue, you should come to the

African Development Bank and ask for assistance. What we would do is to look at the case you have; it's not the African Development Bank itself it's the African Legal Support Facility. And the African Legal Support Facility itself will provide you with the kind of advice and pay for the services you need to recruit an international law firm that will indeed allow you to defend yourself. That's the message I would like to send. And I think there's absolutely nothing wrong coming because that money is there, available, and most of the African countries actually could access those funds for free.

ZB: Yes, now, you know, people come to you at the African Development Bank and say to the President, Donald Kaberuka, and all of you senior officials there, you know, we want you to do this, we want you to do that. They want you to do everything to try to promote development on the continent. How do you choose your priorities and the kinds of projects that you throw your weight and your considerable money behind?

KG: What we do is try to establish some kind of strategy and we have a medium-term strategy and we are working on a long-term strategy. Our medium-term strategy is trying to focus on infrastructure because Africa lacks infrastructure. We need roads, we need highways, we need communication, we need IT communication. And infrastructure is one of the pillars of our strategy.

Governance, as we mentioned earlier, is one pillar because we need to establish the kind of environment that is conducive for business. We also need higher education but we have to do it in a different way. Education today is different than how it was done in the past; we need to use the wonders of information technology to spread education through a virtual university. And we are currently experimenting something extraordinary; we call it an African Virtual University, where we provide education through this kind of technology.

So that's what we do. But we also have cross cutting issues, of violence, gender, clean energy; it's already a lot. From time to time obviously, when there is a drought in Africa, we are called to assist. And obviously it's not necessarily our mandate, it is not our expertise to deal with drought or earthquake, but we have a small fund, we provide some kind of assistance.

ZB: What's the African Development Bank position on China? Because when it comes to trade, we know that China does a fantastic amount of trade, hundreds and hundreds of billions of dollars, every year, with African countries. And a lot of people say that actually this isn't good for Africa. If you just saw the man who won the elections in Zambia, Michael Sata, a key part of his campaign platform was, frankly, anti-China. So there is a great

deal of resentment in Africa, in some quarters, that actually it's a bit of a one-way street and that China benefits more than Africa when it comes to trade. What's your position at the AfDB?

KG: First of all, what is important is that people don't necessarily know China is a member of the African Development Bank; it's a member country. So China is entitled to bid for Bank projects, as are all members. And they win contracts primarily on the basis that they have a lower cost but not necessarily low quality. I think the Chinese can plead their own case but we do not participate in this anti-Chinese fashion and we believe that African governments should take their own interests.

kind of institutions and resources that will allow it to develop its own local economy.

What we want to do and what we are doing is to say if a government like in Guinea is about to negotiate a major mining concession or oil exploration with a Chinese company, we can provide them the kinds of services and techniques and expertise they need in order to better negotiate the deal. That's what we do.

ZB: I know that the Bank does deal a great deal with fragile states. You've got your Fragile States Unit, and that comes in here with this question from Obinna Ogbuagu from Wali-Uwais & Co: how has the AfDB positioned itself



What we do is providing, through the African Legal Support Facility, the ability to negotiate. If the Chinese government or if Chinese institutions would like to negotiate [with] a mining company in the mining sector we have resources that will allow that government to retain the best experts to negotiate. Obviously, if we provide a project, a road, if a Chinese company bids and wins on the basis of fair and competitive.. AfDB doesn't have a problem with that.

ZB: So you don't have a problem when people on the continent say all these cheap Chinese goods flooding our markets, squeezing out local industries? In Senegal, for instance, the garment industry there is badly affected by the cheap garments coming in from China. Some of the products that people actually buy from Chinese markets in Africa – in Zimbabwe they're called 'zing zing' products because they just break after a short time. So it's not as though they're even necessarily getting the top-quality stuff. And, you know, sentiment is quite high and some people say justifiably so. The AfDB wants to remain neutral on that?

KG: Again, as I said earlier, I mean, AfDB cannot do everything. I mean, obviously what we want is to be able to help countries develop their own industry, small and medium scale enterprises. And we have resources and we have instruments to allow countries to develop. But we cannot regulate for Senegal how to deal with China in terms of importing goods and services. What we do is to provide Senegal the

to find African solutions to development or problems facing African countries, especially those ravaged by war and conflict, in view of global economic challenges?

KG: We have a special instrument, it's called the Fragile States Unit, which is endowed with a considerable amount of resources. It does three things: one, some of these countries are in arrears. The Fragile States facility provides resources to help them clear their arrears, so that's one positive aspect. The second pillar of that facility is also to provide additional resources; as you know, at the African Development Bank the pie is divided among African countries based on a number of criteria: population, poverty. So if you are a fragile state you can get additional resources from that part. The third thing is also we provide technical assistance, ie, we can recruit experts here in the UK, including in China, in France, in Germany, or in Nigeria, in Kenya, to come and assist a particular country, whether it is in the area of law, or economics, or finance. Or even in engineering.

So the facility is providing all these three services and I think it is doing very well. It has done a commendable job in Liberia, in Sierra Leone, in DRC, including also some other activities elsewhere. ☒



This is an edited version of a longer interview. To view it in full go to: www.ibanet.org.



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A pivotal period as International Criminal Court comes of age

The ICC, marking its tenth anniversary this year with landmark convictions in the Thomas Lubanga and Charles Taylor cases, provides a sense that this is an historic moment for the new and evolving system of international criminal justice.

KAREN MACGREGOR

In April this year, Gambian lawyer Fatou Bensouda, the new chief prosecutor of the International Criminal Court (see **article on page 9 of this edition**), was listed by *TIME* magazine as one of the 100 Most Influential People in the World. Clearly, the global profile of the court in The Hague has grown since it was established a decade ago.

Ironically, among the eclectic *TIME* list were some people she might prosecute, such as Syrian President Bashar al-Assad and Somali insurgent leader Sheikh Moktar Ali Zubeyr.

Bensouda, 51, is by all accounts a popular choice. Certainly, her appointment is crucial to the ICC's efficacy – as an African she may help dampen criticism that the continent has been singled out for prosecutions while appalling offenders elsewhere have been largely ignored.

Her appointment is the latest milestone in what so far has generally been a good year for the ICC, the kernel of an evolving international justice system that is charged with prosecuting war crimes, crimes against humanity and genocide.

In March, in the ICC's landmark first judgment, Congolese rebel leader Thomas Lubanga was convicted of conscripting, enlisting and using children in armed conflict between 2002–03. The court will hold a separate sentencing hearing and consider the issue of redress for victims for the first time.

In April, former Liberian President Charles Taylor was found guilty on 11 counts of aiding and abetting rebel forces in neighbouring Sierra Leone who waged a campaign of terror including murder – of some 50,000 people – sexual slavery, conscripting children and mining 'blood diamonds' until 2002. It was the first war crimes conviction of a former head of state by an international court since the Nuremberg trials after the Second World War.

Criticisms in Africa

There are 33 African States Parties to the ICC's Rome Statute agreed by 120 countries in 1998. By the Court's launch in 2002, Africa had more countries represented than any other region. The continent thus played a major role in the Court's creation, but since then relations have soured – particularly with African leaders. Unsurprisingly, perhaps, given there are some two dozen people facing trial in 14 cases – all of them African.

There have been accusations that the court has unfairly targeted Africans – even though all except two African cases were referred to the ICC by the countries concerned. The ICC has investigated conflicts in seven African countries – Central African Republic, Democratic Republic of Congo, Ivory Coast, Kenya, Libya, Sudan and Uganda. It also has preliminary investigations into Afghanistan, Georgia, Guinea, Colombia, Honduras, Korea and Nigeria. Only in Kenya and Ivory Coast did the ICC prosecutor open cases.

In Kenya this followed parliament failing to establish a national tribunal and Kofi Annan, as chair of the African Union Panel of Eminent African Personalities, handed a list of suspects to the Court. In Ivory Coast, former President Laurent Gbagbo accepted ICC jurisdiction in 2003, hoping the Court would prosecute rebels. But when he was sent to The Hague, his supporters accused the ICC of being a 'white man's court' with an imperialist agenda.

Accusations become actions

Recently, resistance to the Court among African political leaders has moved from words to action.

On 26 April, the East African Legislative Assembly passed a resolution calling on the ICC to transfer the cases of Kenya's 'Ocampo

Four' to the East African Court of Justice (EACJ). Former Deputy Prime Minister Uhuru Kenyatta, MP William Ruto, former civil service head Francis Muthaura and journalist Joshua arap Sang are accused of fomenting violence after December 2007 elections, during which 1,200 people died and 600,000 were displaced. Subsequently the appeal was rejected and the four men will stand Trial in the Hague.

The ICC also dismissed the proposal as 'technically impossible', but a summit of heads of state mandated urgent amendments to the East African Community treaty to extend the jurisdiction of the EACJ to cover crimes against humanity. Then, on 7 May, the African Union said its legal committee had been directed to review the Africa-ICC relationship with a view to expanding the jurisdiction of the African Court of Justice and the African Court on Human and Peoples' Rights to cover international crimes. These moves against the ICC have ignited massive debate and split African opinion.

ICC supporters argue the EACJ lacks necessary jurisdiction and capacity. More generally, they believe the ICC makes wartime leaders think about their actions and makes them accountable. It provides justice for victims of heinous deeds in countries where judicial institutions are too weak or politicised to do so.

Many Africans believe moves against the Court are motivated by politicians who fear prosecution and that in East Africa, where national leaders were heavily involved in conflict in the Congo, there are good reasons for such fear.

Ahmed Bogere Masembe, a journalist with Uganda's Ssuubi FM, recently argued that the African Union wanted an African court able to be manipulated by governments 'through the appointment of judges, control over prosecutorial activities, and by providing a limited budget'.

Abdul Tejan-Cole, a former prosecutor at the Special Court for Sierra Leone and African Regional Director of the Open Society Foundations, wrote that most Africans did feel that Africa was 'on trial'. 'It is definitely not the view of the victims of mass crimes... who know that their national courts are invariably unable or unwilling to prosecute.'

'There is not a single case before the Court that one could dismiss as being frivolous or vexatious. They might all be African but they are also all legitimate. It is farcical that we can equate the trial of 25 accused with the trial of an entire continent,' said Tejan-Cole.

Meanwhile, critics have condemned the ICC for being slow and costly. Some argue that despotic leaders may cling on to power to avoid prosecution, and that only 'politically acceptable' leaders have been prosecuted.

Some argue that ICC trials are a demonstration of Western judicial power rather than a genuine

pursuit of international justice for victims, and that the leaders of powerful nations – notably the permanent members of the Security Council: China, France, Russia, America and Britain – will never face prosecution.

Dr Christine Cheng, a politics fellow at the University of Oxford, wrote recently for *Al Jazeera* that courts build legitimacy partly on cases they choose to hear. 'For the ICC to remain viable, it also cannot be perceived as the back door by which Western powers target their political enemies.'

'Some argue that ICC trials are a demonstration of Western judicial power... The question now is whether an ICC prosecuting team led by an African will help to quell growing resistance in Africa... Bensouda faces a daunting task, but one that could determine the future of international justice for the victims of wars and atrocities around the world.'

The future under Bensouda

The question now is whether an ICC prosecuting team led by an African will help to quell growing resistance in Africa.

Deputy chief prosecutor since 2004, the African Union lobbied hard for Bensouda to succeed Argentinian Luis Moreno-Ocampo, who it viewed as antagonistic. Last year AU Commission chair Jean Ping said: 'We are not against the ICC. What we are against is Ocampo's justice.'

Bensouda worked well with Moreno-Ocampo, and some critics have expressed concern that his office's less-than-perfect prosecuting and slow progress may have rubbed off on her. On the other hand, she offers the key asset of continuity to the ICC and has been credited with holding the Office of the Prosecutor together in difficult periods.

Bensouda faces a daunting task, but one that could determine the future of international justice for the victims of wars and atrocities around the world. ☒

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



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Europe's downturn bodes ill for refugees

There's no good time to be a refugee, but things are getting worse as, 61 years after the UN Declaration on Refugees was signed, Europe forgets the horrors that forged it.

TOM BLASS



This is a bad time to be a refugee or asylum seeker in Europe,' Christoph Hein of the Italian Refugee Council told *IBA Global Insight*, adding, 'not that any time is a good time.' But cash-strapped Europe has lost sympathy for refugees. They arrive by plane, in rickety boats, or in the close confines of unlit, unventilated shipping containers. Prey to extortion, racketeering and despair, for many refugees, new fears and uncertainties await them in the very destinations they hoped would offer sanctuary: the scepticism of the authorities who assess their claims, prospect of forcible return, detention in conditions tantamount to prison, destitution, statelessness or any combination of the above.

Sixty-one years ago, with much of Europe still

displaced by war, the founding members of the United Nations convened in Geneva to finalise and sign the 1951 Convention on the Rights of Refugees, which established many principles relating to refugees regarded as unassailable by right-thinking persons today. Some of these are definitional, setting out, for example, who constitutes a 'refugee'. Others set out refugees' rights to transit to safe havens, and to sustenance and welfare in their host country. Perhaps most importantly of all, they enshrine the principle of 'non-refoulement', by which states are obligated to refrain from sending refugees back to anywhere they might meet with harm.

Now, politicians from across the spectrum of 'left' and 'right' are increasingly unrestrained as they thump the anti-immigrant tub in their efforts

to stimulate flagging support. Refugee issues are often way down the list of political priorities – asylum seekers after all, do not have a right to vote. In real terms, this means less money available for emergency accommodation, legal access, education for refugee children and integration projects – and an increased desire on the part of national authorities to send asylum seekers back to their countries of origin. That's not to say they have no champions. A wide network of civil society groups across Europe works on refugee issues: ECRE, the European Council on Refugees and Exiles has over 70 member organisations who work on topics relating to everything from detention of children through to integration in the labour market.

In addition, EU institutions including the European Commission (EC), the European Court of Human Rights (ECHR) and the European Court of Justice (ECJ) provide a valuable bulwark against states' apparent forgetfulness as to the Convention and the events that led to its drafting. In early 2012, for example, the ECHR found that the Italian authorities had breached three articles of the European Human Rights Convention in 2009 by cooperating with the Libyan authorities to 'push back' to Libya some 200 Somalis and Eritreans, among them pregnant women and children.

The migrants, the court found, were 'taken on board Italian ships, pushed back to Tripoli and handed over to the Libyan authorities against their will. They were not identified, neither heard, nor informed of their real destination.'

A lawyer involved in the case says that the most appalling aspect of the case was that the 'Italian Government had publicly stated that the migrants pushed back were not eligible for asylum and were not facing any risk in Libya'. Subsequent events proved that not to be so. The vast majority of the would-be claimants were interned in Libya in brutal conditions; a number suffered reprisals during the unrest of the Arab Spring.

Refugee issues are complex. Flows of refugees into (and out of) Europe are driven by global events and thus highly unpredictable. Different countries face divergent issues: some, by dint of their proximity to North Africa and Asia (like Italy, Greece, and Malta) must 'deal with' the bulk of new arrivals; but the intention of many asylum seekers is to seek residence elsewhere.

The International Organization for Migration monitors such flows on an ongoing basis. According to Dr Frank Laczko of the International Organization for Migration, there have been distinct changes in terms of actual flows of people both internally within Europe, and in and out of the European Union. For example, many Greeks are leaving their economically hard hit country in search of work, particularly in Germany, while Albanians are returning home from Greece with a resulting impact on their own labour market (and on remittances).

The Arab Spring, he says, caused a 'huge outflow' of migrants from Tunisia and Libya into Europe, although most have returned, but he adds: 'In general, there's a difference between say, Poles, who typically return from – for example – Germany or the UK if there's a downturn, and non-EU migrants who stick it out. There are obvious reasons for that – it's a lot harder for them to get in in the first place, so there's a greater incentive to weather the storm.'

Appalling conditions

'There's an enormous disparity both between the refugee issues that Member States face, and in the way that they deal with them,' says one lawyer. 'This has a bearing on everything – from who they grant asylum to, to the kinds of support and welfare available to refugees.'

But troubling aspects of this lack of convergence have emerged, not least in Europe's courts, which have challenged the practical application of one of the bedrocks of EU asylum policy. Under the Dublin Regulation, a principle is established whereby a Member State responsible for the examination of an asylum claim is, primarily, the state in which the asylum seeker first entered the EU. This means, in theory at least, that if, for example, an asylum seeker enters the EU in Malta and makes his or her way to France, and lodges an application for asylum there, the French authorities are within their rights to return that person to the Maltese authorities.

The legislation is premised on the understanding that there exists a parity of conditions between all the Member States of the EU. But a January 2011 judgment (*MSS v Belgium and Greece* in the ECHR) turned that understanding on its head. The case concerned an Afghan who had travelled to Greece through Iran and Turkey, and made his way on to Belgium, where he claimed asylum. (The Afghan, who had paid \$12,000 to a smuggler to bring him

'There is still a mythology about how asylum seekers are given huge houses to live in and all drive flashy cars'

Sharon Waters
Irish Refugee Council

to Greece, had chosen Belgium as his destination because, while working as a translator for NATO forces in his country, he had been befriended by two Belgian soldiers).

In brief, it established that Greek facilities for receiving asylum seekers are so appalling (in particular on account of 'overcrowding, dirt, lack of space, lack of ventilation, little or no possibility of taking a walk, no place to relax, insufficient

mattresses, dirty mattresses, no free access to toilets, inadequate sanitary facilities, no privacy, limited access to care') that for Belgium to return the applicant to Greece constituted a breach of the European Convention (as, indeed, did Greece's detention facilities and asylum application procedures).

'There are two major issues. In my experience it is actually very difficult to ascertain who is going to integrate easily. The other is this – that, surely the best criterion to apply is humanitarian need?'

Rick Jones

Director of operations at the NGO Refugee Action

A similar ruling in December, this time at the ECJ, established that Member States have an obligation not to transfer asylum seekers to Member States where they would face inhuman or degrading treatment in violation of Article 4 of the EU charter.

The reality of refugees' experiences in Europe is that some conditions are appalling and others adequate. Jelle Kroes is chair of the immigration law committee of the Netherlands Bar Association, and secretary of the International Bar Association's Immigration and Nationality Law Committee. In the Netherlands, he says, 'populist right wing politics' has been a major factor in immigration policies, 'particularly family reunification policies and nationality law,' with the result that while the Netherlands traditionally had a reputation for relatively fair and transparent refugee policies and procedures, 'policy makers are [now] constantly making efforts to introduce more austerity in the reception facilities, increase deportation numbers, and decrease the length of asylum proceedings.'

Under the current system, he says, 'If a first asylum request is refused, a second one – for example where new evidence has emerged to support the claim - is not covered by subsidized legal aid unless the request is granted. If it is refused, the lawyer has worked for (almost) nothing. The Bar Association is categorically opposed, obviously, and is involved in a lobby to block this or at least mitigate the effects.'

A recent report by the Jesuit Refugee Service on alternatives to detention generally condoned the accommodation options being provided to asylum seekers in Germany and Belgium. Neither was luxurious. But, under the German scheme unaccompanied minors enjoyed the same standard of protection, care and education as native wards of state, while in Belgium, asylum seeking families were housed in units which were basic, but indistinguishable from neighbours and located in community areas.

But, the report says, the conditions faced by the failed asylum seekers in the UK that were spoken to, who were electronically tagged and ordered to report to the UK Border Agency (UKBA) on a regular basis, left the asylum seekers largely destitute, and elicited 'crippling' levels of anxiety in interviewees, afraid that any one visit to the reporting centre would result in deportation.

Arguably, the report did not compare like with like. But this highlights some of the disparities intrinsic to the European asylum process (or indeed processes).

Sharon Waters of the Irish Refugee Council points out that asylum seekers are better off before their claims are decided than they are at any time afterwards. Ireland, traditionally a source of migration rather than a destination for migrants, has seen a major fluctuation in the numbers seeking asylum. In 2000, the figure was around 1,000–2,000; this escalated to around 10,000 in 2006 but has dropped to 1,600 in 2011. Three groups, Nigerians, Chinese and Pakistanis, constitute around half of all those making applications.

Ireland has adopted a system called 'Direct Provision', by which all asylum seekers are automatically entitled to subsistence shelter and accommodation run by private, profit-making companies in former hotels, caravan parks and bed and breakfast accommodation. Conditions are far from luxurious. Each adult asylum seeker is entitled to an allowance of €19.10 per week with a little more afforded to families with children. Currently around 6,000 asylum seekers are provided for, including, 2,000 children, some of whom have been in the system for almost a decade. The net effect, says Waters, is that the system avoids putting refugees in destitution but also acts as a deterrent. Nonetheless, she says, 'There is still a mythology about how asylum seekers are given huge houses to live in and all drive flashy cars.'

Indeed, the Italian Refugee Council's Christoph Hein says that while these kinds of attitudes are prevalent throughout Europe, has observed that where refugees are housed in integration centres within communities, and where they have the opportunity to interact with local people, attitudes towards them soften considerably: 'They're no longer just a faceless statistic – they become humanised.'

That's not to say that face-to-face interaction is always positive. One NGO worker said that, especially in small communities faced with a very sudden influx of new arrivals: 'Often young men, with no means of sustaining a living,' there are inevitably tensions.

But ironically perhaps – given the general perception of public opinion being 'against' immigration, some of the charities that exist to assist refugees are, in fact, ordinary citizens who have grown accustomed to fighting to retain families and individuals that have settled, working, studying

What happens when claims are refused?

The European Centre for Refugees and Exiles (ECRE) describes the EU asylum process as a lottery – and it has a point. Europe-wide, around 25 per cent of the approximately 250,000 claimants seeking refugee status each year are given positive outcomes, but it varies widely from country to country. By way of example, in 2010, Ireland gave positive decisions to two per cent of asylum claimants and Portugal, 100 per cent. Those in between include the United Kingdom (25 per cent), Netherlands (44 per cent), Norway (41 per cent), Germany (26 per cent), and Finland (61 per cent).

Eurostat, the body that collates European statistics, attributes the 'wide diversity in the handling of asylum applications between Member States... to the differing citizenships of applicants in each Member State but may also reflect the current asylum and migration policies applied in each country.' Those differences also impact on what happens to the asylum seekers whose claims are refused, and who face the prospect of one of three outcomes:

Typically, governments attempt to persuade them to return voluntarily. A number of programmes exist to facilitate this, and typically the asylum-refusing state makes some effort to mitigate the potential hardship of return through the provision of some minimal financial support on arrival.

The alternative is called 'administrative' (ie, non-voluntary return). In some Member States this is carried out by private contractors, and several (states and contractors) have been heavily criticised for the manner in which they're undertaken, which has resulted in the death of at least one returnee and considerable suffering incurred in several other cases.

Lastly, there is the possibility that, though denied asylum, an individual cannot be returned for any one of a number of reasons; for example, that he or she lacks travel documents, or where the country of origin refuses to accept them back.

The 1951 Convention holds that:

'No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.' And yet at least one NGO holds that there is incontrovertible evidence that it occurs – not only on a one-off basis, but frequently.

Key to asylum authorities decision-making is the use of Country of Origin reports, compiled from various sources, including government fact-finding and documents supplied by NGOs. Critics say that those reports are not always kept up to date, and that they can be incorrectly interpreted by a case-handler more anxious to meet a target than to avert a human rights abuse further down the line. Further, they argue that unless the authorities monitor what happens to returnees,

they cannot be certain that they will not face persecution in their countries of origin.

Gemma Hyslop, an immigration lawyer at the London law firm Mulberry Finch, says the UK authorities are typically less than thorough when it comes to research: 'We've seen a situation in Iraq where the UKBA attempted to return Kurdish failed asylum seekers, but when the plane touched down, the Iraqi authorities refused to accept any of the Kurds on board. At the very least it showed incompetence on the part of the UK authorities, and a lack of due diligence.'

UK Prime Minister David Cameron announced that 'no decent country sends people back to their home country to be tortured.' Indeed, to do so would be to commit a grave breach of international law. But Member States' policies differ on the point of returns. Some have significant monitoring mechanisms in place, either through arrangement with local or international NGOs, or independent government agencies and ombudsmen, covering some or all of phases of the return, ie, up to including departure, and beyond. Others have none.

In March 2012, a London-based pressure group, Freedom From Torture, petitioned the UK government (unsuccessfully) to prevent 100 Tamils being returned to Sri Lanka in the light of a Human Rights Watch report that found evidence that eight Tamils had been tortured on their return from the United Kingdom. The UK does not have a policy to monitor forced returns and in response to questions about its returns policy, the UK Border Agency, which is responsible for returns, typically issues a stock statement to the effect that the UK does not return asylum seekers where to do so would be to put them in danger.

Catherine Ramos, a researcher with a grass-roots organisation called Justice First, says that she has incontrovertible evidence that the UK is re-fouling asylum seekers in contravention of the 1951 Convention and European law.

Justice First, located in England's northern industrial Teesside district, which has been home to many asylum seekers pending resolution of their asylum claims, and many of its case-workers are ordinary members of the public who became attached to asylum seekers as, throughout their protracted claims processes, they increasingly became embedded into local communities, schools and churches.

In 2007, one of the organisation's clients and his wife and children, was forcibly removed from the United Kingdom and returned to the Democratic Republic of Congo. The day after his return he was arrested and tortured in the Kin Mazière prison. On release he went into hiding and exile.

Subsequently, Justice First began to research the outcomes of returns of their clients and in 2011, Ramos travelled to the country herself to

undertake what the UK Border Agency refuses to do – to check its assertion that returnees would not be harmed.

The results, she found, were chilling. Through interviews, both with the returnees themselves – and also with Congolese officials – she found that of the 17 adult returnees that she researched (11 of whom were men and six of whom women) and nine children:

- Thirteen were subjected to some degree of interrogation, arrest, imprisonment, verbal, physical or sexual abuse, rape or torture.
- Six children were imprisoned.
- Six have fled the DRC or been forced to move location on account of fears for their safety.

(in 2009, a UN Special Rapporteur concluded that to be imprisoned in the DRC is 'a fate worse than hell.')

While the Home Office has repeatedly been apprised of Justice First's research and concerns (by the organisation itself but also by MEPs, MPs, councillors and clergymen, its ministers and spokespeople) typically issue a stock response along the following lines:

'Failed asylum seekers are returned to the Democratic Republic of Congo only when we and the independent courts are satisfied that it is safe to do so, taking full account of the circumstances of the individual applicant.'

In response to an IBA query on this point, the Home Office sent this statement on behalf of the UK Border Agency:

"We only enforce the return of individuals whom we, and the courts, are satisfied are not in need of protection and who do not elect to leave voluntarily... In December 2008, the Court of Appeal upheld a ruling that returnees are not at risk of persecution or ill-treatment on return to the Democratic Republic of Congo simply because they are failed asylum seekers'

Ramos says that one upshot of her research is that the Home Office has said it will update the country of origin information on the DRC, which she points out, 'is a start.' Indeed, the Home Office confirmed to the IBA that it had done so in March – taking into account the Justice First report.

Ramos believes refoulement is very much more widespread. She says, 'We know that it's happening, not just on returns to DRC but also Afghanistan, Iraq, Cameroon and other places.'

A UK Border Agency spokesperson said:

'The UK has a proud record of offering sanctuary to those who need it, but people who do not have a genuine need for our protection must return to their home country.

'We consider each individual case on its merits and only undertake returns when we are satisfied that an individual has no international protection needs.'

locally or joining church groups, successfully integrating within their host communities. Hein has observed it in Italy: 'Sometimes, local people volunteer spontaneously. It happens when they see that the "refugees" are not anonymous, but real people.'

Integration proves divisive

It's another irony that while governments have a tendency to berate communities for failing to integrate into the national mainstream, their efforts to encourage integration are lacklustre. (exemplified by an online multiple choice 'test' which rewards a head for figures and detail, but is used to ascertain whether an individual's understanding of 'Britishness' is sufficient to merit their citizenship.) Several initiatives on integration exist at the European level. In 2004, Member States agreed Common Basic Principles for Immigrant Integration Policy, which holds that successful integration of immigrants has positive social and economic effects while:

'We've seen a situation in Iraq where the UKBA attempted to return Kurdish failed asylum seekers, but when the plane touched down, the Iraqi authorities refused to accept any of the Kurds on board. It showed incompetence on the part of the UK authorities, and a lack of due diligence'

Gemma Hyslop
London law firm Mulberry Finch

'The failure of an individual Member State to develop and implement a successful integration policy can have in different ways adverse implications for other Member States and the European Union. For instance, this can have impact on the economy and the participation at the labour market, it can undermine the respect for human rights and Europeans' commitment to fulfilling its international obligations to refugees.'

There is considerable debate as to what 'successful integration policy' might entail, which touches on difficult and divisive issues, such as the difference between multiculturalism and assimilation.

In February, the Dutch immigration minister, Gerd Leers, wrote an open letter in which he said that the Netherlands, which each year resettles a number of refugees under the UNHCR Gateway Protection Programme, should select candidates on the basis of their 'integration potential'; ie, how

easily they will fit into and adapt to Dutch society.

One person who disagrees with that analysis is Rick Jones, director of operations at Manchester-based Refugee Action, an NGO that implements the Gateway Protection Programme on behalf of the UK government. Under the scheme, partner nations handpick refugees from camps around the world and accord them automatic refugee status. Once 'in', they benefit from housing and resettlement advice. But the numbers are small: 500 each year (against several thousand in the United States). 'There are two major issues. In my experience it is actually very difficult to ascertain who is going to integrate easily. The other is this – that, surely the best criterion to apply is humanitarian need?' says Jones.

For most of those seeking or having recently received refugee status, life is very much more precarious than for those under the protection of the programme. Cuts to legal aid (government funding of legal advice for those that could not otherwise afford it) mean, he says, that applicants for asylum status are woefully underprepared for their initial interview with the UKBA, the authority which decides whether their claims are genuine. Further, the Refugee Integration and Employment Service (REIS), which had provided opportunities for successful asylum seekers to improve their English and socialise, has had its funding entirely cut and no longer exists.

True to its instincts, the EU is minded to regularise its Member States' approach to asylum and refugee issues. But, given the criticism levelled at processes and facilities in Greece, in Malta, the United Kingdom (where, despite years of campaigning the detention of children still continues), the aspiration looks hopeful. Nonetheless, last year a new EU institution entered the fray – the European Asylum Support Office (EASO) – based in Valetta, Malta.

EASO mandate is three-fold: first, to facilitate cooperation between EU Member States; second, to give support to EU states under pressure; and last, to 'contribute to the implementation of the Common European Asylum System', encouraging the exchange of best practice. A recent deployment was to advise Luxembourg (at the Grand Duchy's own request) on how it should best respond to a tripling of asylum applications made in 2011 (as against the previous year.)

EASO is certainly well-intentioned, and says Ana Fontal of ECRE, 'harmonisation will be no bad thing if it universally raises the bar'. But it faces some very considerable pressures. One is that Europe is strapped for cash. Another, that refugee numbers are extremely unpredictable. Last but not least, 61 years on from the signing of the 1951 Declaration on Refugees, Europe is tending to forget the horrors that forged it. ☒

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Bringing the Khmer Rouge to justice

Cambodia's war crimes court appears to have reached an impasse and run into controversy over potential future cases.

MARY KOZLOVSKI

Kaing Guek Eav, a slight man in a beige jacket, stood still in the dock as he listened to a final appeal judgment in the first case ever tried at the Khmer Rouge tribunal. It was a warm February morning on the outskirts of Phnom Penh, where victims of the Khmer Rouge regime gathered along with hordes of journalists, diplomats and government officials, at the tribunal known officially as the Extraordinary Chambers in the Courts of Cambodia, or ECCC. The Supreme Court Chamber – the United Nations-backed tribunal's court of appeal – was announcing its judgment in the case involving Kaing Guek Eav, better known by his revolutionary alias Duch.

The 69-year-old former schoolteacher was once the chairman of the Khmer Rouge's

S-21 prison, a cluster of old school buildings in central Phnom Penh. In the late 1970s, thousands deemed traitorous by the Khmer Rouge were interrogated and tortured within its walls, before being executed. Only a handful of people sent to S-21 are known to have survived. Duch's sentence was increased to life imprisonment for crimes against humanity and war crimes for his role in the deaths of at least 12,272 people.

'The crimes committed by Kaing Guek Eav were undoubtedly among the worst in recorded human history,' the appeal judgment read. 'They deserve the highest penalty available to provide a fair and adequate response to the outrage these crimes invoked in victims, their families and relatives, the Cambodian people, and all human beings.'

The judgment was a milestone, finalising the court's first case against a former member of the Khmer Rouge, a movement that presided over a brutal regime between 1975 and 1979. It was not without controversy, however, overturning a remedy granted to Duch for the eight years in which he was unlawfully detained at a Cambodian military court prior to his transfer to the ECCC. In July 2010, the Trial Chamber had sentenced Duch to 35 years' imprisonment, which was reduced to 30

sentence was 'consistent with internationally recognised standards of fairness' and the ECCC 'continues to serve as a model for fair trials'.

Excessive pre-trial detention is commonplace in Cambodia, and frequently contravenes domestic laws. Anne Heindel, a legal adviser for the Documentation Centre of Cambodia, which researches Khmer Rouge history, says that the Trial Chamber's decision to provide a remedy was legally correct.



'The crimes committed by Kaing Guek Eav were undoubtedly among the worst in recorded human history. They deserve the highest penalty available to provide a fair and adequate response to the outrage these crimes invoked in victims, their families and relatives, the Cambodian people, and all human beings.'

Appeal judgment

years as a remedy for his unlawful detention, and gave him credit for 11 years already spent in detention. Public reaction to the verdict was acute, with many survivors feeling it was too lenient given the gravity of Duch's crimes.

The Supreme Court Chamber judges agreed that the gravity of Duch's crimes warranted a life sentence, but diverged on the issue of a remedy. One international judge and the four Cambodian judges in the Supreme Court Chamber ruled by 'supermajority' – which is required under the ECCC's hybrid model – to reverse the remedy.

Meanwhile, two international judges — Sri Lanka's Chandra Nihal Jayasinghe and Poland's Agnieszka Klonowiecka-Milart — appended a partial dissent, arguing that Duch should be granted a reduced sentence of 30 years' imprisonment as a remedy to ensure his

'Without it, the ECCC's potential impact on Cambodian fair trial standards is massively diminished,' she says.

Despite the controversies attending the conclusion of Case 001, the judgment was in its own way a landmark. A second trial is currently under way involving three more senior former Khmer Rouge. Rupert Abbott, Amnesty International's researcher on Cambodia, says that while the overturning of the remedy was disappointing, the Case 001 proceedings were nonetheless 'of the highest standard' Cambodia had ever seen. He added that the current trial sent a powerful message about accountability. 'The space that this tribunal has created to talk about the Khmer Rouge period and to talk about what justice means, what trials should look like, is great for Cambodia,' Abbott says.

Controversy at the court

However, the ECCC's gains are in danger of being overshadowed by internal conflict and enduring controversy over two potential future cases known as Case 003 and Case 004. The two cases, which involve five former mid-ranking cadres alleged to have committed atrocities during the Khmer Rouge era, have been hobbled by numerous allegations of political meddling.

perceptions of 'attempted interference' by Cambodian officials in the cases. The resignation followed allegations that he and national Co-Investigating Judge You Bunleng had deliberately botched the Case 003 investigation, closing it in April 2011 without suspects being questioned or certain alleged crime sites being examined.

The UN then jostled with Cambodian authorities over the full appointment of Swiss reserve Investigating Judge Laurent



'There are serious concerns about the ECCC judicial process'

Martin Nesirky

Spokesperson for UN Secretary-General, Ban Ki-moon

In October 2010, Cambodia's Prime Minister Hun Sen, himself a former Khmer Rouge cadre who defected to Vietnam in 1977, told visiting UN Secretary-General Ban Ki-moon that Case 003 would not be 'allowed', arguing that the investigations were a threat to the country's stability. Senior Cambodian officials have since echoed the sentiment.

Earlier, in 2009, French Co-Investigating Judge Marcel Lemonde issued summonses for six senior officials to testify as witnesses in the Court's second case. All six officials ignored the summonses and have never given testimony.

However, government spokespeople have consistently denied interference with the tribunal's work. A spokesperson for Cambodia's Council of Ministers dismissed the allegations as accusations made by foreigners, and says that Cambodia expected the UN to 'respect our sovereignty... we respect UN credibility, integrity'.

Then came the resignations. In October, German Investigating Judge Siegfried Blunk unexpectedly stepped down, citing

Kasper-Ansermet. Kasper-Ansermet appeared committed to moving the investigations forward, issuing an order to reopen the Case 003 investigation.

In January, Cambodia's Supreme Council of the Magistracy declined to formally appoint Kasper-Ansermet, a move the UN stated was a breach of the ECCC Agreement. Kasper-Ansermet announced his own resignation in March, claiming that Bunleng had opposed investigations into Cases 003 and 004. In a subsequent 'note', Kasper-Ansermet claimed that Bunleng and other national court staff had thwarted his efforts to investigate, prompting a lengthy response from Bunleng refuting many of the allegations. The controversy has magnified concerns about whether alleged meddling and misconduct could taint the Court's other cases.

In a letter to UN headquarters dated 27 March, lawyers for Case 002 defendants Nuon Chea, Ieng Sary, Khieu Samphan and Ieng Thirith, and then officer-in-charge of the Defence Support Section Nisha Valabhji, requested the UN investigate the circumstances

surrounding Kasper-Ansermet's resignation and the manner in which decisions were taken in the Case 002 investigation. The note 'sets out serious irregularities in the functioning of the ECCC and conduct that has the potential to prejudice the interests of the accused persons in Case 002', the letter says.

In November, the Trial Chamber ruled that former Khmer Rouge Social Action Minister Ieng Thirith, 80, was unfit to stand trial, that the charges against her be severed from the Case 002 indictment and that she be released, after experts testified that she suffered from dementia 'most likely' caused by Alzheimer's disease. A majority of the Supreme Court Chamber overturned the order to release Ieng Thirith on appeal in December, ruling that

Observers say the UN has moved too slowly to address the issues surrounding the two cases. Martin Nesirky, spokesperson for Ban Ki-moon, said in a recent statement there were 'serious concerns about the ECCC judicial process in relation to Cases 003 and 004', adding that Ban Ki-moon would initiate the selection of a new international investigating judge and reserve.

'The Royal Government of Cambodia should afford the new international Co-Investigating Judge every assistance and full cooperation to carry out his or her functions,' Nesirky says.

Rights groups have pressed the UN for an independent inquiry into alleged interference at the tribunal. 'There's a

'The breakdown in the investigations into Case Files 003 and 004 indicates that the process has failed in an important way'

Stuart Ford

Assistant professor, John Marshall Law School

she undergo additional treatment pending an examination 'no later than six months' from the beginning of treatment, to determine whether she is fit to stand trial.

Nuon Chea's co-defence counsel Michiel Pestman said in court in March that the integrity of the case file was 'highly suspect' also stating that 'nothing sound, we maintain, can arise from such unstable groundwork'.

In a candid article on the ECCC for *Jurist* in December, Valabhji, who recently left the court, wrote that if an institution responsible for adjudicating alleged violations of international humanitarian law is subject 'without doubt' to government interference, 'fair trial rights cannot be guaranteed in its proceedings'.

British co-prosecutor Andrew Cayley says he did not believe there were any allegations of misconduct specifically within Case 002, but that he had 'shared the same concerns' about the potential for other allegations to bleed into the case. 'That's why 003 and 004 have got to be properly addressed,' he says.

Clair Duffy, a Phnom Penh-based tribunal monitor for the Open Society Justice Initiative, says there were 'legitimate gripes' about the fact that Bunleng – a judge against whom allegations of serious misconduct have been made – had investigated other cases. 'The only way you're ever going to address that in my opinion is by conducting some kind of inquiry and by allowing independent assessors to... decide to what extent, if any, it's impinged on the accused's rights in Case 002 to be tried by a fair and independent tribunal,' she says.

risk that a lot of the good work... could be undone by this message that's coming out at the moment: that impunity will win through, and that political control will win through, unless what's happening in 003 and 004 is addressed,' Rupert Abbott says.

Agrarian utopia: 1.7 million deaths

After the Khmer Rouge marched victoriously into Phnom Penh in April 1975, they swiftly evacuated urban populations to the countryside. An estimated 1.7 million people died from execution, starvation, disease and overwork during the ensuing three years and eight months of Khmer Rouge rule, in the communist movement's bid to transform Cambodia into an agrarian utopia.

The regime was ousted by Vietnamese troops in January 1979, though its remnants lingered – predominantly along the Thai-Cambodian border – before crumbling in the late 1990s. Due to the exigencies of Cold War geopolitics, the Khmer Rouge retained a seat in the General Assembly for years after they were toppled – in what observers consider a shameful chapter in UN history.

In 1997, Cambodia sought assistance from the UN and the international community to bring those responsible for atrocities under the Khmer Rouge to justice. Early disagreements during negotiations appear to have foreshadowed the current tensions at the court. In 2000, then-UN Secretary-General Kofi Annan sent Hun Sen a letter voicing a preference for chambers with a majority

of foreign judges and an independent, international prosecutor and investigating judge. '[Cambodian Senior Minister Sok An] basically told the United Nations to take a hike,' David Scheffer, recently appointed as Special Expert on UN Assistance to the Khmer Rouge Trials, wrote in his book, *All the Missing Souls*.

In 2002, the negotiations ground to a halt. Hans Corell, then-UN under-secretary for legal affairs and lead negotiator, said at the time that the court 'as currently envisaged' would not guarantee 'the independence, impartiality and objectivity that a court established with the support of the United Nations must have'.

However, some Member States pushed for a return to negotiations, and the parties eventually signed an agreement in 2003, which established a tribunal with a mandate to try 'senior leaders of Democratic Kampuchea' and those 'most responsible' for atrocities committed between 17 April 1975 and 6 January 1979.

The hybrid model was a compromise, consisting of a majority of Cambodian judges in each chamber and a blend of national and international personnel in each of the court's various sections.

Provisions were woven into the ECCC agreement and law that legal experts say were intended to insulate the court from possible interference, such as 'supermajority' voting, which requires the assent of at least one international judge alongside national judges for a chamber to render a decision.

But the Court's structure has nonetheless proven problematic. Corell recently wrote in a foreword for an upcoming book that the ECCC should have been 'an international tribunal with a single prosecutor and a majority of international judges'.

Stuart Ford, assistant professor at the John Marshall Law School and an expert in international criminal law, says that the supermajority rule was intended to prevent Cambodian judges from effectively controlling the process without input from international judges. 'The breakdown in the investigations into Case Files 003 and 004 indicates that the process has failed in an important way,' he says.

'In hindsight, it was naïve to expect that judges that are subject to political control in the national judiciary, who were handpicked by the national government... would not be subject to political interference while at the ECCC.'

Ford, a former ECCC assistant prosecutor, says that 'co-leadership at all levels' was problematic. 'As we have seen with respect to

Case Files 003 and 004, when the co-leaders disagree the court can be paralysed,' he says.

Duffy says that while the Court's structural safeguards may work to a degree, it was hard to conceive of suspects in Cases 003 and 004 being prosecuted without government cooperation. 'It would need to be Cambodian police who arrested those individuals... [and] even presuming the indictments were ever transferred to the Trial Chamber you couldn't get a conviction without the national judges,' she says. 'The national Co-Prosecutor, the national Co-Investigating Judge and every national judge on the Pre-Trial Chamber has ruled consistently along government lines on that issue.'

The ECCC is not the only war crimes court to adopt a hybrid model. One such example is the Special Court for Sierra Leone (SCSL) in Freetown, which differs crucially from the ECCC. 'I think that you do see political leanings play out in some of the decision-making at the SCSL and it's been criticised for that, but I think generally it's been overcome by the fact that the majority of the judges are international,' Duffy says.

Ford says that any future hybrid courts would likely be designed along the lines of the SCSL. 'I don't think that the UN or the international community will be in a hurry to create another court like the ECCC with co-leadership,' he says.

Fair trial or no trial

As uncertainty over the Court's financial state and the fate of Cases 003 and 004 casts a cloud over the institution, some have suggested that the UN should consider revisiting the terms of the ECCC Agreement or withdrawing from the Court entirely. 'No trial can be better than a flawed trial,' says Abbott of Amnesty International. 'For the sake of ensuring that this tribunal meets international standards and for the sake of its own reputation, the UN has got to set out... what's going to happen if political interference doesn't stop, and ultimately withdrawal has to be one of the options.'

However, how the Khmer Rouge tribunal will be viewed by those to whom it arguably matters most – the victims – is difficult to know. 'How do victims of Khmer Rouge atrocities feel about this process?' says Duffy. 'You need to measure it against whether the accused got a fair trial ultimately, but that's the single greatest unknown to me.' ☒

Mary Kozlovski is a writer based in Phnom Penh.



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'Big Monthly' exposes failings in Brazilian political system

Development could be stymied by political paralysis in a country that has 29 parties, with 23 represented in Congress. Most lack a consistent or even discernible ideological position, and some are sub-divided into warring factions.

BRIAN NICHOLSON

The Brazilian Supreme Court (STF) is about to judge one of the country's most important political corruption cases of recent years: the so-called Mensalão or 'Big Monthly' scandal that brought down several senior members of the last government. Beyond tabloid-style headlines about wads of cash in brown paper bags, the case highlights some serious structural weaknesses in Brazil's political system that hamper economic and social development.

First, the caveats. 'About to judge' doesn't necessarily mean 'about to rule on'. Judges on the Supreme Court said 105 hours of hearings were likely to run from June through August, but the Brazilian judicial system is replete with opportunities for defendants to lodge appeals and create procedural delays.

The case started in 2005 with reports that people inside, or close to, the government, headed by President Luiz Inácio Lula da Silva, were operating a systematic slush-fund to secure congressional support for the Workers' Party (PT). Antonio Fernando de Souza, then Attorney General, sent the STF indictments against 40 people, 38 of whom now face trial. Why the STF, Brazil's senior forum for constitutional questions? Because a dozen of the alleged participants were federal congressmen, and as such enjoyed a constitutional privilege to be tried there.

Leading the charge sheet, at least in terms of public prominence, was José Dirceu, Lula's Chief of Staff at the time, who ran the government from an office adjacent to the president's. Other high-profile defendants included João Paulo Cunha, President of the Chamber of Deputies at the time; José Genoino, then a federal congressman

and PT President; and Delúbio Soares, then PT Treasurer.

Charges included being a member of a criminal organisation, lying on a public or private document, offering bribes, accepting bribes, embezzlement of public funds, money laundering, fraudulent management of a financial institution and foreign exchange fraud, with penalties of up to 12 years in prison. Many of the accused faced multiple indictments; all denied any wrongdoing.

More than R\$75m was involved according to current Attorney General Roberto Gurgel. Adjusted for Brazilian inflation and using current exchange rates, that would be roughly US\$55m. Cash was allegedly doled out to various members of the PT and other pro-government parties to finance election campaigns, pay off past campaign debts, and generally buy support for congressional votes. There is no suggestion that personal financial gain was a key driver, although at least one politician said she was offered money to change party. The affair became popularly known as the 'Big Monthly' because of initial suggestions that it involved regular monthly payments.

'The criminal scheme was conceived and carried out to serve the aims of the political nucleus, headed by the then Presidential Chief of Staff José Dirceu,' Gurgel said in his final written argument delivered to the STF last year. 'The evidence supporting the charges proves that the accused... associated in a regular and organized way, with division of tasks, to commit crimes against the public administration (and) the financial system.'

Money allegedly came from two main sources:

a couple of minor banks that simulated loans to the PT via an advertising agency in exchange for government permission to make profitable payday loans to public employees and pensioners; and rake-offs from advertising contracts with private companies that received government contracts.

Brazil has seen various high-profile political corruption cases since the end of military rule in 1984, involving parties of various hues. Fernando Collor de Mello suffered impeachment and resigned the presidency in 1992 after allegations of kickbacks on government contracts, and Federal Police are currently investigating what appears to be a wide-ranging scheme said to involve public construction contracts, numbers racketeering and payoffs to both government and opposition politicians.

One thing making the 'Big Monthly' such a landmark case was the involvement of so many senior members of the PT. Founded three decades ago by Lula and other prominent leftists, the PT boasted that it offered a clean new alternative based on grass-roots activism rather than traditional power structures. Thus, when the 'Big Monthly' was exposed, Lula's suggestion that the PT had done no more than 'is done systematically in Brazil' came to be seen as a milestone in the party's induction into the political mainstream. Similarly, his claim of total ignorance about the manner whereby his government was apparently securing its congressional majority led several commentators to debate if this indicated presidential dishonesty or incompetence.

There were other consequences. The first presidency of a party created to fundamentally transform Brazil ended up producing some moderate social improvement, but precious little basic structural reform; while the forced clean-out of PT leaders paved the way for Rousseff to rise from obscurity.

More even than individual venality, the bottom line is that Brazil has a largely unworkable political system. The 1964–85 military dictatorship imposed a pro-forma democratic façade with two tightly controlled parties. Today there are 29 parties; 23 of them represented in Congress, where the largest has just 17 per cent of seats. Most parties lack a consistent or even discernible ideological position, and some are sub-divided into warring factions. Maintaining a majority could be likened to herding adolescent cats, with constant tidbits the main inducement to good behaviour.

The coalition supporting President Dilma Rousseff comprises ten parties that bicker over

no less than 34 ministries and ministry-status secretariats, avid for the patronage that running a ministry permits. More than 23,500 federal jobs are 'positions of trust' held by political appointees chosen by ministers. Agencies that control large budgets are hotly disputed.

Federal highway investments ground to a halt last year and are still running way behind schedule because of a kickbacks scandal that toppled the Transportation Minister. He was just one

'The coalition supporting President Dilma Rousseff comprises ten parties that bicker over no less than 34 ministries and ministry-status secretariats, avid for the patronage that running a ministry permits. More than 23,500 federal jobs are 'positions of trust' held by political appointees chosen by ministers. Agencies that control large budgets are hotly disputed.'

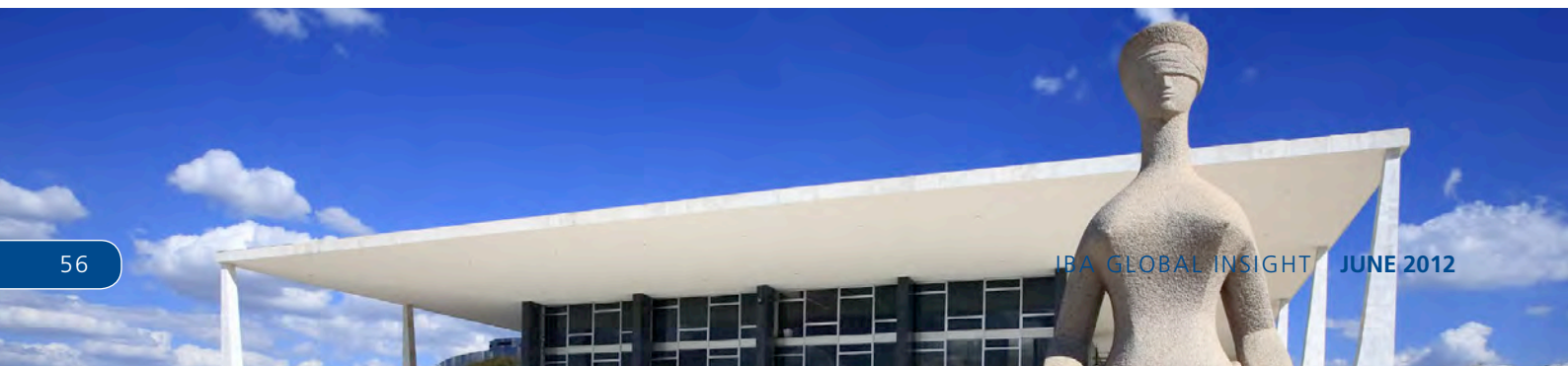
of six ministers to quit in Rousseff's first year of government following media reports of corruption, normally related to patronage and contract skimming to finance political parties.

Rousseff sports an 'iron lady' halo and has pledged not to continue 'politics as usual.' But it remains to be seen if she can win a congressional majority of the strength of argument alone.

Shortly before taking office at the start of the Rousseff administration in January 2011, the current Justice Minister, José Eduardo Cardozo, described political reform and public financing of campaigns as 'an imperative,' because elections were decided by financial muscle with no debate of party programmes, leaving the system susceptible to organised crime.

'The first year of government is the moment when you can move ahead with structural reforms,' he said. But, as things turned out, Rousseff's first year was largely dedicated to managing scandals. ☒

Brian Nicholson is a freelance journalist. He can be contacted at brian@minimaxeditora.com.br.





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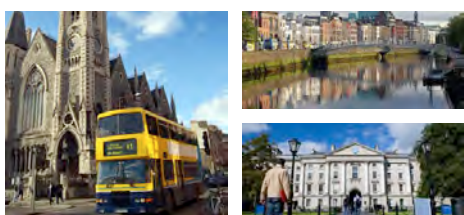


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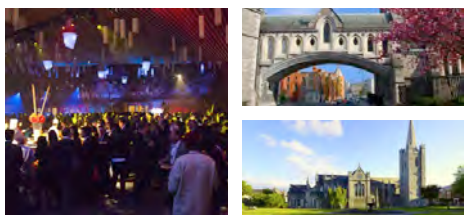
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