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## Global Businesses and the *Just* Rule of Law

By Aaron Schildhaus

**B**usiness is business, but “business” can no longer be defined as it was in the 20th century. Today, global businesses must be conscious of social responsibility obligations and must operate in legal environments that are incorporating higher standards of ethical and moral conduct than ever before.

Indeed, if the leading economic powers of the world have their way, corporations may supplant states as the key forces promoting human rights. As will be seen in this article, the Organisation for Economic Co-operation and

Development (OECD) has recently promulgated guidelines for global businesses that would move businesses to the forefront of the human rights movement. By wielding their economic power to implement policies that advance a so-called “just rule of law,” global businesses can make a difference. And they are! Adopting policies to comply with anti-corruption laws and international agreements is but one such example.

A “just rule of law” recognizes that the “rule of law” has

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## CHAIR'S COLUMN

### Stand Up for the Rule of Law

The most important component of the Section of International Law's mission is promoting global acceptance and just implementation of the rule of law. We serve our members and the global legal community by promoting and defending the rule of law around the world, including the independence of the profession and the judiciary. The ABA–United Nations Development Programme (UNDP) International Legal Resource Center (ILRC), our flagship project, enhances access to worldwide pro bono legal expertise for technical assistance projects. ILRC represents our common commitment with the UNDP to advocate globally for good governance and the rule of law. Qualified Section members should list themselves as experts in the ILRC database.

The Section's rule of law activities are supported by the Section Support Fund through the ABA Fund for Justice and Education, a 501(c)(3) charitable organization. Consider supporting our rule of law projects by donating.

Our committees may request that the Section endorse a rule of law letter proposal for consideration by the ABA Center for Human Rights and issuance by the ABA president. These letters to national governments express the association's concerns about alleged intimidation, harassment, or abuse of lawyers, judges, and human rights advocates. We can, and should, do more in this important area.

The Section has a variety of task forces that focus on specific international rule of law issues. This year we will establish a task force on legal empowerment of the poor—supporting inclusive development through a unique focus on key livelihood rights (property, labor, entrepreneurial, access to justice) to promote inclusion and foster economic growth, poverty reduction, and human development. When this task force is operational, we will invite all Section members to participate in its important work.

Through the International Legal Exchange Program (ILEX), the Section arranges briefing trips throughout the world, offers legal information sessions and training for foreign lawyers and other professionals, and facilitates US entry for foreign attorneys who have been offered training by US law firms. We have scheduled an ILEX briefing trip to Belfast, Northern Ireland (October 9–10, before the Fall Meeting in Dublin) and a briefing trip to Tanzania and Rwanda (March 4–14, 2012). I encourage all Section members to participate in at least one ILEX program, as they are truly exceptional events.

The Section also is active in developing and promoting policy at—and through—the ABA House of Delegates. Our committees are the engines of policy development. We have been successful in getting several Section-initiated policies through the house, including most recently a recommendation urging Congress to fund US participation in and replenishments for capital increases by international development institutions.

If you become aware of a threat to the rule of law, in any form and in any jurisdiction, contact the Section through me or its rule of law officer, Jason Matechak. The Section can only act on those threats to the rule of law that it is aware of—and where we can, we will act. Standing up for the rule of law is one of the most noble and important things we can do. ♦



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## SECTION NEWS

# FREE REGISTRATION WITH THE INTERNATIONAL LEGAL RESOURCE CENTER



An ILRC expert with UNDP/Jordan conducted a training workshop on corruption in tax revenues in Jordan from December 2010 to January 2011.

The International Legal Resource Center (ILRC) was established in December 1999, based on the common commitment of the United Nations Development Programme (UNDP) and the ABA to advocate for democratic governance and the rule of law on a global scale. Seated within the ABA Section of International Law, the ILRC identifies legal experts for short- and long-term assignments with UNDP requests relating to technical legal-assistance projects, knowledge management, and advisory services. The ILRC provides legal research and substantive advice through UNDP to governments on policy formulation. Also, the ILRC conducts assessments of draft and current legislation, gauging compliance with international standards when appropriate. Core areas where the ILRC provides technical assistance to UNDP include access to justice and the rule of law, anti-corruption, climate change, crisis prevention and recovery, decentralization and local governance, energy and environmental sustainability, human rights, gender equality, increasing political participation, monitoring and evaluation, transitional justice, parliamentary development, post-conflict resolution, public administration reform, security sector reform, and violence against women.

Legal experts are placed with UNDP offices worldwide. They are selected from a database of more than 1,900 members from common law, civil law, and mixed jurisdictions. Legal specialists who participate in international assignments experience rule of law first-hand and return with a deeper understanding of international norms and their impact.

Registration is free, and legal experts registered with the ILRC will receive UNDP alerts for opportunities around the world. For more information about the ILRC, please visit [ambar.org/ilrc](http://ambar.org/ilrc). If you have any questions regarding the registration process, contact Jacqueline Gichinga, the ILRC international program associate, at 202/662-1662 or [jacqueline.gichinga@americanbar.org](mailto:jacqueline.gichinga@americanbar.org). ♦

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# THE RULE OF LAW

## *Just Rule of Law*

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different definitions. There is often the danger that the “law of the ruler” becomes too easily justified as the “rule of law.” The rule of law should be viewed as a concept that embraces a universally accepted set of principles about the interaction of the state and its subjects. That universal concept presupposes a body of law that is not only fair and equitable in its form and letter, but also applied to all fairly, consistently, and uniformly—in other words, that it is a “just” rule of law.

Most legal scholars would agree that a just rule of law in any country must be consistent with the Universal Declaration of Human Rights (UDHR)—now approved by more than 150 countries—and, for the most part, the provisions contained in its successor treaties: the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; the Convention on the Elimination of All Forms of Discrimination Against Women; and the International Convention on the Elimination of All Forms of Racial Discrimination. These are documents that reflect not only written legal protections, but also anticipate consistent enforcement.

Sadly, the legal guarantees that exist in writing in many countries are frequently honored in the breach. Too often, the law, written to reflect the precepts of the UDHR, is not applied on a fair, equitable, uniform, and consistent basis. For this reason, it is convenient to refer, not just to the rule of law, but to a “just rule of law,” when speaking of a rule of law that by definition offers fair, consistent, uniform, and impartial implementation.

In many ways, and in a great many countries, concerns about corporate governance are starting to have an impact on the just rule of law, writ large. New protections are guaranteed by national legislation and recent case law in selected countries with a commitment to a just rule of law. They are beginning to affect corporations operating domestically, but also abroad, including in places where support for a just rule of law is weak or nonexistent.

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An important example of corporate conduct affected by these considerations is that of the fight against corruption. Corruption, particularly that practiced by government officials, violates the precepts of a just rule of law because it is a form of theft and misconduct that is directly inimical to the interests of the general population of the state. Knowledgeable leaders of global businesses know that their competitiveness will be enhanced over the long term (and the short term) by taking steps to fight corruption within their ranks and by promoting anti-corruption efforts with their partners. Such businesses accept the notion of being good corporate citizens and, as such, are adopting codes of conduct and implementing compliance programs that reinforce the rule of law and, consequently, sound business practices.

Let us examine more closely the issues of corruption and why the fight against it is taking center stage as a pillar of the just rule of law. Many multinational corporations have operations in countries with a weak rule of law. In the past decade, increased extraterritorial prosecutions by the United States government under its Foreign Corrupt Practices Act (FCPA), increased enforcement of anti-bribery statutes in other member countries of the OECD and the enactment of new legislation in still others are causing executives and directors to see to it that their subsidiaries and affiliates everywhere adapt their operations and procedures to protect themselves and their future business relations. Indeed, fighting corruption by the leading industrial countries of the world, although of recent vintage, has been taken very seriously by international bodies and is recognized in more and more international instruments.

A host of international and regional agreements and understandings include the following releases of the OECD: the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Anti-Bribery Convention) entered into force on February 15, 1999. Core OECD instruments that target the offering side of a bribery transaction are: The Anti-Bribery Convention, further updated with the 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (the 2009 Anti-Bribery Recommendation), the 2009 Recommendation on Tax Measures for Further Combating Bribery of Foreign



Public Officials in International Business Transactions, and the 2006 Recommendation on Bribery and Officially Supported Export Credits. They aim to eliminate the “supply” of bribes to foreign public officials, with each country taking responsibility for the activities of its enterprises and what happens within its own jurisdiction. A program to promote the full implementation of these instruments has been established, which rigorously and systematically monitors country-by-country implementation of the Anti-Bribery Convention.

The 2009 Anti-Bribery Recommendation recommends in particular that governments encourage their enterprises to develop and adopt adequate internal controls, ethics and compliance programs, or measures to prevent and detect foreign bribery, while taking into account the Good Practice Guidance on Internal Controls, Ethics and Compliance, included as Annex II to the 2009 Anti-Bribery Recommendation. This Good Practice Guidance is addressed to enterprises as well as business organizations and professional associations. It highlights good practices for ensuring the effectiveness of internal controls, ethics and compliance programs, and other measures to prevent and detect foreign bribery.

The United Nations Convention against Corruption (UNCAC), entered into force on December 14, 2005, sets out a broad range of standards, measures and rules to fight corruption. Under the UNCAC, States Parties are required to prohibit their officials from receiving bribes and their enterprises from bribing domestic public officials, as well as foreign public officials and officials of public international organizations. It also commends State Parties to consider disallowing private-to-private bribery. The UNCAC and the Anti-Bribery Convention are mutually supporting and complementary.

Good governance practices are an important element of reducing demands to pay bribes and thereby help address the demand side of bribery. Enterprises can support collective action initiatives on resisting bribe solicitation and extortion. Both home and host governments should assist enterprises confronted with solicitation of bribes and with extortion. The Good Practice Guidance on Implementing Specific Articles of the Convention in Annex I of the 2009 Anti-Bribery Recommendation states that the Anti-Bribery Convention should be implemented so as to avoid providing a defense or exception when a foreign public official solicits a bribe. Furthermore, the UNCAC requires the criminalization of bribe solicitation by domestic public officials.

As these laws have developed, the links between corporate governance issues, anti-corruption, and human rights is gaining increased recognition. On May 25, 2011, the OECD released the OECD Guidelines for Multinational Enterprises (available online at [www.oecd.org](http://www.oecd.org).) The guidelines cover most aspects of corporate behavior and include significant recommendations for the protection of human rights as well as those dealing with combating bribery and corruption.

Respect for human rights is the highest level of expected conduct for enterprises, independent of states’ abilities or willingness to fulfill their human rights obligations. The expectation that enterprises respect human rights is not diminished by states’ actions—whether it fails to enforce relevant domestic laws or implement international human rights obligations or acts contrary to such laws or international obligations itself.

Direct reference is made to the Universal Declaration of Human Rights, and the rights contained therein as a key element of the rule of law. The guidelines mention fighting corruption: The first paragraph of the guidelines goes on to say that enterprises should not offer or accept undue pecuniary or advantage to or from public officials or employees of business partners. The second emphasizes development of internal controls and compliance programs. The third discourages use of small facilitation payments and proper record-keeping when such payments are made.

The guidelines then state the obvious: “[B]ribery and corruption are damaging to democratic institutions and the governance of corporations. . . . Enterprises have an important role to play in combating these practices.” The final four guidelines also stress the need for businesses to concentrate their efforts on complying with the requirements of the FCPA and the new UK Anti-Bribery Act.

Obviously, businesses everywhere are dealing with the anti-corruption legislation of their home country as well as of other countries. Because companies based in the United States must comply with the FCPA in their dealings outside the United States, they are insisting that their subsidiaries, affiliates, agents, and partners in other countries provide them with assurances that they do not and will not run afoul of the FCPA provisions in their own operations.

Although many countries have anti-corruption legislation on their books, and new legislation is being enforced more stringently in all OECD countries, the FCPA remains the gold standard for anti-corruption laws. The enforcement mechanisms are top rate, and the amount of “gold”

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finer it generates for the US Department of the Treasury is also impressive. This confluence of factors has a direct bearing on the ability of the private sector to force changes in behavior to reduce corruption. In turn, these changes free more resources to combat human rights violations, remove corrupt officials from the gravy train of bribery-induced decision making, and further promote a fair and open society in which the just rule of law controls.

The accelerating number of investigations, prosecutions, settlements, and convictions in the United States has created a sense of urgency in corporate boardrooms and officers' suites—both in the United States and in countries where business relationships with US entities are important. Moreover, with more active enforcement in a number of countries, and with the entry into force of the UK act, many other countries are jumping on the bandwagon and reevaluating the costs of permissive attitudes toward corruption.

Corruption costs may be measured in two ways: (1) in lost opportunities for affected companies, which may not pass anti-corruption litmus tests and end up contributing to their countries' reputations as "at risk" for investment and (2) in lost revenues from guilty corporate entities and their officers, who could be a source for big fines.

Aimed at modifying the behavior of US businesses outside the United States, the FCPA when adopted in 1977 recognized that corruption is a major impediment to economic growth, particularly in developing countries, where bribery and "kickbacks" are often sewn into the fabric of everyday life. In those countries, which critically need economic development, corruption diverts scarce financial resources into the pockets of corrupt government officials and their cronies. This reality is more than just unfair; these countries are also where the just rule of law is absent. Eventually, investment flows into those countries are seriously reduced—foreign investors find more secure environments in which to invest. Less foreign investment translates into even poorer conditions in those countries, and human rights of their citizens become even more compromised.

Since 1977, the Securities and Exchange Commission and the US Justice Department have initiated a number of criminal actions against companies and individuals violating various provisions of the FCPA. In the past decade particularly, investigations and prosecutions have increased significantly. Various factors underlie this acceleration, including the growing use of electronic

communications and the availability, easy transfer, and duplication of data across the Internet—thus providing more opportunities to secure evidence. Scandals such as Enron and WorldCom, and the passage of Sarbanes-Oxley, forced additional transparency and accountability on the acts of corporate officials and helped change how corporations fulfilled their ethical responsibilities. More internal due diligence became the rule, and more cooperation, not only among US government agencies, but with foreign prosecutors as well, were additional factors leading to what is now a virtual explosion in the number of FCPA investigations taking place. Noteworthy are the new "whistleblower" provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Regulators in many countries are taking note of the successes of US prosecutors and the ramifications thereof. In the four years between 2005 and 2009, assessments of penalties under the FCPA rose from approximately \$15 million to \$2 billion; 52 companies were impacted in 2009. Investigations are generally lengthy, serious, and comprehensive, as well as being very expensive for companies in time and out-of-pocket costs—to combat or to cooperate, to investigate, and most of all, to defend. This trend is continuing.

Although the FCPA was not welcomed in its early years by many US businesses trying to compete in international markets, the criminalization of such behavior and the rapidly increasing enforcement of it and laws like it around the world have forced corporations and their management to take the matter very seriously—to the point that any company not taking active steps to comply with this kind of legislation today is at risk—and that is where the confluence of factors is creating an optimism on the part of human rights activists and proponents of the rule of law. More active and transparent opposition by business to corruption, and an improved system for the delivery of justice, coupled with a free press to keep public awareness high, translates into better corporate citizens, less corrupt governments, more involved citizenry, a more just rule of law, and a greater level of human rights protection.

Corruption undermines the abilities of countries to devote adequate resources to protecting human rights and the rule of law. Fighting corruption is not only good business and part of good corporate governance; it is an essential component of the fight for universal human rights and the just rule of law. Corporations therefore can play an important role in the fight. ♦



## Middle East Unrest and the Rule of Law

By James R. Silkenat

**A**s reflected in President Barack Obama's speech on Libya to the National Defense University in Washington, D.C., the social unrest in North Africa and the Middle East today is unique in its flavor and context. It is not the same as the turmoil involved in the dissolution of the Soviet empire in Eastern Europe in 1989. And Tahrir Square in Cairo is not the Berlin Wall or even Tiananmen Square. But the emotions, the longing for an effective voice, and a material stake in the future are the same and will lead in unexpected and unpredictable directions for the region's national populations that now appear on television each night with such passion and daring.

Much of the hunger that is driving the demonstrations in Egypt, Bahrain, Morocco, Libya, and elsewhere in the world now relate to the conviction that law in those countries does not protect citizens from corruption or provide a level platform on which they can build communities of opportunity and equity. Rather, law serves less laudatory governmental or political interests, far removed from people's daily lives. The absence of a fully functioning rule of law is as vivid in the hearts of anti-government demonstrators in Tripoli or Cairo as it was for dissatisfied patriots in America's own revolution so long ago.

What are the components of the rule of law that are so universally sought, even if unarticulated, by demonstrators now in the Middle East? What new government structures or policies might lead to democratic, or at least pluralistic, societies in this long-troubled region?

Empirical rule of law studies by the World Justice Project and other nonpartisan groups provide some material hints about the factors that would be important in such development. The questions are basic ones: Can people access public services without the need to bribe a government official? Can a basic dispute among neighbors or companies be peacefully and economically resolved by an independent adjudicator? Can people conduct their daily activities without fear of crime or police abuse?

The factors that go into a substantive definition of the rule of law are now also becoming more widely accepted.

*James R. Silkenat, a lawyer at Sullivan & Worcester in New York City, is a director of the World Justice Project.*

First, governments and their officials must be accountable under the law. Rulers must not be immune from the rules that apply to everyone else.

Second, the laws must be clear, publicized, stable, and fair and protect fundamental rights, including the security of persons and property. These are basic freedoms that motivate and engage us all: speech, assembly, religion, due process. There is a substantive content to the rules that bind us. It is the "rule of law" not the "rule by law."

Third, the process by which the laws are enacted, administered, and enforced should be accessible, fair, and efficient. The arbitrariness and lack of transparency existing for decades in Egypt, Tunisia, and other states in the Middle East do not provide the participatory clarity that their populations are now demanding.

And, fourth, access to justice must be provided by competent, independent, and ethical judges and court officials who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve. The politically controlled and obedient courts that exist in much of the world serve interests very distinct from the ones that the populations now find so central to their lives.

Countries in North Africa and the Middle East, which are now following their own paths of protest and uncertainty, may be emblematic of much of the current debate. The World Justice Project's Rule of Law Index, after extensive popular polling in major cities in the region, confirms the rule of law factors where countries in this region are weakest: freedom of opinion and expression; judicial control over government power; the role of improper influence in creating, interpreting, and enforcing government regulations; and the lack of due process and substantive rights of the accused in court proceedings.

These detailed findings, which are now being echoed in numerous jurisdictions around the world, including China, do not provide a conclusive road map for the future for these countries. The vagaries of economic development, military influence, and institutional leadership are too fluid now to allow that. But they do show the concrete, on-the-ground realities that affect the daily lives of citizens in these countries and allow some glimpse of what kinds of nation-states might coexist or

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compete with America in the future.

If governments, either existing or to be formed by new leaders in these countries, can respond to the underlying motivations that are driving the current unrest and dissatisfaction, then this portion of the world can achieve much of the promise that has evaded it for so long. No country anywhere has ever attained, let alone sustained, a perfect

realization of the rule of law. Every nation faces the perpetual challenge of building and renewing the structures, institutions, and norms that can support and sustain basic human rights and some level of legal empowerment of the poor and disenfranchised. That is the challenge now for the Middle East and North Africa and possibly other areas of belated popular unrest in the future. ♦

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## SECTION NEWS

### RULE OF LAW INFORMATIONAL SERIES

In 1983, the ABA adopted as one of its institutional goals what is now called Goal IV: “Advance the rule of law.” The Section of International Law has actively contributed to this vital initiative. The Section undertook its first international project in 1986 and, in the more than 25 years since, has implemented numerous short- and long-term legal capacity-building projects around the world. The Section’s rule of law activities are supported by the Section Support Fund through the ABA Fund for Justice and Education, which is a 501(c)(3) charitable organization. The Section’s Rule of Law Officer, Jason Matechak, oversees these activities in coordination with the Rule of Law Committee and Section staff. Section members are encouraged to support and participate in these exciting rule of law initiatives.

The Rule of Law Informational Series was launched at the beginning of the 2010–11 ABA bar year. The series of informational sessions explores the notion of the rule of law, which organizations are involved in fostering the rule of law, and how to get involved. The sessions are free of cost and presented in person and as interactive teleconferences (advance registration is required). Each teleconference is recorded and accessible on the Section’s website. Upcoming programs are posted online as well. Program materials and speaker biographies can also be found online at [ambar.org/introl](http://ambar.org/introl). Below is a list of past sessions:

#### MILLENNIUM CHALLENGE CORPORATION

September 29, 2010

#### USAID AND THE US DEPARTMENT OF JUSTICE’S INTERNATIONAL CRIMINAL INVESTIGATIVE TRAINING ASSISTANCE PROGRAM

October 22, 2010

#### THE WORLD JUSTICE PROJECT

November 16, 2010

#### WORLD BANK: OFFICE OF EVALUATION AND SUSPENSIONS/SANCTIONS MANAGEMENT

December 6, 2010

#### ABA-UNDP INTERNATIONAL LEGAL RESOURCE CENTER

December 15, 2010

#### ABA RULE OF LAW INITIATIVE

January 27, 2011

#### DEPARTMENT OF STATE’S BUREAU FOR INTERNATIONAL NARCOTICS AND LAW ENFORCEMENT AFFAIRS

March 10, 2011

#### INTERNATIONAL MODELS PROJECT ON WOMEN’S RIGHTS

March 31, 2011

#### WORLD BANK: JUSTICE REFORM PRACTICE GROUP

May 1, 2011



# Enforcement Failures Undermine Rule of Law Protections in Ghana

By Angela D. Giampolo and Kathryn A. Hettler

**W**omen are gaining stride in Ghana. Over the past two decades, the Ghanaian legislature has taken various measures to heighten the protection of women under the law. The 1992 Ghana Constitution, which prohibits discrimination on the basis of sex, has put in sharper relief many unjust and inhumane customary practices against women. Various treaties, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), have brought international attention to the cause. Yet, despite such efforts, violence and discrimination toward women persist. Male-dominated practices, cloaked behind religion and custom, have perpetuated the oppression of, and discrimination against, Ghanaian women and have led to atrocious abuses of their constitutional rights.

Women in Ghana continue to face many social, legal, and economic barriers. Domestic abuse, female genital mutilation, accusations of witchcraft, forced childhood marriages, and unequal property and inheritance laws are just some of the obstacles facing Ghanaian women today. Fortunately, an increase in the number and activities of women's advocacy groups has brought much-needed attention to the unequal treatment of women in Ghana, and the Ghanaian government has taken notice. However, despite the equal treatment mandated by the law, the lack of funding and the inadequate enforcement of laws protecting women have left many women throughout Ghana unaware of their rights.

## Childhood Marriages and Polygamy

Forced childhood marriages continue the ongoing suppression of young women throughout Ghana. Although the Children's Act of 1998 set the minimum of age of marriage

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at 18, a 2004 United Nations report estimated that 16% of Ghanaian girls between 15 and 19 years of age were married, divorced, or widowed. Although the law against childhood marriage is officially on the books, certain ethnic groups practice childhood marriages behind the "banner of religion." Thus, the Ghanaian government, not wanting to meddle in family or religious matters, is hesitant to intervene. Opponents of childhood marriage argue the real reason behind the continuation of such practice is purely economic. Impoverished families, in dire need of cash, are eager to collect their child's bride price, often selling children as young as 14 years of age. As a consequence, women in Ghana continue to suffer. The high prevalence of childhood marriage results in young girls having less access to education, economic opportunities, and social networks. The girls, often forced to drop out of school to raise a family, are more likely to die while giving birth, are more susceptible to domestic violence, and more likely to continue to live in poverty ([www.usaid.gov/our\\_work/cross-cutting\\_programs/wid/dg/child\\_marriage.html](http://www.usaid.gov/our_work/cross-cutting_programs/wid/dg/child_marriage.html)).

Polygamy is another problem afflicting women in Ghana. Ghana's Marriage Ordinance states that a marriage must be monogamous and prohibits men already married to one wife from marrying again, unless first obtaining a legal divorce. However, this ordinance is in direct contradiction with many customary and religious practices, which allow multiple wives. Despite being illegal under civil law, under customary law, polygamy still widely exists. According to the 2005 CEDAW Committee recommendation, religion, tradition, and agricultural factors appear to be the reasons for the prolongation of polygamy in Ghana, where an estimated 22% of women are in polygamous relationships. Most women forced into polygamous marriages come from impoverished backgrounds. Once married, they continue to live in poverty and are treated as nothing more than "child-bearing" property, thus perpetuating the cycle of oppression.

## Domestic Violence Continues to Plague the Nation

Despite an increase in the number and activities of women's rights advocacy groups and the 2007 passage of the Domestic

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Violence Act, domestic abuse in Ghana continues to plague the nation. Historically, domestic violence has been seen as a “private” matter, which may explain why women have been reluctant to report such incidents of abuse and why police have failed to adequately address them. In this largely male-dominated society, it is not uncommon for a man to not only beat his wife, but to believe he has the right to do so. In fact, § 42(g) of Ghana’s 1960 Criminal Code, which preceded the Domestic Violence Act, gave merit to such a proposition. Taken from the British colonial criminal code, § 42(g) allowed the use of force against a spouse, on the basis that “consent” is given upon marriage.

Because this archaic belief has been engrained into Ghanaian culture for so long, domestic violence continues to haunt the country. Fortunately, Ghana’s government realized domestic violence was an issue worth addressing and took measures to codify an act making domestic abuse a crime. Unfortunately, domestic abuse laws continue to be inadequately enforced, and many women remain unaware of their rights. To the extent women are aware of the protections afforded to them, they are afraid to come forward to authorities for fear of further abuse or of being ostracized by their families.

As with any issue, proper recognition of the domestic abuse problem is the first place to start. Thanks to the plethora of advocacy groups educating and empowering women throughout Ghana, combating domestic abuse continues to be at the forefront of both the social and political agendas. Such advocacy led to the creation of the Domestic Violence and Victim Support Unit in Ghana’s Police Service, which has better enabled police to respond to reports of domestic violence.

## Illegal Cultural Practices Driven Underground

Under the Criminal Code Amendment Act of 1994, Ghana became the first African country to criminalize female genital mutilation (FGM), which primarily existed in the Northern Region of the country. Nevertheless, the pressure to conform to societal norms has perpetuated the practice, widely believed necessary to instill femininity and modesty into young women and prepare them for adulthood and marriage. A 1998 study by Rural Help Integrated (cited in a report by the US Department of State in 2006) found that FGM had been performed on 36% of the Upper East Region female population and estimated that 9% to 12% of women nationwide have undergone the practice. According to a 2005 study conducted by the Ghana Ministry of

Health, the percentage of women in the Upper East and Upper West Regions who have undergone FGM has fallen to 15%. Similarly, a 2005 UNICEF report has estimated the nationwide percentage of females undergoing FGM has also fallen. The more recent reports appear to indicate that government-sponsored awareness campaigns have successfully driven down the practice, but some observers believe the campaigns have simply driven the practice underground, thus artificially deflating the statistics.

## Explaining the Unexplainable

In the Northern, Upper East, and Upper West Regions of Ghana, the belief in witchcraft remains alive and well. Despite widespread Christian and Muslim beliefs, the modern views of which discount its existence, witchcraft is thought to be the cause of bad fortune, including drought, sickness, financial misfortune, and even death. The punishment for witchcraft—banishment. Women accused of practicing witchcraft are plucked from their communities and banished to northern “witch camps,” where they are subject to deplorable living conditions. In 2003, Ghana’s Commission on Human Rights and Administrative Justice estimated that more than 1,000 women were living at the country’s four northern witch camps.

The Ghana government continues to investigate and charge persons who commit acts of violence against those accused of being witches and has refrained from charging people based solely on allegations of witchcraft. Despite their effort, violence against “witches” persists. Under Ghana’s constitution, people do not have the right to accuse someone of witchcraft because they cannot prove it in a court of law. Nonetheless, most women banished to witch camps are afraid to return home for fear of humiliation, discrimination, and even death.

In December 2010, a 72-year-old woman found wandering from home was unable to explain her whereabouts. After being forced to confess to witchcraft, the woman was doused with kerosene and set ablaze by matches. The five people responsible, including an evangelical minister, claimed the elderly woman’s death was the result of an attempted exorcism gone wrong. The most likely cause of 72-year-old’s confusion was dementia. But in a country that lags behind in medical advancements, witchcraft remains the only way to explain the unexplainable, thus leaving the most helpless individuals the most susceptible to injustice. Some advocates believe that criminalizing accusations of witchcraft would be a means to stop the



inhuman attitude displayed toward these women. Nevertheless, until Ghana's citizenry is educated about the medical conditions afflicting certain individuals and the elderly, the belief in witchcraft and the atrocities committed against alleged witches are destined to continue.

### Women in Power—A Shift in Attitude

In a country that believes the rule of law is supreme, male dominated societal norms continue to out-shadow laws protecting women's rights. As mentioned, the problem in Ghana is not with formulating laws, but rather with enforcing them. Some observers suggest this problem would be solved if more women occupied positions of power in Ghana, but historically women have been dissuaded from holding such positions. Even though there is an effort to use the quota system to create a balance in the proportion of women and men in the assemblies, there is still low representation of

women in decision-making positions at district, regional, and national levels. And, despite women constituting over 51% of Ghana's total population, women occupy a mere 19 out of the 230 seats available in the national parliament ([www.modernghana.com/news/267771/1/gender-equality-and-womens-rights.html](http://www.modernghana.com/news/267771/1/gender-equality-and-womens-rights.html)).

Ghanaians must overcome the taboos surrounding females holding positions of power. They must allow women to influence national decision making to overcome gender biases and the continued discrimination against, and oppression of, women in Ghana. No longer should Ghanaian women or Ghanaian society in general accept antiquated beliefs, such as the notion that a woman is a man's property to do with as he wishes. But change takes time. The good news is that Ghana seems to be moving in the right direction. The laws are on the books; now it is just time for Ghana to enforce them. ♦

## **A** Alfa Fellowship Program

Alfa-Bank, Cultural Vistas (formerly AIPT-CDS) and Oxford University are pleased to announce a call for applications for the Alfa Fellowship Program's 2012-13 Fellows. Now entering its eighth year, the Alfa Fellowship Program is a professional-level exchange designed to foster a new generation of American and British leaders with meaningful professional experience in Russia.

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Applications must be received no later than **December 1**. Program information and the online application can be found at: [www.cdsintl.org/alfa](http://www.cdsintl.org/alfa)

For more information, please contact:  
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T: 212.497.3510 | F: 212.497.3587 | E: [alfa@cdsintl.org](mailto:alfa@cdsintl.org) | [www.culturalvistas.org](http://www.culturalvistas.org)

## The Robert Bosch Foundation Fellowship Program

### FOSTERING A COMMUNITY OF TRANSATLANTIC LEADERS

The Robert Bosch Stiftung and Cultural Vistas invite U.S. professionals to apply for the 2012-2013 Robert Bosch Foundation Fellowship Program. Twenty Fellows will complete a nine-month program consisting of two high-level work phases in major German institutions and three professional seminars throughout Europe. Bosch Fellows meet with key decision-makers in the public and private sectors, thereby strengthening their understanding of issues facing Germany, the EU and the transatlantic relationship today.

German language skills are not required at the time of application. Intensive language training is provided as needed in the U.S. and Germany prior to the program year. Fellows receive a generous compensation package including a monthly stipend, health insurance, and all program-related travel expenses.

Candidates should be U.S. citizens between the ages of 23 and 34 with professional experience in one of the following fields: business administration, economics, law, public policy, or journalism/mass communications.

Applications must be received no later than **October 15, 2011** for the program beginning in September 2012. Program information and the online application can be found at: [www.cdsintl.org/bosch](http://www.cdsintl.org/bosch). For further information, please contact us at [bosch@cdsintl.org](mailto:bosch@cdsintl.org) or (212) 497-3527.

# THE RULE OF LAW

## Combating the Rape Crisis in War-Torn Eastern Congo Reflections on ABA ROLI Efforts

By Michael Maya

That tens of millions of people perished in the former Soviet Union under Stalin and in China under Mao is both staggering and well known. Less well known is the scale of suffering endured by the Congolese people over the last 100 years as a result of a succession of rapacious rulers and, more recently, an ongoing conflict in mineral-rich eastern Congo that is an outgrowth of the 1994 genocide in neighboring Rwanda. The American Bar Association Rule of Law Initiative's (ABA ROLI) efforts to address one of the most sinister features of this conflict—the use of rape as a weapon of war—will be described below. But first, here is some brief background on Congo, the site of the single deadliest conflict since World War II.

Perhaps the most compelling book written about Congo is Adam Hochschild's *King Leopold's Ghost*, which describes the king's rule over Congo, first as his personal domain in the late 1800s/early 1900s, and later as a colony under the auspices of the Belgian government. The book describes one of the ugliest chapters in the history of Africa's colonization, with Hochschild marshalling credible evidence that 10 million Congolese perished as a result of disease, executions, and sheer overwork, particularly among those conscripted to work in the dreaded rubber industry. The Rwandan genocide, which claimed the lives of 800,000 Tutsis and moderate Hutus in 1994, marked the beginning of another—and ongoing—tragedy in Congo. Roughly 5.4 million Congolese are believed to have perished as a result of conflict that erupted in the wake of that genocide.

A main driver of the ongoing conflict is the rush to exploit Eastern Congo's vast mineral wealth or "blood minerals," with various militias, rebel groups, businessmen, and even the Congolese army competing for control over mines that yield huge profits. One of the most valuable minerals is coltan, which is used in an array of consumer electronics, including cell phones and laptops. Congo is thought to possess 64% to 80% of the world's coltan reserves, much of it finding its way to electronics factories in China.

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The scale of Congo's rape epidemic is arguably without rival in modern history. The United Nations estimates that roughly 500,000 persons have been raped or subjected to sexual violence since 1996, earning Congo the unfortunate title "the most dangerous place on earth to be a woman." Boys and men are also targeted. Regardless of the victim's gender, rape is used as a weapon of war. It has proven to be remarkably effective, destroying not only the lives of its victims, but also their families and sometimes entire villages. Particularly in the case of girls and women, rape survivors are frequently rejected by their families and communities.

Rapes in Congo are remarkable for their brutality—even by war-time standards. Many survivors are maimed for life as a result of sadistic acts that accompany the rapes. Initially, rapes were almost entirely restricted to conflict zones and committed by armed combatants. With each passing year, however, more and more rapes are being committed by civilians, some of whom are former soldiers who continue to rape upon returning to their villages and cities as non-combatants. Another disturbing trend is that the average age of rape victims appears to be dropping. Rapes of girls as young as two and three are not unheard of. Rapes of girls between the ages of 8 and 13 are extremely common.

The epicenter of the rape epidemic is North and South Kivu provinces. Each time I have visited there over the last two years, I have traveled by car from either Kigali, Rwanda, or Bujumbura, Burundi. Almost everyone who travels either route remarks, almost sheepishly, about the breathtaking beauty of the region, and Congo in particular. On some level, people feel discomfort at deriving pleasure from being in such a magnificent and seemingly serene setting when it is well known that rapes and killings regularly occur just a few dozen kilometers from the relative safety and beauty of Goma and Bukavu, the provincial capitals of North and South Kivu. ABA ROLI maintains offices in both those and other cities, along with the UN and countless nongovernmental organizations (NGOs) that provide humanitarian relief and other assistance.

The first of my four trips to Congo—a visit to ABA ROLI's Goma office in early 2009—remains the most haunting. One of



my first stops was at HEAL Africa Hospital, on whose premises ABA ROLI maintains a State Department–funded legal clinic that provides legal and psychological assistance to rape victims. There, I met with several of ABA ROLI's clients, rape survivors in their teens and 20s, but some as young as eight. Remarkably, many of these rape survivors were intent on prosecuting their assailants despite the risks and unwanted attention associated with testifying in a court case. Others looked decimated and were unable to make eye contact. I wondered if they would be willing to subject themselves to a formal court proceeding, assuming their perpetrator could be identified. In many cases, even if survivors are willing to pursue justice, their perpetrators can't be apprehended. Many rapes are committed by combatants who enter villages either alone or in roving bands, and quickly retreat into the dense forest that covers much of eastern Congo, never to be seen again.

A visit to a refugee camp outside Goma, like my visit to HEAL Africa Hospital, also left its mark on me, as did a visit to the Goma prison. At the refugee camp, thousands of people lived smashed next to each other in UN-issued tents in an area the size of several football fields. We were told that rapes committed in this and other refugee

camps were not uncommon. The only thing worse than the camps, of course, was being back in the still insecure village from which the refugees had fled.

Goma's desperately overcrowded prison had a menacing look to it from a distance, with its façade blackened by a recent, fiery riot. The warden invited me and my Goma-based colleague, a Cameroonian country director who helped launch our program in 2008, to visit the quarters that housed roughly 25 female prisoners. They ranged in age from about 14 to 60 years. The youngest explained she was there for stealing. The oldest stated she had murdered her husband. As we were exiting the prison, we walked by a large enclosed courtyard filled with hooting and hollering young boys and men. They insisted that we come into their quarters for a visit. The warden could not ensure our safety and we declined the invitation. A few weeks after our prison visit, another riot erupted. The male inmates burst into the women's section of the prison and reportedly raped all of the female prisoners with whom we had met.

Despair is understandably rampant in eastern Congo after years of seemingly never-ending conflict and unimaginable levels of sexual and gender-based violence. In 2008, the number

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of prosecutions of combatants or civilians who committed rape was inconsequential; it was understood by victims, rapists, and would-be rapists alike that there were effectively no consequences for committing acts of sexual violence. Further, there was no meaningful plan in place to bring an end to impunity. When ABA ROLI initially met with the judges, prosecutors, and police to discuss possible collaboration, over and over again they told us the same thing, such as “until the war, rape was not part of our culture” or “rape is not part of who we are and it must stop.” We were left with little doubt about whether there was sufficient will to tackle the rape epidemic.

Since 2008, ROLI has worked hand in hand with Congolese justice sector actors and NGOs to mount a successful campaign against impunity for rape. Working with partner NGOs and the legal community, ABA ROLI’s staff in Goma and Butembo in North Kivu, in Bukavu in South Kivu, and in five cities throughout neighboring Maniema province have helped file over 2,800 complaints with the police for rape. Of these, 645 have thus far gone to trial, resulting in 434 convictions. Prison sentences have ranged from 5 to 20 years. Through radio programs, public service announcements, billboards, word of mouth, and ABA ROLI’s travels to remote villages, large numbers of Congolese, including would-be rapists, now understand that there *are* consequences for rape. Further, these same channels of communication have also educated people about the fact that ABA ROLI provides psychological counseling to rape survivors and their families, part of its multidisciplinary approach to the rape crisis. Without such counseling, many survivors have remarked that they would not have been able or willing to testify against their perpetrator in open court.

One of the most effective aspects of ABA ROLI’s efforts to combat impunity has been its “mobile court” program in South Kivu and Maniema provinces. Because much of eastern Congo lacks roads and adequate transportation, it is almost always impracticable and sometimes impossible for a rape survivor to travel for days to attend a trial in one of the few cities with a courthouse. Congolese law allows for teams of justice sector actors to travel to remote villages and establish temporary courts, often for two weeks. Mobile court trials are typically held outdoors, under a tent, often with hundreds of onlookers from surrounding villages.

Although mobile courts that ABA ROLI has facilitated handle both rape and non-rape cases, preference is given to rape cases. In May 2010, a team of us observed a military mobile court trial in Idjwi, a small island in Lake Kivu that had never before seen a judicial proceeding. I was accompanied by ABA ROLI colleagues from our Bukavu office and representatives

from Soros’ Open Society Justice Initiative (New York) and the Open Society Initiative for Southern Africa (Johannesburg), which funds ABA ROLI’s mobile court project in South Kivu. Despite the heat, villagers stood attentively for hours under the hot sun while lawyers and prosecutors presented their cases and rape survivors, defendants, and witnesses provided testimony. One case involved the rape of a three-year-old girl. The girl stood, distracted, by her mother’s side as she made an impassioned plea to the court that it find the defendant, a member of the Congolese army, guilty of raping her daughter. The court sentenced him to 15 years in prison.

In February 2011, a mobile court that ABA ROLI facilitated along with the UN and other partners convicted several members of the Congolese army for raping over 50 girls and women in the village of Fizi during a New Year’s Day rampage. What made this mobile court remarkable was that four high-level officers, including Lieutenant Colonel Kibibi Mutware, were among those convicted. They received 20-year sentences, while soldiers who reported to them received 10- to 15-year sentences. Word spread quickly about these unprecedented convictions throughout eastern Congo and, as a result of robust media coverage, internationally as well; this time, it wasn’t only the “small fish” who were made to answer for their horrible acts.

In conclusion, there is reason to be hopeful that the tide is turning with regard to impunity for rape in eastern Congo. There is little doubt that the decision to invest in the justice sector in eastern Congo as a means of combating impunity has been a very sound one. A more robust commitment by donors and implementers alike will be needed to provide the training and resources needed to make impunity a thing of the past. Continued leadership by US Secretary of State Hillary Clinton and UN Secretary-General’s Special Representative on Sexual Violence in Conflict Margot Wallstrom will also be critical to ensuring that Congo’s rape crisis and the broader conflict get the attention a tragedy of this magnitude deserves.

Finally, ABA ROLI wishes to acknowledge the following donors, all of whom currently support ABA ROLI’s rape prosecution efforts in eastern Congo: Dutch Government, MacArthur Foundation, Norwegian Government, Open Society Initiative for Southern Africa, State Department (Bureau of International Narcotics and Law Enforcement and Bureau of Democracy, Rights and Labor), and the US Agency for International Development. Their commitment to ending Congo’s rape crisis and their generosity have made an incalculable impact, empowering ABA ROLI’s Congolese partners to combat the rape epidemic this conflict has spawned. ♦



# The Rule of Law in ASEAN

## Protection of Foreign Investment

By Kitsuron Sangsuvan

**F**oreign investment has an important role in today's global economy. Foreign investment promotes economic growth and creates jobs in developing countries. However, foreign firms are often concerned with the quality of domestic policies and the enforceability of laws in developing countries. Developing or host countries may not act fairly or impartially toward foreign investors; domestic courts may provide little value in the face of prejudice against foreigners or governmental interference in the judicial process. A number of new instruments in Southeast Asia now offer increased protection to outside investors. Some of the instruments may include bilateral investment treaties (BITs), free trade agreements (FTAs), and investment agreements.

The Association of Southeast Asian Nations (ASEAN) was established on August 8, 1967. It is a regional and economic organization of 10 countries in Southeast Asia. The member states are Brunei Darussalam, Cambodia, Indonesia, Lao, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam. The aims and purposes of ASEAN are to accelerate the economic growth, social progress, and cultural development in the region.

ASEAN members have also signed BITs to attract more foreign investment and promote the economic growth. ASEAN countries believe that BITs are a critical international legal mechanism for increasing and governing foreign investment, encouraging investment in member countries by providing enforceable rights and protection for foreign investors. BITs have also been proved useful in providing special benefits for developing countries and increasing economic growth. For example, Singapore entered into an FTA with the United States, which came into force in 2004. The US-Singapore FTA provides important protections for US investors: US investors will be treated the same as Singaporean investors.

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In 2007, ASEAN members agreed to establish the ASEAN Economic Community (AEC) by 2015 and to transform ASEAN into a region with free movement of goods, services, investment, labor, and freer flow of capital. The AEC blueprint encouraged member countries to create a free and open investment regime in the region through the ASEAN Investment Agreement. This would be an efficient way to enhance the AEC.

In 2009, ASEAN countries signed the ASEAN Comprehensive Investment Agreement (ACIA). The ACIA is the outcome of a consolidation and revision of two ASEAN Investment Agreements: the 1987 ASEAN Agreement for the Promotion and Protection of Investments and the 1998 Framework Agreement on the ASEAN Investment Area. The combination of the two agreements would increase intra-ASEAN investments and enhance ASEAN's competitiveness in attracting investment into ASEAN.

In general, the ACIA contains (1) provisions on liberalization, protection, facilitation, and promotion of investments, (2) benefits for foreign-owned ASEAN-based investors, (3) provisions on treatment standards, (4) provisions for a more liberal, facilitative, transparent, and competitive investment environment based on international best practices, and (5) provisions for investment disputes between an investor and a member state, transfer, and treatment of investments. Those provisions aim to increase investment protection and improve investors' confidence in investing in the region. They are also likely to encourage further development of intra-ASEAN investment, especially among multinational corporations based in ASEAN.

The ASEAN countries entered into BITs or FTAs with other countries as a single entity. In 2009, ASEAN countries signed the FTA with Australia and New Zealand. The FTA is called the Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area (AANZFTA).<sup>1</sup> The AANZFTA Agreement entered into force in 2010. It contains measures to improve business flows and promote cooperation in a broad range of economic areas of mutual interest. In an investment regime, the AANZFTA Agreement provides a regional legal framework for investments.

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It contains a range of investment provisions on protection and treatment standards. The agreement also provides Australia and New Zealand investors with access to binding investor-state arbitration procedures if an ASEAN member violates investment provisions.

The concept of the rule of law is not well defined and is difficult to understand. Different people define it differently, particularly when they come from the perspectives of different cultures and different languages. The analysis of the expression “rule of law” often starts with the formal and substantive concepts of the rule of law. The formal concept focuses on the existence of law and whether the law is clear and prospective. The substantive concept is concerned with the achievement of a particular substantive goal of the legal system and substantive outcome such as justice or fairness.

Based on those two concepts, the components of the rule of law consist of (1) governments and officials are under the law, (2) the law is clear, publicized, stable, and fair and protects fundamental rights, (3) the process by which the law is enacted, administered, and enforced is accessible, fair, and efficient, and (4) the law is upheld and gives access to justice.

The rule of law has a vital role in the ASEAN region. Another purpose of ASEAN is to promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region, and adherence to the principles of the UN Charter. The rule of law in the ASEAN region is designed to provide a stable and coherent framework for interstate relations among member states and to achieve effective implementation of the member states’ economic commitments. The rule of law in the ASEAN region also extends to other countries outside the region to maintain international peace and security and to comply with the principles of justice and international law.

Regarding investment, the rule of law ensures that ASEAN countries provide equal and efficient treatment and fairness in the application of law. It also guarantees an environment giving foreign investors the confidence and safety to invest in physical, industrial, and social infrastructure. This aims to increase economic growth and social development and lead to the efficient economic community.

Under BITs or investment treaties, ASEAN countries are obligated to provide protection for foreign investment and treatment that is not less favorable than investments of their own investors. BITs usually establish standards of

treatment that each signatory is legally bound to accord the other state party’s investors and investments. Provisions on the standard of treatment include (1) National Treatment, (2) Most Favored Nation Treatment, and (3) Fair and Equitable Treatment. In addition, BITs establish protection measures for foreign investment in host countries. Such provisions include (1) investor-state dispute settlement mechanism, (2) transfer and repatriation of capital, (3) transparent coverage on the expropriation and compensation, (4) full protection and security, (5) treatment of compensation for losses resulting from strife, and (6) investor-state dispute settlement.

A policy behind those provisions in BITs is the promotion of the rule of law. Investment protection and treatment standards are influenced and formulated by it. Provisions on investment protection and treatment standards then promote the ideal of the rule of law. Those provisions represent the ideas of coherence, justice, fairness, accountability, representation, correct use of procedure, predictability, and transparency. When those factors are present under the rule of law, parties under investment treaties can anticipate how to comply with the law and deal with foreign investment correctly.

The rule of law also allows foreign investors to anticipate the consequence of an action. Foreign firms will likely invest in host countries when they believe that the rule of law is followed through BITs. However, not all bilateral investment treaties are the same. The level of investment protection and treatment standards in one treaty may be different from that of other treaties. This difference may also affect the level of the rule of law because investment protection and treatment standards are formulated and connected to the rule of law. The greater the degree of protection and standard, the stronger the rule of law will be, and vice versa.

For example, if a BIT does not have a provision on Fair and Equitable Treatment and another BIT has it, it is reasonable to assume that the level of the rule of law under the first BIT is not as strong as that of the second BIT. Thus, the rule of law depends on negotiations with a prospective treaty partner.

Because BITs or investment treaties contain provisions on investment protection and treatment standards, ASEAN countries must comply with the principles under investment treaties. In other words, ASEAN members must practice and regulate investment under the rule of law. With the clarity and consistency of the principles and application under investment treaties, ASEAN countries would increase their willingness and abilities to comply with the rules. Adherence to the



principles of investment protection and treatment standards would also promote the rule of law in the ASEAN region. Therefore, the rule of law is an important instrument for attracting foreign investment, raising foreign investors' confidence, and enhancing the economic community.

Although BITs or investment treaties offer protection and treatment standards to signatories, the principles are not universally applied to non-signatories. Rather, the obligation to provide investment protection and treatment standards is only stated and limited in BITs that are legally bound on the parties. Protection and standards are only beneficial to treaty signatories. ASEAN members can refuse to provide investment protection and treatment standards for other foreign firms or countries outside the relevant BITs. However, because the UN promotes the rule of law and good governance in member countries, ASEAN countries as the UN members tend to adapt their policies to apply the rule of law concepts universally.

Note, however, that some ASEAN countries adopt their

investment regulations giving investment protection and treatment standard to foreign investors without considering BITs. For instance, Indonesia's Investment Regulations, Law No. 26/2007, give legal certainty to foreign investors that their investment shall be protected and they shall receive equal treatment from the government regardless of their country of origin. All foreign firms investing in Indonesia will receive investment protection and will be treated as equally as all other firms.

In sum, even though the rule of law mainly focuses on human rights, corruption, or criminal law, the rule of law has a significant role in economic development in the ASEAN region. The rule of law is used to promote and protect foreign investment in the ASEAN region through BITs. Under the rule of law, the countries would deal with foreign investment correctly and fairly. Foreign investors can also anticipate the consequence of an action. More importantly, the rule of law is used to attract foreign investment, create investors' confidence, and enhance the AEC. ♦

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## SECTION NEWS

### INTERNATIONAL MODELS PROJECT ON WOMEN'S RIGHTS

The International Models Project on Women's Rights (IMPOWR) is an innovative initiative to establish a global collaborative database on women's rights under law. It promises to play a unique role in supporting the worldwide implementation of the principles underlying the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Among other objectives, IMPOWR aims to accomplish the following:

- Provide original, editable, searchable, and comparable content summarizing gender equality law reform and enforcement efforts on 40 specific topics in more than 185 countries
- Serve as a hub of links to numerous other databases, providing a uniquely comprehensive and navigable research tool for primary and secondary source materials on laws, legal resources, law reform projects, reports, and assessments of gender equality under the law around the world
- Showcase expert analyses of gender equality legal issues and models of law reform as expressed in original articles and presentations
- Link stakeholders, policymakers, legislators, jurists, financial institutions, nongovernmental organizations, not-for-profits, research institutions, project directors, law enforcement professionals, social workers, news organizations, legal experts, law schools, law students and volunteers around the globe in a powerfully informed community focused on promoting gender equality and development

IMPOWR was established by the ABA in 2008. The project is administered by the ABA Section of International Law and cosponsored by the ABA Commission on Women in the Profession, ABA Commission on Sexual Orientation and Gender Identity, and the ABA Section of Real Property, Trust & Estate Law. Initial funding of IMPOWR was provided through a grant by the ABA Enterprise Fund. For further information on IMPOWR, please visit [www.impowr.org](http://www.impowr.org). ♦

# THE RULE OF LAW

## The Relationship Between Transitional Justice and Security System Reform

By Alexandre Richelieu

**T**he security system is fundamental in any democracy for protecting the citizens' rights. Yet in post-conflict environments, the security system's members—comprising the police, military, secret police, intelligence agencies, armed rebel groups, and militia—are often the most responsible for serious and systematic human rights violations during conflict. Therefore, reforming the system to ensure security agents become protectors of the population and the rule of law is crucial, though political and security context may pose serious challenges to reform.

The objective of security system reform (SSR) is to contribute explicitly to the strengthening of good governance, democracy, the rule of law, the protection of human rights, and the efficient use of public resources. According to the international principles, SSR should aim for the following:

1. Establishment of effective governance, oversight, and accountability in the security system
2. Improved delivery of security and justice needs
3. Development of local leadership and ownership of reform processes
4. Sustainability of justice and security service delivery

The integrity of a security system refers to its adherence to the rule of law in the provision of safety and security. This goes beyond building the capacities of the security agency. Crucial elements for building the integrity of an institution will be establishing multiple, overlapping mechanisms and processes for accountability, based on international practices. Reforms within the institution will include developing professional standards and codes of conduct, accompanied by disciplinary measures to ensure

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adherence. The legitimacy of a security system refers to the level of civic trust it enjoys. A legacy of serious abuse fundamentally undermines the legitimacy of the security system. Building the integrity of the security system may not be sufficient in itself to overcome the fundamental crisis of trust that is characteristic of such a legacy.

Security institutions can only be successful if they are responsive to the security needs of the public and earn the confidence of the population by treating all citizens fairly and addressing their security concerns effectively. In addition, efforts to promote the legitimacy of the security system may include verbal or symbolic measures (such as memorials, apologies, and changing insignia) that reaffirm a commitment to overcoming the legacy of abuse, and an endorsement of democratic norms and values.

### The Concept of Transitional Justice

Part of the SSR process involves “a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice, and achieve reconciliation.” United Nations, [www.undp.org/cpr/we\\_do/trans\\_justice.shtml](http://www.undp.org/cpr/we_do/trans_justice.shtml). The UN defines this attempt as “transitional justice.”

Transitional justice aims to deal with the legacy of systematic and massive human rights abuse, recognizing victims, and contributing to the processes of peace-building and democratization. It is not in itself a special form of justice, but a set of approaches that seek to bring about justice in extraordinary conditions, usually in transitions from authoritarianism or violent conflict, to democracy and peace. A key element of transitional justice is placing the victim at the center: ensuring that the victims of oppression are recognized as such, and that they are empowered as full rights-bearing citizens and have their dignity restored to them. Transitional justice approaches include prosecutions, truth-seeking, reparations for victims, the reform of abusive institutions, and memorialization.

The different transitional justice approaches share the same goal, are interrelated, and should be designed to mutually reinforce one another. For example, recognizing



that it would be impossible to prosecute all those guilty of human rights violations during conflict, prosecutions will tend to focus only on those most responsible. Unlike courts of law, truth-seeking measures do not have the authority to impose sanctions on perpetrators. But truth is itself an aspect of justice. By investigating and publicizing events that took place, truth-seeking contributes to generating a common historical narrative. This is key for re-establishing trust between population groups, and between citizens and the state, but truth-seeking should not replace or prevent future prosecutions to sanction individuals. Similarly, the different processes should reinforce, and not replace, each other, and a holistic approach is likely to be most successful in meeting the justice needs of the population.

For example, a case study from Burundi showed that there were no linkages between SSR and the wider transitional justice programs in the country, nor any foreseen opportunity to create them. The successful prosecution of human rights abusers and other criminals, in addition to SSR, has been identified in case studies from Afghanistan and Democratic Republic of Congo as important elements in reform. In Timor-Leste, case studies have shown that truth-telling, prosecutions, and vetting processes must be supported by a long-term strategy to ensure the full implementation of the results of these processes. Without this long-term strategy and commitment, it is likely that these accountability measures will never be implemented.

### **Justice-Sensitive Approaches to SSR**

A justice-sensitive approach to SSR is an important component of transitional justice, particularly where security agents have committed human rights violations. This approach seeks to reform abusive public institutions in the security system by addressing the past record of the institution, as well as by holding individual perpetrators accountable rather than ignoring past abuse. It aims to make the institutions accountable to the population; protect (rather than abuse) citizens' rights; and defend (rather than threaten) the safety of citizens and vulnerable populations.

Reforming abusive institutions so that they are accountable to, and trusted by, the population transforms both the institution and the people, the latter thus becoming full rights-bearing citizens rather than victims of state oppression. A justice-sensitive approach to reform focuses on four main areas:

1. Building the integrity of the security system
2. Establishing effective accountability

3. Strengthening its legitimacy
4. Empowering citizens

Justice-sensitive approaches to SSR are not stand-alone projects, but rather should be an integral part of any transitional justice approach and of SSR projects seeking to establish effective and accountable public institutions. Reform of public institutions may also be a key enabling factor for other transitional justice measures: for example, spoilers within key public institutions may well be able to block efforts to establish the truth.

Furthermore, the empowerment of citizens is an integral component of a justice-sensitive approach to SSR. Victims of state repression or conflict-related violence and other marginalized or vulnerable groups must truly become citizens with rights, responsibilities, and needs that public institutions are called to serve. Emphasis must be placed on efforts to assist these victims to recognize themselves as rights-bearing citizens. These efforts include, among others, empowerment measures, public information campaigns, citizens' surveys to identify their security and justice needs, and training civil society organizations (CSOs) to monitor the security system.

Lastly, informal justice systems can be useful, even when they overlap with the formal system. For the most part, informal justice systems provide a modicum of justice and security to the population in areas where the formal system cannot. Improving the justice system should not simply mean creating a formal structure, as working with the informal structures is necessary to yield sustainable results.

### **Recommendations**

Recognizing that the rule of law offers an overall framework for guiding effective justice and security approaches, the UN can strengthen the linkages between these two sectors by the following approaches:

- SSR should be seen as part of a broader state-building approach. Emphasis should be put on ensuring cohesiveness between SSR and other transitional justice approaches. SSR projects should consider the entire system, including informal structures, relevant ministries, the current justice system, and disarmament, demobilization and reintegration processes.
- Perpetration of crime by security agents must be addressed with highest priority. The UN should encourage the prosecution of at least the most serious abusers, preferably through the domestic system.

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- The UN should support a justice-sensitive approach, ensuring that accountability for human rights violations is at the heart of SSR programs. This will include the design and implementation of vetting processes to remove human rights violators and other abusers from the security system. For sustainable reform, these efforts must be supplemented with the support of the development of internal disciplinary mechanisms and effective civilian oversight.
- Citizens must be empowered to hold public institutions to account. Creating or restoring civic trust in the institutions is fundamental for sustainable reform.

In addition, the following recommendations could improve implementation of SSR programming:

- Program design must be context-specific and informed by best practices and lessons learned. It should be based on recognition that reforming the security system in a post-conflict environment is both political and technical and demands a long-term strategy that is flexible enough to adapt to the changing environment. Commitment should be long term and response should be rapid.
- The national government should drive the SSR process and coordinate programs, but the UN (and other actors) must insist on principles such as accountability.
- The quality of programming could be improved by:

1. Rigorous screening and selection of international staff. International staff should be trained in transitional justice approaches and should have an adequate mission length.
2. All programs should be evaluated with the participation of civil society actors.
3. All programs should be gender-sensitive.
4. Security personnel and institutional reform specialists from former regimes or from regional partners may be more appropriate mentors than Europeans or North Americans.
5. Programs should ensure that different ethnic groups are equitably represented.


Given the current world events, transitional justice and security sector reform will continue to be an essential component of establishing the rule of law in developing nations. Support programs must be clearly designed and budgeted. Meanwhile, program designs must include sufficient flexibility to allow the implementers on the ground the flexibility they need to adjust to changing circumstances. Each nation's history and experience will also shape the transitional justice and security sector reform processes. Because the UN is strategically positioned to facilitate exchanges between the national government and regional partners where relevant, it should endeavor to improve coordination between international actors and support the coordination between the governments and international community. ♦

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## SECTION NEWS

### TASK FORCE ON FINANCIAL ENGINEERING FOR ECONOMIC DEVELOPMENT

The purpose of the ABA Section of International Law's Task Force on Financial Engineering for Economic Development (FEED) is to assist emerging economies in developing a framework for functioning capital markets. Members of FEED have a wealth of knowledge with regard to financial markets and risk management and include lawyers with experience in Canada, Hong Kong, Italy, Nigeria, the United Kingdom, and the United States. Drawing from its international members with combined decades of experience, FEED provides the know-how on legal and regulatory frameworks for capital markets, sharing best practices and lessons learned. Emerging-markets officials and regulators consult directly with FEED members and can request both in-person and online training. Furthermore, FEED can coordinate similar assistance to officials in the US government, United Nations, and other multinational organizations that are working on these issues. For more information on FEED, please visit [ambar.org/FEED](http://ambar.org/FEED). ♦



## Reverse Mergers and Takeovers Follow the Money or Follow the Law?

By Adedayo Banwo

**T**he rule of law, as generally conceptualized, focuses on the impartial exercise of power by the state. Accordingly and within that context, certain functions are crucial, namely an independent judiciary and legal profession. Another, often less discussed, key aspect of the rule of law is widespread acceptance or submission to laws. As discussed in the Council of the International Bar Association's 2009 resolution on the rule of law, acceptance "must be supplemented by enforcement. Acceptance of the law is irrevocable with extensive tolerance of breaches of the laws."

Therefore, according to generally accepted conceptions of what the rule of law means, in order to ensure compliance with laws, governments must impartially enforce them. Where there is weak enforcement, weak acceptance and compliance will follow.

In many frontier and emerging economies, there can be a tension between enforcement and acceptance on one hand and liberalization and increased investment on the other. For example, over the past 10 years Indonesia deregulated the banking sector, and foreign banks responded by expanding dramatically. According to Bain & Co., total loans in Indonesia grew an average of 20% a year between 2005 and 2010, and in certain sectors growth is even stronger. Now in the face of recent scandals, including charges that a private wealth manager from a prominent international bank stole money from clients and that many banks hired criminals to collect debts, Indonesia is trying to crack down and institute stronger oversight laws. Hardly any of the scandals involved specific activities that were deregulated, but there is a perception that weak regulation led banks and related associates to ignore other existing laws.

If these perceptions are empirically supported, there are potential implications for more robust markets given

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the increasing links between investors in markets where there is widespread acceptance, enforcement, and compliance with robust regulatory regimes and other markets where there is liberalization and where enforcement and acceptance are lax. Namely, does the direction of investment to weaker markets weaken the more robust markets? If so, do legal practitioners share any responsibility in the facilitation of these types of investments?

This article will explore these issues in the context of reverse mergers or reverse takeovers (RTOs). These types of securities transactions provide a useful context to explore these issues because they involve connecting investors, companies, and capital from different types of regulatory and enforcement regimes.

### Reverse Mergers or RTOs

Strong regulations do not always amount to strong regulatory regimes. This is especially true in developing or emerging economies. Nearly all economies have financial regulators and financial regulations, but some lack the capacity to regulate companies, capital markets, and massive inflows of capital effectively. As a result, fraud becomes more common as many companies simply ignore compliance mandates. This ends up damaging the overall investment climate with even established, reputable companies finding it difficult to attract adequate investment.

In recent years, a sophisticated type of financial transaction has developed that seemingly solves this issue by combining the best of both worlds—merging resource rich economies with the strong rule of law and investor protections of established financial markets. But does this hybrid system work? Does it end up strengthening regulatory regimes in lax markets or weakening those in strong markets?

The type of transaction involved is commonly known as an RTO. Many privately owned foreign companies (mainly in emerging markets), with primarily overseas assets and businesses, have long sought to access established capital markets in the United States and the UK through RTOs. The number of RTOs has been on the upswing in recent years as wealthy investors increase their appetite for

# THE RULE OF LAW

investments in emerging markets. In recent months, however, regulators on both sides of the Atlantic have become increasingly concerned, expressing alarm about the potential for regulatory arbitrage and abuse.

Additionally, a new type of investor seeking to take advantage of weaknesses in home-country regulation, governance, and disclosure practices has emerged to exploit and weaken the RTO model. As RTOs increase, the roles of lawyers and accountants as well as increased regulatory scrutiny, both in destination capital markets and in home jurisdictions, will be extremely important to ensure the sustainability of these types of transactions.

In a reverse merger or RTO, a publicly traded shell company is acquired by a private operating company, usually via a share exchange with the shareholders of the operating company receiving a majority of the shares of the public shell company. The public shell company survives, but is controlled by the private operating company, and the assets and operations of the shell company will normally derive from those of the private operating company.

Companies pursue RTOs for a variety of reasons, but primarily for decreased regulatory and transactional costs. RTOs are viewed as a way for a company to go public without formally undertaking an initial public offering. Furthermore, there are no registration requirements under the Securities Act of 1933. The new RTO company must file a Form 8-K (report filed with the Securities and Exchange Commission (SEC) to announce major events that shareholders should know about) regarding the reverse merger but is not required to file a full-blown S-1 prospectus (filing used by public companies to register their securities).

If a public shell company is traded on the over-the-counter (OTC) market, the newly acquired company may be able to continue trading on the OTC market without even having to file an updated Form 211 (representing that a firm has satisfied all applicable requirements of the SEC) with the Financial Industry Regulatory Authority. In this case, the public shell OTC-traded company may also not be a reporting company under the Exchange Act of 1934.

## Increased Scrutiny

What does all this mean? Simply put, RTO companies can enter established capital markets with much less scrutiny than companies undertaking traditional IPOs, and other ongoing disclosure and reporting may not be as transparent as more traditional public companies. These issues have generated a lot of scrutiny recently as a result of the

SEC's June Investor Bulletin, which highlighted some of the risks in investing in RTOs. Additionally, many new investment firms have started publicly criticizing RTO companies by marketing research reports alleging they have faulty practices.

The debate concerning reverse mergers has become increasingly acrimonious as some lawyers and accountants allege that many of these new investment companies are spreading false rumors to bolster short positions held in underlying RTO stocks.

One RTO company, Sino-Forest Corporation, a Chinese forestry company listed on the Toronto Stock Exchange, has become a lightning rod of the RTO debate. One of the most prominent of the new anti-RTO investment companies, Muddy Waters Research, has continually attacked Sino-Forest (among other companies) while also admitting it holds a short position in the underlying stock. Despite having a roster of preeminent investors, since the Muddy Waters report, Sino-Forest's stock has fallen dramatically. Sino-Forest has aggressively denied the allegations, released evidence to respond to the attacks, and threatened legal action against Muddy Waters Research.

The head of Muddy Waters Research, Carson Block, a former corporate lawyer, is unrepentant. He helped kick-start the emergence of these investment-cum-"research" companies by successfully shorting other Chinese RTO companies after releasing scathing research reports. Block alleges that Sino-Forest is "aggressively committing fraud." The Ontario Securities Commission has opened an investigation and famed hedge fund investor John Paulson recently exited his investment in Sino-Forest, selling shares at a lost estimated over \$500 million.

## Better Governance and Accounting

Although the true state of RTO companies is subject to debate, there clearly are improvements that can be made in overall corporate governance and accounting.

The Financial Reporting Council (FRC), an independent UK regulator responsible for the UK Corporate Governance Code, has recently expressed concern regarding governance of RTO companies after the recent IPO in London of Vallares, a large cash shell being backed by Nathaniel Rothschild and former BP CEO Tony Hayward. Vallares is expected to enter into an RTO.

The FRC is concerned about the protection of minority shareholders. The Corporate Governance Code depends on a diverse and diffused shareholder base to be effective,



and in many RTO companies main shareholders often act primarily in the interest of the private operating companies and or controlling interests. Some critics have argued that this creates a lack of true corporate governance and risks damaging the brand of capital markets like London that have traditionally been thought of as being safer for minority investors than other, less-developed markets. Some have advocated for the UK Financial Services Authority to consider putting in place stricter governance rules for overseas companies that invest in RTOs.

Another area where the influx of RTOs has highlighted room for improvement deals with accounting standards. The US Public Company Accounting Oversight Board recently held a public meeting to consider issuing for public comment a concept release on changing the form of auditor reports regarding audited company financial statements.

The RTO debate has highlighted the fact that audit opinions often lack detailed information about the companies being audited. Many expect the board to consider requiring auditors to disclose aspects of companies' businesses that they could not audit effectively or areas where fraud is more likely than others. Other ideas include requiring auditors to disclose company risks in their audit opinion and having the lead audit partner personally sign the opinion letter. Changes like these, advocates for reform argue, would tell investors more about the information and challenges auditors faced when performing an audit and providing opinions.

#### **Increased Diligence**

Given the increased scrutiny, legal practitioners will have to be vigilant with respect to diligence for not only public

shell companies, but also the private operating companies that buttress the public company RTO. Investors and regulators increasingly expect more from both auditors and lawyers, namely for them to be more forthright and cautious regarding the risks and challenges in bringing these companies into established capital markets.

In addition to better governance and accounting standards, another way to improve the transparency of RTO transactions is to work with the home country regulators of RTO companies to develop stronger regulatory regimes on the front end. Organizations such as the ABA sponsor committees and task forces that work on these issues.

The rule of law is not a primarily theoretical and academic pursuit. It is (or it should be) the concern of everyday practitioners as they negotiate transactions for their clients. There must be respect given to regulatory regimes, even where regulators do not have the muscle and framework to back them up. While service to clients is important and some would say foremost, duty to the law should also be a guiding light to those who navigate regulatory waters for clients.

In the short term, lawyers and accountants can work with RTOs to build stronger governance and accounting standards on the front end with the private operating company sponsors. Although this would, in many instances, increase transaction costs, negating one of the key motivations for undergoing a RTO in the first place. It would also improve markets worldwide, building greater acceptance for the rule of law and potentially leading to stronger enforcement, helping to ensure that RTOs ultimately contribute to development in their home markets. ♦

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## **SECTION NEWS**

### **INTERNATIONAL TASK FORCES AND SPECIAL PROJECTS**

The Section of International Law created a variety of task forces and special projects that focus on current international legal and rule of law issues. Task forces produce programming, listserv communications and discussions, ABA policy recommendations, and publications and often collaborate with other bar associations or ABA entities. Some of the Section's task forces and special projects are the International Intellectual Property Rights Advisory Program, International Models Project on Women's Rights (see page 17), Task Force on Financial Engineering for Economic Development (see page 20), Task Force on Haiti, Task Force on Legal Empowerment of the Poor, and Trial Observation Task Force.

**FOR INFORMATION ON ALL THE SECTION'S INTERNATIONAL TASK FORCES, PROJECTS, AND INITIATIVES, VISIT**

**[ambar.org/introl](http://ambar.org/introl)**

# THE RULE OF LAW

## Trial by Jury and the Rule of Law in Russia

By Thomas Firestone

The reintroduction of jury trials, which had a rich history in Russia between 1864 and 1917, has been one of the most significant legal reforms in post-Soviet Russia. Established on an experimental basis in nine regions in 1993, trial by jury for certain serious crimes, including murder and rape with aggravating circumstances, was expanded throughout the entire country in 2002 by a new Code of Criminal Procedure. Now, almost 10 years later, many experts believe that trial by jury in Russia has failed to live up to expectations and cite the small number of jury trials (approximately 600 a year), allegations of corruption and intimidation of jurors, apparently inexplicable verdicts in certain high-profile trials, and the frequency with which jury acquittals are reversed by higher courts (a phenomenon which has frequently resulted in defendants spending several years in pretrial detention despite being acquitted of the same crime in multiple trials).

While there is clearly some validity to these arguments, they fail to take into account the vital contributions that trial by jury has made in reforming the Russian legal system. This article highlights three benefits sometimes omitted in Western analyses of the contemporary Russian jury system: jury trials (1) deter fabricated prosecutions, (2) force both prosecutors and defense lawyers to prepare more thoroughly, and (3) educate jurors about the legal system.

### Deterrence of Fabricated Prosecutions

The proliferation of fabricated prosecutions, or “commissioned cases” (*zakaznye dyela*), in which a party procures a criminal prosecution of a business competitor or political opponent through bribery of prosecutors or the exercise of political influence over them, is one of the most pernicious forms of corruption in contemporary Russia. This problem is so widespread that in 2006, Prosecutor General Yuri Chaika acknowledged the large number of prosecutions

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lacking a solid evidentiary basis and promised a thorough review of such dubious cases. (No results were ever announced.) In 2008, President Dmitry Medvedev called on law enforcement to stop “terrorizing” business through “attacks” motivated by commercial objectives. Then in 2009, Prime Minister Vladimir Putin conceded that the majority of regulatory inspections of businesses (often the first stage of a criminal case) were likely “commissioned.” Despite recognition of this problem at high levels, the government has yet to develop an effective solution.

In the Federalist Papers, Alexander Hamilton described trial by jury as a defense against “arbitrary impeachments, arbitrary methods of prosecuting pretended offenses, and arbitrary punishments upon arbitrary convictions.” Though the context was obviously different, the problem with which he was concerned—criminal cases fabricated for improper purposes—is essentially the same one that plagues Russia today. And recent Russian experience suggests that just as trial by jury served as a deterrent to such practices in America, it can have the same effect in Russia. Analysis of verdicts indicates that Russian juries are much harder to convince than judges. For example, while the conviction rate in bench trials is approximately 99%, the conviction rate in jury trials is only 80% (despite the fact that only a majority vote is needed to convict). This makes commissioning a criminal prosecution in a case that is jury-eligible a risky investment. As one former investigator bluntly wrote on a Russian blog, “commissioned cases fall apart in jury trials.” Thus, expanding trial by jury to other classes of criminal cases may be a solution to the problem of fabricated prosecutions.

### Better Lawyering on Both Sides

Anyone who has ever tried a case before a jury is aware of the preparation and attention to detail that it requires. The habits developed in working on jury trials typically carry over into other aspects of the lawyer’s work, producing an improved quality of work across the board. This same effect seems to be appearing in Russia. Given that it is so much harder to obtain a conviction in a jury trial than in a bench trial, it is not surprising that Russian prosecutors work harder on jury trials. For example, in one academic survey



of Russian prosecutors, 100% of those questioned said that they believe that jury trials require special trial techniques, 98% said that they require special pretrial preparation, 88% said that they require special techniques for questioning witnesses in court, and 76% said that they require special techniques in the presentation of physical evidence at trial.

More thorough preparation by prosecutors naturally tends to generate better preparation by defense lawyers. In a parallel survey of defense lawyers, 98% of those questioned said that jury trials require special trial techniques, 88% said that they require special pretrial preparation, and 78% said that they require special techniques in the presentation of physical evidence at trial. Not surprisingly, Russian judges say that when prosecutors and defense lawyers are better prepared, it helps them to rule more appropriately, thus improving the overall quality of the judicial system.

#### A “School for Democracy”

But perhaps the greatest benefit of trial by jury lies in the effect that it has on citizens who serve as jurors. Alexis de Tocqueville described jury service as a school for democracy, noting that it “help[s] to instill in the minds of all the citizens something of the mental habits of judges, which are exactly those which best prepare a people to be free.” De Tocqueville further wrote:

The jury contributes powerfully to form the judgment and to increase the natural intelligence of a people; and this, in my opinion, is its greatest advantage. It may be regarded as a gratuitous public school, ever open, in which every juror learns his rights, enters into daily communication with the most learned and enlightened members of the upper classes, and becomes practically acquainted with the laws, which are brought within the reach of his capacity by the efforts of the bar, the advice of the judge, and even the passions of the parties. . . . I do not know whether the jury is useful to those who have lawsuits, but I am certain it is highly beneficial to those who judge them; and I look upon it as one of the most efficacious means for the education of the people which society can employ.

Thus, de Tocqueville concluded that “the practical intelligence and political good sense of the Americans are mainly attributable to the long use that they have made of the jury in civil causes.”

Jury service appears to be having a similar beneficial effect in contemporary Russia. For example, in 2008, feeling that they were all that had protected a businessman from wrongful conviction in a commissioned prosecution, a group of former jurors formed an association to lobby for legal reform. The “jurors’ club” that they formed fought (unsuccessfully) against a 2008 amendment to the Code of Criminal Procedure removing certain offenses, including terrorism and espionage, from the list of jury-eligible offenses. It also maintains a website, [www.juryclub.ru](http://www.juryclub.ru), which facilitates open discussion of problems in the Russian legal system. The website includes a “hotline” where people can pose legal questions to experts, a forum for discussion of issues relating to jury trials such as ways to prevent jury tampering and manipulation, videos in which former jurors talk about their experiences, instructions about what to do upon receipt of a jury summons, and the latest news about significant trials.

Academic research also confirms the positive effects of jury service on citizens. For example, in a study of 100 jurors conducted by the Russian Academy of Sciences, respondents repeatedly indicated that the most important result of jury service for them was the development of a sense of responsibility for the fate of another person. The study also revealed an increased respect for the basic elements of the rule of law and the presumption of innocence.

Of those surveyed, 82% indicated that their knowledge and understanding of the legal system had improved as a result of jury service, 78% said that their impression of the Russian legal system had improved as a result of their jury experience, 65% responded that they would like to serve as jurors again, 51% indicated that they think trial by jury should be extended to other classes of crimes, and 85% said that they believe that it is better to let a criminal go free than to convict an innocent person.

Similarly, a survey conducted by the Center for the Study of Public Opinion found that 75% of Russians had a more positive view of the justice system after serving as jurors, while only 15% emerged with a more negative view.

Trial by jury in Russia is still very much a work in progress. While its shortcomings are frequently discussed, its benefits are not. Analysis of these benefits suggests that expansion of jury trials to a broader category of criminal and civil cases, while not a panacea, could dramatically improve the Russian legal system and advance the rule of law. ♦

# THE RULE OF LAW

## The Cost of a Corrupt Judiciary

By Carolyn Lindsey

**A**n independent, transparent and professional judiciary is a key element of any free and open society and one that is too often tainted with corruption. Instances of judges and their clerks requesting illegal payments to effect a certain outcome or merely to schedule a hearing, trial, or other proceedings are common in much of the world. These requests result in justice being sold to the highest bidder. Individuals do not have meaningful recourse to courts, businesses have little faith that legitimate commercial disputes will be resolved fairly and efficiently, and the courts are often turned into a political tool to prosecute those who challenge powerful, entrenched interests.

**A demand for a bribe is, in effect, a tax on justice that disproportionately affects society's most weak and vulnerable.**

Reports to TRACE's BRIBELine, a secure and anonymous online tool for reporting bribe demands, demonstrate that, like other forms of corruption, demands for bribes by judges or judicial representatives is not limited to a specific geographic area. Bribery in the judiciary occurs in both the east and the west, in developing and developed countries. Thirteen of the 20 countries with the highest number of reports submitted to BRIBELine allege at least one request for an improper payment by the judiciary, including the

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United States. The countries with the largest number of reports indicating that the source of a bribe demand was either a member of the judiciary or a judicial representative are Ukraine, followed by China, Russia, and India, all countries with a reputation for high levels of corruption generally. Indeed, according to BRIBELine data, 17% of the bribe demands made in France, a country generally considered to have a relatively high level of transparency, are reported to have originated with the judiciary.

Unfettered access to the courts should be available to all individuals, not simply those who can afford to pay a gatekeeper to have their claims heard. A demand for a bribe is, in effect, a tax on justice that disproportionately affects society's most weak and vulnerable. The idea that justice is blind to status, wealth, or privilege disappears when individuals are expected to buy a favorable outcome or even the opportunity to be heard.

And not only individuals suffer. Commercial interests are not served by a corrupt judiciary. In a corrupt legal system, legitimate commercial disputes are not decided on the facts; this results in damage to property, both real and intellectual, and other economic interests. This, in turn, causes business resources to be allocated inefficiently.

Companies resist investing in countries where judicial outcomes are unpredictable and often depend on conduct that puts employees at risk for prosecution in their home countries under laws such as the US Foreign Corrupt Practices Act or the UK Bribery Act.

Finally, a judicial system that is rife with corruption is often the favorite tool of the ruling elite to prosecute those who challenge the government. The Khodorkovsky trial in Russia, which resulted in a second prison term for former businessman Mikhail Khodorkovsky, and trumped up charges against journalists in Somaliland are but two examples of how judicial corruption can pervert justice.

The increased focus on combating corruption provides the international community with an opportunity to shine a light on corrupt judges around the world. Fighting corruption in the judiciary has a positive impact on efforts to reduce bribery and corruption more generally. Without a transparent judiciary, the fight against corruption is a battle that is much harder—if not impossible—to wage. ♦



# The Geneva Conventions: What Past, What Future?

By Saksham Chaturvedi

*In 2011, the ABA Section of International Law sponsored its second annual Rona R. Mears Student Writing Competition & Scholarship Awards to encourage law student interest and participation in the practice of international law. Entrants were asked to write on the theme “The Scope and Application of Universal Jurisdiction.” Saksham Chaturvedi of Hidayatullah National Law University in Raipur, India, won first place. Current and previous essays can be read on the Section’s Student Headquarters website: [www.americanbar.org/groups/international\\_law](http://www.americanbar.org/groups/international_law), under “Section Resources” click “Student Headquarters.”*

War is with us more than ever.

— *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006)

**T**hroughout human history, the foremost peril to international harmony and security has been warfare, the threat that the League of Nations, the Kellogg-Briand Pact, and the United Nations sought, but failed, to prevent.

Although interstate warfare has declined in recent decades, civil conflict arising from ethnic, religious, and nationalist strife is on the rise. And as the events of September 11 demonstrated in the starkest terms, international violence is no longer limited to war fought between states, whether declared or undeclared. Individuals can murder thousands and potentially millions of other individuals across national borders without ever encountering an army. The physical space between combatant states as patrolled by soldiers, sailors, and pilots no longer serves as a protective buffer to safeguard civilians. National armies and state-supported terrorism are still important, but international rules addressing only organized state violence are more appropriate for past wars than for wars to come.

Traditionally, war has been declared and fought on a mass scale, waged by soldiers fighting for states in organized armies. In the traditional understanding of war, it

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was possible to attack a nation only by first destroying the army that protected it. Civilians were largely insulated from conflict, physically separated from danger by the armies that stood between them and their enemies. Before the rise of airpower and the advent of weapons of mass destruction, international law did not have to address the security of the civilian populations themselves. Legal regimes therefore proscribed war generally and only protected civilians in occupied territories. “Civilian” security was generally a matter of domestic law.

The Bible says, “Thou shalt not kill.” But in the Book of Samuel, God tells the Israelites to kill every man, woman, and child of Amalek. We are torn between our conscientious desire to uphold the sanctity of human life, and acknowledging the stark reality that warfare has existed since the dawn of humankind. How do we reconcile the two? The object of this essay is to show that such reconciliation is already taking place, thanks to the development and authority of Geneva Conventions. Human rights have humanized the law of war, so that even in time of armed conflict our focus has shifted to protecting individuals to the greatest extent possible.

While there has been a constant tension between the world of human rights and the world of war, over the past century, the pendulum has swung firmly toward human rights. This process has resulted in an overlap between these two previously distinct disciplines of law, with human rights law informing interpretations of international humanitarian law and vice versa. But neither regime will entirely subsume the other—to some extent, different rules will always apply to war and to peace. Nevertheless, strengthening the reach of international humanitarian law and the international community’s commitment to safeguarding human rights is an inexorable process—one to applaud and foster.

## The Law of War

The law of war has a long history both in formal agreements and in the practice of states. This body of law provides the foundations for the principle of civilian inviolability. As early as the Hague Conventions of 1907, international treaties restricted the conduct of warfare to protect civilians from armed conflict. These early regulations were limited,

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prohibiting only “the killing and wounding treacherously” of noncombatants and the bombardment of undefended towns. Killing civilians for killing’s sake was outlawed, but killing civilians for military advantage remained permissible. In 1938, the League of Nations added its voice, finding that the intentional bombing of civilians was illegal.

It was not, however, until the 1949 Geneva Conventions that an overarching regime to protect civilians was codified. The Fourth Geneva Convention of 1949 was drafted to protect civilians in international armed conflicts. The convention regulates the treatment of civilians in occupied territories and forbids “grave breaches,” including the “willful killing, torture or inhuman treatment” of civilians. The Geneva Conventions place affirmative duties on states to suppress such breaches and to search for and extradite or prosecute violators.

Although the grave breaches provisions only apply in international armed conflicts, Article 3, common to all four Geneva Conventions, applies to any armed conflict, international or internal. Common Article 3 is weaker in form than the grave breaches provisions; it does not impose duties to suppress or prosecute. Nonetheless, Common Article 3 forbids “violence to life and person,” and “outrages upon personal dignity” against “persons taking no part in the hostilities.” The 165 states-parties to the Geneva Conventions thus created the first global regime to protect civilians from willful killing in the course of armed conflict.

The next significant step forward in the development of the principle of civilian inviolability was the adoption of the 1977 Additional Protocols to the Geneva Conventions. Additional Protocol I, applicable in international armed conflicts, establishes a basic rule that all parties must “distinguish between the civilian population and combatants . . . and accordingly shall direct their operations only against military objectives.” Likewise, Additional Protocol I requires that “the civilian population as such, as well as individual civilians, shall not be the object of attack.” Additional Protocol II, which applies in all armed conflicts, is less specific, but nonetheless guarantees that “the civilian population . . . shall enjoy general protection against the dangers arising from military operations.” The foundations of the principle of civilian inviolability were thus established.

Despite the heightened protection accorded civilians in the Geneva Conventions and their protocols, such protections have historically applied only in the context of interstate war. War-crime trials in the wake of World War II all required a preliminary finding of an international

armed conflict before invoking laws protecting civilians. Given that the physical separation of the civilian population from the enemy army was seen as protection itself, the Geneva Conventions applied largely to prisoners of war and civilians who were in territory occupied by another state. Common Article 3 of each Geneva Convention and Additional Protocol II expanded the scope of protection for civilians, applying it to civilians in armed conflict, whether or not they were in the hands of the enemy or in occupied territory. Nevertheless, the existence of an armed conflict, preferably of an international character, remained an absolute prerequisite for legal protection.

The jurisprudence of the ad hoc international tribunals of the 1990s greatly expanded civilian protection law, relaxing the requirement that there be armed conflict and applying these rules in noninternational as well as international armed conflicts. As the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) held in 1996, “[t]he rule that the civilian population as such as well as individual citizens, shall not be the object of attack is a fundamental rule of international law applicable to all armed conflicts . . . irrespective of their characterization as international or non-international.” Recent ICTY jurisprudence does not distinguish between international and non-international armed conflict; the same high level of protection is accorded civilians in both types of war. As the senior legal advisor in the ICTY Office of the Prosecutor clarified, “attacks on [civilians and] civilian objects are prohibited as a matter of customary law in all conflicts.”

By expanding well beyond traditional organized armed violence to a definition of “armed conflict” broad enough to include violence traditionally the province of police rather than soldiers, the law of war lays the foundation for an international legal principle protecting individuals from violence of almost any kind. The Geneva Conventions have traditionally applied primarily to states, imposing duties on governments that they were then bound to transmit to their generals and officers. International criminal law has translated these obligations into a code of specific crimes for which individuals can be specifically accountable.

## The Past

In the early days when the term *jus in bello* was in vogue, the laws of war chiefly regulated nations’ behavior toward one another. If one nation offended the rules, the other nation was justified in taking action against it, up to and including reprisals against civilians that would otherwise be unlawful.



The law of war was therefore inter-state law, and as Georges Abi-Saab put it, driven by “collective responsibility, with the attendant collective sanctions of classical international law: belligerent reprisals *durante bello* and war reparations *post bellum*.” The legality of such tactics was cold comfort to those caught in the middle—soldiers, POWs, and civilians—who as individuals were not subjects of international law, let alone of the laws of war.

During the Cold War, human rights instruments proliferated further. The Helsinki system proved critical in countries under Soviet domination. These international human rights instruments have been interpreted as conferring rights on individuals against states, and not just their state, but all states. Under human rights law, states are not autonomous, indivisible entities with rights and duties only vis-à-vis one another. Rather, they are conceptualized as wielders of power, with the responsibility to refrain from certain actions against individuals and, affirmatively, to provide for their basic needs. Under human rights law, rights vest not in the state, but in the individual.

The human rights revolution has, more than anything else, taught us that what states do to their own citizens is the concern of the entire world, a teaching reflected in the development of international law. This does not mean that the old attitude has disappeared entirely, far from it. Nations still frequently invoke sovereignty to prevent others from peering behind their borders. But it does indicate a shift in how we think about human beings and their relationship to the world.

### The Present

This shift has had a notable impact on international humanitarian law. The new conception of state responsibility introduced by human rights and the parallel notion that the international community has the responsibility to protect individuals from their own governments have not been the only drivers of the humanization of humanitarian law. Calamitous events and atrocities have driven the development of international humanitarian law throughout history; the more offensive or painful the suffering, the greater the pressure to adjust the law.

The American Civil War, with its millions of dead and maimed, generated the Lieber Code of 1863 and spawned the branch of international humanitarian law known as Hague Law, which governs the conduct of hostilities. The Battle of Solferino inspired the Red Cross movement and Geneva Law which, starting with the first Geneva

Convention in 1864, emphasizes the protection of victims of war—the sick, the wounded, prisoners, and civilians.

The media attention paid to 20th-century conflicts contributed to humanizing international humanitarian law and regulating the behavior of states. Increased media attention has resulted in rapid sensitization of public opinion, reducing the time between atrocities and international responses. One result was the establishment of the ad hoc criminal tribunals for the former Yugoslavia and Rwanda, which have had a tremendous impact on both the development of international humanitarian law and its humanization. Another was the establishment of the International Criminal Court and the indictment of Sudanese President Omar Hassan al-Bashir by Prosecutor Luis Moreno Ocampo for genocide and war crimes in Darfur. In the modern world, by contrast, a strike on civilians is seen as a strike on the state itself. Conflicts involving non-state actors, such as al Qaeda and other terrorist groups, have also proliferated, with civilians caught in the crossfire.

Technology and new means of warfare have also made the need to protect civilians from the ravages of war all the starker. The first half of the 20th century saw the first uses of gas attacks, air power, automatic weapons, tanks, and nuclear weapons. Each one of these implements of destruction has resulted in increased civilian suffering and death. From the end of the nineteenth century, a combination of a greater focus on the individual and a heightened need to protect individuals has forced the international community to look at the humanitarian law from a new perspective. This reflects an effort to protect human dignity in the face of overwhelmingly destructive wars.

### The Future and Conclusion

Although the “humanization” of the law of war has been immensely beneficial for both combatants and civilians affected by armed conflict, this process must take into account the reality of armed conflict. War will never be completely safe. Yet, under the influence of human rights law, international humanitarian law has come to offer far greater protections for both civilians and combatants.

In practice, respect for international humanitarian law and human rights law has not always developed as rapidly as relevant legal doctrines. Fortunately, our arsenal of newly humanized norms is accompanied by an emerging system of international criminal courts and various other sanctions against the violators. These courts will help encourage combatants and noncombatants alike to take

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the norms of international humanitarian law and human rights law more seriously.

Yet, norms and courts are not enough. Humanitarianism in the application of the law of war must continue and be accepted in the public's consciousness if respect for the rules is to be ensured. Today, in our attempt to avoid future cruelty, some of the most serious problems that we face stem not from the inadequacy of the law, but from a lack of shared universal values. This can be seen vividly in the rise of terrorist groups, such as al Qaeda, that reject these values. As we move forward, we must vigorously pursue efforts to promote ethical values.

States, organizations, and individuals that deliberately flout the most basic humanitarian rules should be universally condemned, delegitimized, and prosecuted. The creation of a culture of values is thus indispensable. The job cannot be left to legal scholars alone. Nor can it be left to those involved in armed conflicts.

A foundational principle of civilian inviolability creates a new category between civilian and soldier. It is the category of global criminals. Individuals who deliberately target and kill civilians are the modern equivalent of "the enemies of all mankind," the designation given pirates, slave-traders, and torturers under the international law establishing universal jurisdiction. In their current incarnation, global criminals

have killed hundreds of thousands of people.

Those who kill civilians are global outlaws, individuals who have violated the basic precepts of all legal systems. They have violated the law of war and both national and international criminal law. They may be government officials or generals, religious or political fanatics. Global outlaws may be pursued by armies and police forces as well as by intelligence operatives, financial regulators, and prosecutors. But their pursuit, arrest, and trial must be conducted under a new international legal order closely connected to national law. Developing that order is the international legal challenge of the 21st century. ♦

## STUDENTS!

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## SECTION NEWS

### RULE OF LAW LETTERS

Rule of law letters from the ABA President to other national governments express the association's concerns about alleged intimidation, harassment, or abuse of lawyers, judges, and human rights advocates. Each letter reflects the ABA's independent research and analysis of the facts and human rights laws applicable to each case, and copies are sent to the US secretary of state and other relevant officials. The ABA Section of International Law, the ABA Section of Individual Rights and Responsibilities, and the Standing Committee on Law and National Security, among other entities, review the draft forms of these letters. In coordination with the ABA Center for Human Rights, the Section may initiate the process of evaluation for a rule of law letter regarding a particular situation in a country. Recent rule of law letters include:

- President Stephen N. Zack's November 2010 letter to the Iranian government, titled "Treatment of Human Rights Lawyer and Advocate, Nasrin Sotoudeh"
- President Carolyn Lamm's April 2010 letter to the Bolivian government, titled "Bolivia: Protect Judicial Independence"
- President Lamm's May 2010 letter to Venezuela, titled "Judicial Independence in Venezuela"

Any committee or Section member considering the possibility of a rule of law letter should contact Christina Heid at [christina.heid@americanbar.org](mailto:christina.heid@americanbar.org) to obtain the letter guidelines. ♦

## CITIES ABROAD

# A Lawyer's Survival Guide to Belfast

By Michael E. Burke

The Section of International Law will host a special International Legal Exchange Committee briefing trip to Belfast, Northern Ireland, October 9–10, 2011. This trip will immediately precede the Section's 2011 Fall Meeting in Dublin and will focus on the theme "The Changing Legal Landscape in Northern Ireland." Belfast is the capital of and largest city in Northern Ireland and is a truly unique place.

### Getting Around

Belfast is served by two airports. The main one, Belfast International Airport (BFS), is approximately 17 miles (about 30 minutes without traffic) from Belfast city center and handles both international and domestic flights. There are also direct flights to Belfast from Newark, New Jersey (on Continental/United) and Toronto. Taxi fares from BFS to Belfast city center should cost about £27. Belfast's second airport, George Best Belfast City Airport (BHD), is situated 3 miles (about 10 minutes without traffic) from the city center and mainly handles domestic flights within Ireland and the UK. Taxi fares from BHD to Belfast city center should cost around £8.

Belfast Central Station is the main railway station. It is located close to the Waterfront Hall and St George's Market—about a 10-minute walk from City Hall and the city center. A free bus link will bring you from the station into the city center with your train ticket. The frequent Cross-Border Enterprise service between Belfast Central Station and Dublin is very popular, and fares start at about £28 one way; lower web-only fares are available on the Enterprise website.

**Michael E. Burke** ([mike.burke@agg.com](mailto:mike.burke@agg.com)), chair of the Section of International Law, is a partner at Arnall Golden Gregory's Washington, D.C., office.

Getting around Belfast by public transportation is relatively easy. The Metro is the name of the city's bus service with routes that run from the city center outward. Fares start at £1.40 per trip. Public taxis are another method of getting around town.

### Hotels

The Section's ILEX trip will be centered at the Belfast Hilton (4 Lanyon Place). Other hotels catering to business travelers include The Merchant Hotel, the Europa Hotel, the Radisson Blu Hotel Belfast, the Fitzwilliam Hotel, and the Malmaison. The Culloden Estate and Spa is about five miles east of Belfast city center on the A2 in Holywood, County Down, and is regarded as one of the best hotels in Northern Ireland. Visit the Belfast Visitor & Convention Bureau website at [www.gotobelfast.com](http://www.gotobelfast.com).

### Food/Restaurants

Northern Ireland cuisine starts with the famous Ulster Fry. A traditional breakfast, a genuine Ulster Fry should include bacon rashers, sausages, black pudding, eggs, potato farl, and soda farl.

There are numerous award-winning restaurants in Belfast that highlight the quality of local produce. Northern Ireland's seafood, beef, lamb, game, dairy produce, fruit, and vegetables are among the best in the world. Deane's Restaurant & Bar is one of the finest restaurants in Belfast. Castle's Cellar, Zen Japanese, Great Room, The Grill Room at Ten Square, James Street South, La Boca, The Ginger Bistro, and Nick's Warehouse also are very good and popular with businesspeople. For great fish and chips, visit one of the Brights restaurant outlets.

### Business Etiquette and Other Items

In general, businesspeople in Belfast dress smartly (suits are the norm).



Belfast Castle

Appointments should be made (and kept promptly), and the exchange of business cards is customary. Handshaking is customary when introduced to someone new. Smoking is banned in all enclosed public spaces, including pubs, restaurants, and public transport. Business hours are 9 a.m.–5:30 p.m. The electrical current in the UK is 230 volts, 50Hz. Flat three-pin plugs are standard.

Northern Ireland's currency is the pound (GBP). ATMs are available all over Belfast, and Visa, MasterCard, and American Express are widely accepted. Tips of 10% to 15% are expected in restaurants and upmarket hotels in Northern Ireland if a service charge hasn't been included as well as for taxi drivers. ♦

## SURVIVAL GUIDES ON THE WEB

For more tips from the author, please visit the Section website at [apps.americanbar.org/intlaw/pubs/csg.html](http://apps.americanbar.org/intlaw/pubs/csg.html). There you'll find other city Survival Guides, including Ankara, Beijing, Dublin, Hanoi, Minsk, Paris, Reykjavik, Stockholm, and Toronto.

# INTERNATIONAL LAW NEWS

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