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INTERNATIONAL LAW NEWS

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Integrating Rule of Law: New Solutions to the Global Displacement Crisis

By Paula Rudnicka

The global migration and displacement crisis demands our utmost attention and new, humane solutions. Now. With a record 65 million people currently displaced within and across national borders, and displacement becoming increasingly prolonged, forced migration cannot be addressed solely as a short-term humanitarian problem. Nor, in our interconnected world, can any country pretend to solve the problem by merely tightening its borders.

Because large movements of refugees and internally displaced persons (IDPs) have significant human rights and development ramifications, humanitarian interventions must be integrated with initiatives promoting sustainable development in countries of origin, transit, and destination.

A new approach to displacement must tackle its root causes, ensure the safety and human dignity of those forced to flee, and provide comprehensive solutions for displaced persons, migrants in vulnerable situations, and their host communities. Rule of law development is central to these efforts because very often, forced migration is driven by rule of law problems in countries of origin, such as ineffective laws, poor governance, and weak accountability mechanisms. Weaknesses in the rule of law are also impediments to the realization of the rights of people who flee. *(continued on page 5)*

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INTERNATIONAL LAW NEWS

FEATURE ARTICLES

COLUMNS

NEWS

International Law News
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Chair's Column

This will be my last column in *International Law News* as Section Chair, and I want to take the opportunity to talk about our conferences. The focus on corporate social responsibility, and the fusion of aspects of public and private law, was a theme that hopefully will persist in our programming, policy, publications, and projects. We are all human rights lawyers, and those in private practice must be attentive not only to soft law considerations but also to actual hard law, as disclosure statutes, contract obligations, and corporate mission statements are now accommodating human rights.

ABA Paris Sessions. At the Paris Sessions, June 7-10, the Section of International Law presented a program on ethical issues relating to corporate social responsibility, and the role that lawyers in private practice can, and should, play. I moderated a panel that included representation from the Law Society of England and Wales, LexisNexis, and Debevoise. This remains a core component of the Section's position within the ABA, not just to host its own conferences but also to participate in meaningful and substantive ways in broader ABA events. We continued such discussions at the Distinguished Guest roundtables in Chicago at the ABA Annual Meeting.

Life Sciences Conference. Immediately after Paris, the Section held its first specialty conference devoted to life sciences in Copenhagen. Two former Section Chairs, **Lisa Savitt** and **Mike Burke**, participated on a closing plenary that I moderated on corporate social responsibility in the life sciences. ABA President **Hilarie Bass** attended, as did former ABA Secretary and former American Bar Foundation Fellows President **Cara Lee Neville**. Not only did we hold an important conference in Scandinavia where we have had active members in the past, but also we strengthened our ties with the academic community, with a strong contingent of attendees and speakers from St. Louis University Law School, led by our International Contracts Committee Co-Chair **Dean William Johnson**.

Canadian Bar. I represented the Section at a Canadian Bar Association partners' roundtable discussion on artificial intelligence and ethical issues for law firms, held in Toronto on June 20.

Chile. I also represented the Section along with **Marcos Rios** and **Fernando Jamarne** on a bar leader visit to Santiago, Chile, where we had not been for over a decade, to thank the Chilean law firms for their sponsorship in New York and continued support for Section activities. Among other things, we responded to a request from the Justice Minister to provide certain information related to monitoring of U.S. lawsuits in which the U.S. State and Justice Departments are involved. We also met with deans of several law schools, and, in a managing partner roundtable, discussed changes in the provision and delivery of legal services.

Puerto Rico. We also fulfilled a long-standing promise to engage in Puerto Rico, where **Max Trujillo** and I represented the Section, with tremendous assistance by former Inter-American Bar Association President **Carlos López López**. We met with the chief judge of the federal district court, as well as members of the Puerto Rico Supreme Court, and senior leaders of the Puerto Rico Bar Association.

ABA Annual Meeting. At the ABA Annual Meeting in August, we hosted leaders from international bars and our bar colleagues from around the world to discuss issues of mutual interest, such as cross-border ethics, artificial intelligence, the delivery of legal services, and issues affecting women lawyers, among other topics.

ABA Membership Model. As various constituent entities within the American Bar Association continue to broaden their activities in the international arena, the Section continues to position itself as the principal member section devoted exclusively to issues of international law. We have reached out to various sections and other ABA stakeholders to coordinate activity and make our expertise and resources available. This needs to continue. Similarly, as the ABA embarks upon a new membership model, the Section must adapt. This will entail careful examination and restructuring of our Section calendar and events and looking for opportunities to partner on a greater basis with entities both within and beyond the ABA.

In this last Chair message from me, I thank all of you in the Section for making this a rewarding year. Thank you to the volunteers on our Executive and Administration Committees and on our Council and to our staff for all they do.

It has been a privilege and honor to serve, and I look forward to continuing to advance the work of the Section as a Delegate in the ABA House of Delegates and as a representative of the Association to the Union Internationale des Avocats (International Association of Lawyers), as well as a member of the ABA Representatives and Observers to the United Nations Committee.

All best wishes to the incoming team of officers. And to all our members, this has been about you, so thank all of you for your participation. ◆

Steven M. Richman
Chair, ABA Section of International Law

"The focus on corporate social responsibility, and the fusion of aspects of public and private law, was a theme that hopefully will persist in our programming, policy, publications, and projects."

About the ABA Section of International Law

Founded in 1933, the ABA Section of International Law is a leader in the development of policy in the international arena, the promotion of the rule of law, and the education of international law practitioners. It is the only ABA entity that focuses on the full range of international legal issues and is involved in a wide variety of substantive legal activities.

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FEATURE ARTICLE

Integrating Rule of Law: New Solutions to the Global Displacement Crisis

continued from page 1

In transit and destination countries, displaced people face rule of law challenges in the form of criminal exploitation by smugglers and traffickers; prolonged detention in substandard conditions; immigration and refugee status determination procedures that fall short of international standards; hurdles to obtaining legal identity documents, work authorization, and access to basic services; and growing tides of xenophobia and discrimination. Women and children, particularly those unaccompanied, as well as lesbian, gay, bisexual, transgender, and intersex (LGBTI) people are among the most vulnerable and require special attention. Undoubtedly, the path forward requires a proactive action to implement people-centered and gender-sensitive rule of law responses to forced migration.

New Global Compacts on Migration and Refugees

To meet the modern challenges of migration and displacement, the United Nations (UN) is poised to negotiate and adopt two new global agreements: one on migration and one on refugees. The Global Compact for Safe, Orderly and Regular Migration, whose text was approved in July 2018, covers international migration in a holistic manner, with a particular emphasis on human rights protections for migrants. The UN General Assembly will convene an intergovernmental conference in December in Morocco to formally adopt it. The Global Compact on Refugees will provide a Comprehensive Refugee Response Framework that acknowledges a shared international responsibility, and a plan of action for states and other stakeholders to implement the framework. The UN High Commissioner for Refugees (UNHCR) is set to propose the compact in his annual report to the UN General Assembly at the end of 2018.

The creation of these new international instruments, albeit non-binding, was driven by a commitment of the international community expressed in the New York Declaration for Refugees and Migrants, adopted by the UN General Assembly on September 19, 2016. *See* G.A. Res. 71/1 (Sept. 19, 2016). The Declaration calls on UN member states to promote and ensure respect for the rule of law as the means to address the root causes of large movements of refugees and migrants. It also makes several references to concepts intrinsically associated with the rule of law, such as equality, good governance, and human rights. As such, the Declaration aligns with Sustainable Development Goal 16, which was established by the UN in 2015 to promote peaceful and inclusive societies for sustainable development, provide access to justice for all, and build effective, accountable, and inclusive institutions at all levels. While the New York Declaration rightfully elevates the rule of law discourse in the context of forced migration, it neither defines it nor offers concrete strategies for its implementation.

How ABA ROLI Is Contributing to Global Action

To capitalize on these historic events, the American Bar Association Rule of Law Initiative (ABA ROLI) devoted its 2018 Issue Paper and Conference on Contemporary Rule of Law Issues to forced migration.

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Paula Rudnicka is an Advisor in the Research, Evaluation, and Learning Division of the American Bar Association Rule of Law Initiative (ABA ROLI) and co-author of ABA ROLI's 2018 Issue Paper *When People Flee: Rule of Law and Forced Migration*.

The issue paper, *When People Flee: Rule of Law and Forced Migration*, reviews the relevant legal frameworks, highlights rule of law gaps that exacerbate the global displacement crisis, and identifies concrete rule of law strategies that stakeholders can undertake to strengthen—and potentially transform—the response to the crisis.

The paper concludes that the rule of law is indispensable both to the prevention and resolution of forced migration, and to the protection of people who flee. It argues that integrating rule of law solutions into the new approach to forced migration will require breaking down silos and ensuring a close collaboration between humanitarian and development actors, national and local authorities, international and civil society organizations, bar associations, justice system actors, and the affected populations. There is also a dire need for stronger and more just normative standards, better implementation of existing laws and treaties, and deeper commitment to research, analysis, and reflection. The latter is necessary to prioritize investments and design evidence-based interventions that are tailored to the needs of a particular country or population.

The issue paper served as a backdrop to ABA ROLI's Annual Conference, organized in April in collaboration with the George Washington University's Elliott School of International Affairs and several ABA entities, including the ABA Commission on Immigration, the ABA Center for Human Rights, the ABA Section of Litigation, and the ABA Section of Civil Rights and Social Justice. More than 200 government and international officials, nongovernmental implementers, academic scholars, experts, and activists met to explore the critical issues around the rule of law and forced migration and to share ideas for addressing the most pressing problems.

Following the route of displaced people originating in sub-Saharan Africa, Syria, and Central America, conference participants discussed the major drivers, risks, and challenges of forced migration occurring in countries of origin, transit, and destination, and explored legal responses that would mitigate some of these problems.

Louise Arbour, UN Special Representative for International Migration, and **Anne C. Richard**, former Assistant Secretary of State for Population, Refugees, and Migration, now at Georgetown University Institute for International Migration, delivered keynote speeches.

A recurring concern expressed in the issue paper and during the conference was that the creation of two global compacts reinforces the binary division between refugees and migrants, which could pose challenges to the effective implementation of the compacts.

AUDIO – WHEN PEOPLE FLEE

Central America Panels

0-1:14 Northern Triangle: Poverty, Crime, and Corruption
1:15-2:24 Dangers of Organized Crime in Mexico
2:25-3:37 Welcome to the United States?

Africa Panels

0-1:22 Fleeing Fragility: African Migrants
1:23-2:43 Transiting Through Libya
2:44-3:54 Crossing the Mediterranean

Syria Panels

0-1:22 From Arab Spring to Syrian Crisis
1:23-2:43 Basic Rights in Transit
2:44-3:54 Seeking Calm in Europe

INTEGRATING RULE OF LAW INTO FORCED MIGRATION SOLUTIONS: POLICY RECOMMENDATIONS

Following the conference, ABA ROLI's expert working group identified policy recommendations to shape a rule of law approach to the forced migration crisis. The recommendations were addressed to the drafters of the global compacts, the U.S. government, and rule of law implementers. Since then, ABA ROLI has worked with its partners to further refine and prioritize these recommendations, urging states and entities working to implement the historic global compacts to:

1. Address the root causes of internal displacement and forced migration, including by providing support to transitional justice mechanisms and justice institutions that address widespread repression, persecution and violence in fragile communities;
2. Develop policies that discourage the criminal prosecution of migrants and refugees, especially asylum seekers, for unauthorized entry, and further encourage the accountable use of prosecutorial discretion in the exercise of enforcement measures;
3. Support and promote the establishment of a system of robust and equitable global responsibility-sharing to foster solutions to protracted displacement;
4. Recognize and emphasize the protection of the rights of displaced persons, especially IDPs, to promote their dignity and self-reliance;
5. Protect refugees, migrants, and IDPs from bias and discrimination on any ground, including gender, race, sexual orientation, national origin, and religion;
6. Adopt specific legislative or other measures to provide protections for LGBTI people; and
7. Promote evidence-based and inclusive conversation and decision-making around the issues of migration and displacement.

Promoting Rule of Law Solutions to Forced Migration

Rule of law development is a powerful tool for creating strong legal frameworks for the prevention of forced migration and the protection of people who flee. It is also a powerful tool for enhancing the capacity of local institutions responsible for the implementation of these legal frameworks in practice. ABA ROLI has identified four rule of law approaches to forced migration: building just legal systems; promoting good governance; strengthening accountability mechanisms; and ensuring empowered protection. Lawyers and rule of law experts play an important role in promoting these approaches in countries of origin, transit, and destination.

1. Building Just Legal Systems

To prevent displacement and protect those who flee, states must create strong, stable, and publicized legal frameworks, based on the universal principles of equality and non-discrimination. These legal frameworks should guarantee the right to asylum, offer sound protections for refugees and IDPs, and establish independent and impartial mechanisms through which individuals, including non-citizens, can seek solutions to their justice problems. In addition, national legal frameworks should prohibit *refoulement*, forced displacement, expulsion of citizens, and collective expulsion. Expulsion of non-citizens should only be allowed on the basis of a lawful decision and due process.

It is also imperative to promulgate human rights-based laws to prevent forced migration and reduce the negative effects of displacement. This includes laws pertaining to nationality, statelessness, gender-based violence, smuggling, human trafficking, corruption, and detention. Lawyers and rule of law experts are well-positioned to assist states in improving their legal systems by providing high-impact legal reform assistance to national parliaments, pertinent government agencies, civil society organizations, the legal profession, and the justice system.

2. Promoting Good Governance

The links between governance and forced migration are complex. On the one hand, poor governance and a lack of transparency are among the chief drivers of displacement. When public institutions are weak, corrupt, and unresponsive to people's needs, the government loses its legitimacy, which increases the risks of instability, conflict, and displacement. On the other hand, migrant, refugee, and IDP flows pose a complex set of challenges for the local governance structures in countries of transit and destination. Inevitably, an influx of people puts unique pressures on public finance, national and local institutions, and host communities. Lawyers and rule of law experts are well-positioned to assist states in strengthening and improving public trust in government structures by increasing the efficiency and accountability of local institutions; promoting participatory governance, citizen engagement, and public integrity; and improving land, environmental, and natural resource governance.

3. Strengthening Accountability Mechanisms

Without accountability mechanisms, a key challenge will be implementing the global compacts in practice. Under international human rights law, states have the duty to respect, protect, promote, and fulfill human rights of all individuals within their territory and subject to their jurisdiction, including refugees, migrants, stateless persons, and IDPs. The notion of accountability stems from the obligations of duty-bearers towards rights-holders and demands that states are answerable for the fulfilment of their human rights obligations. Crime, violations of human rights, impunity, and perceptions of injustice are often at the heart of displacement. Therefore, accountability under the law is indispensable both in preventing displacement and ensuring that state and non-state actors face consequences for violating the rights of those who flee.

Lawyers and rule of law experts are well-positioned to assist states in establishing and strengthening their accountability mechanisms in order to curb and respond to displacement, including by improving the capacity of the legal profession, justice systems, and national human rights institutions; facilitating mobile courts and alternative dispute resolution mechanisms for the displaced; enhancing response to sexual and gender-based violence in humanitarian settings; and supporting transitional justice mechanisms.

4. Ensuring Empowered Protection

Empowered protection means that displaced people and returnees are protected under the law and have the knowledge and resources to exercise their rights. The ultimate goal of empowered protection for displaced people is their security, resilience, self-reliance, and reduced dependence on humanitarian aid. This occurs when they can make autonomous choices about where and how to live; when they feel safe and welcome in their communities; and when they can generate and control income, assets, and other resources. Empowered protection also entails peaceful, safe, and productive co-existence between the displaced and local populations. Accordingly, ensuring empowered protection necessitates support to displaced populations and their host communities. Lawyers and rule of law experts are well-positioned to assist state and non-state actors in these efforts, including by enhancing displaced people's access to justice and improving the capacity of local legal aid providers to offer high quality services to people who flee.

The ABA and its entities will continue to join forces with the international community and local partners to ensure effective implementation of these rule of law solutions in practice. ◆

The author wishes to cordially thank **Dr. Linda Bishai**, Director of ABA ROLI's Research, Evaluation, and Learning Division, who spearheaded the related Conference on Contemporary Rule of Law Issues and authored the post-conference report; **Dr. Elizabeth Ferris**, a Research Professor at the Institute for the Study of International Migration at Georgetown University, who co-authored the issue paper; **ABA ROLI Board of Directors, staff, and interns**; members of the **Expert Working Group on the Rule of Law and Forced Migration**; and the many contributors, reviewers, and participants who gave their time and expertise to assist with the paper, conference, and subsequent report.

About the ABA Rule of Law Initiative

The ABA Rule of Law Initiative (ABA ROLI) is an international development program that promotes justice, economic opportunity, and human dignity through the rule of law.

For more than 25 years, and through its work in more than 100 countries, ABA ROLI and its partners have sought to strengthen legal institutions, support legal professionals, foster respect for human rights, and advance public understanding of the law and of citizen rights.

ABA ROLI has roughly 500 professional staff working in the United States and abroad, including a cadre of short-term and long-term legal specialists, volunteers, interns, and third-party contributors, who in fiscal year 2017 contributed $1.8 million in pro bono legal assistance.

To learn more about ABA ROLI and its programs around the world, visit abaroli.org or email rol@americanbar.org.

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FEATURE ARTICLE

How ABA ROLI Is Helping Syrian Refugees

Since 2011, more than 5.6 million people have fled Syria to neighboring countries and beyond, escaping a civil war. After making the journey out of Syria, the refugees continue to struggle in their new countries and are largely unaware or unable to access basic rights and critical protection needs, such as legal assistance, housing, and education. A majority of Syrians do not live in refugee camps, but are scattered among the urban populations in Armenia, Iraq, Jordan, Lebanon, and Turkey. These individuals require resources to help them navigate legal systems in their host countries, including information on how the law applies to them.

Legal Awareness Program for Syrian Refugees in Turkey

Between 2014 and 2018, ABA ROLI operated a multi-pronged legal awareness program in Turkey serving primarily the over 3 million Syrian refugee population living outside refugee camps. The program, implemented in strong partnership with Turkish Bar Associations, trained more than 200 Turkish lawyers on the country's Temporary Protection Regime and other pertinent legal issues. As of March 2018, the network of ABA ROLI-trained lawyers has conducted over 500 legal awareness sessions for over 19,800 Syrians. More than 175 of these sessions were held for women and youth, and addressed issues such as personal status laws, domestic violence, forced and early marriage, child labor, access to employment and housing, citizenship, and family reunification. Turkish lawyers have also provided private legal information to over 5,350 individuals, mostly through a text message (SMS) helpline, which fielded approximately 100 requests for legal information a month. Further, ABA ROLI has conducted a robust media campaign delivered via Facebook, a mobile app, popular websites, YouTube, and radio, reaching over 250,000 Syrians. Out of nearly 700 program beneficiaries surveyed in September 2017, more than 80 percent responded that as a result of the legal information received from ABA ROLI's project, they took, or had immediate plans to take, steps to resolve their legal issues. ◆

Refugee Legal Aid Program in Armenia

From 2016 to 2018, ABA ROLI operated a holistic legal aid program for refugees in Armenia funded by the U.S. Department of State, Bureau of Population, Refugees, and Migration (PRM). Its Refugee Legal Assistance Center (RLAC) helped displaced and conflict-affected persons (including Syrian refugees and displaced Azerbaijani Armenians) meet their most immediate resettlement needs and build successful livelihoods in the new country. The assistance offered by RLAC focused on access to housing, land, property, education, healthcare, employment, credit, identification documents, and social benefits. It also covered Armenia's complex business and tax laws. RLAC pursued several strategic litigation cases, resulting, for example, in refugees having their work credentials and certifications reinstated for the purposes of obtaining pensions. Finally, RLAC educated refugee children about their rights and responsibilities. ◆

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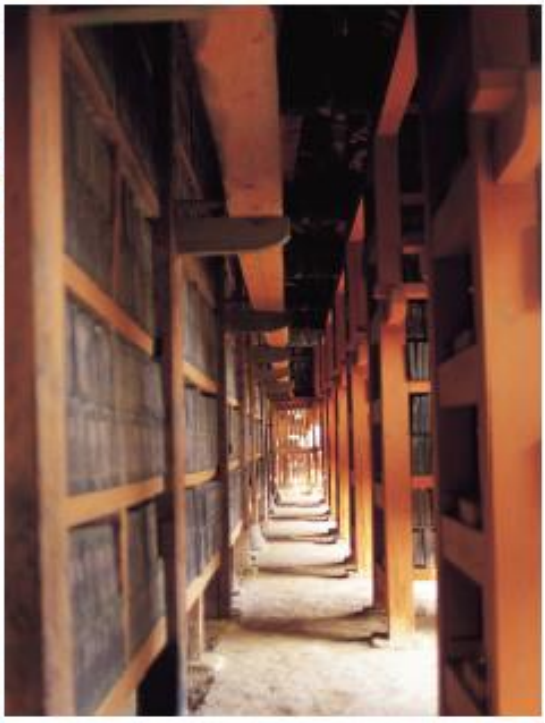

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FEATURE ARTICLE

The Challenge of Corruption in Global Supply Chains: Compliance Risks Posed by Labor Protection Contracts in Mexico

By Tequila J. Brooks

The negotiation of "labor protection contracts" is a common but contested practice in Mexico. This practice involves foreign and Mexican companies entering into labor agreements with "official" trade unions at the establishment of an enterprise, without the participation of workers and frequently before any workers have been hired. When workers in an enterprise later endeavor to organize a trade union and register it with the local or national labor board, they discover there is already a collective agreement in place with a union with which they do not have a relationship. The labor protection contract system has been widely criticized as a practice that violates fundamental labor rights and as being inconsistent with the principles of corporate social responsibility (CSR) and ethical behavior.

Less widely discussed is the significant corporate compliance risk the practice poses under the U.S. Foreign Corrupt Practices Act (FCPA) and other anti-bribery laws. It would behoove human resources directors and compliance officers to eliminate this FCPA risk in their own operations and those of subcontractors in their supply chains in Mexico.

Labor protection contracts pose a risk under the FCPA and other anti-bribery laws because of the tripartite nature of Mexico's current legal framework for settling individual and collective labor disputes. Under current Mexican labor law, representatives of the main employer federation and the main trade union federation in each jurisdiction each have a seat on the local labor board (there is more than one local labor board in each state, depending on population). When the company makes a payment to the president of the local trade union delegation, it is likely that that local union president is the trade union representative on the tripartite local labor board. Along with the employer and government representatives, this local trade union president/labor representative is directly involved in making decisions regarding individual labor disputes (e.g., firings, workplace injuries) and trade union matters (e.g., approval of the registration of a trade union or collective bargaining agreement). Thus, a payment made to the local union president is in fact a payment to a government official—a representative on the tripartite local labor board.

Tripartism itself is not the root of the problem; rather, the distortion of tripartism through the practice of labor protection contracts is the issue. Tripartism is a century-old internationally accepted practice of involving government, labor, and employer representatives in settling labor disputes and developing labor and employment law and policy. It is the bedrock of standard setting through consensus at the International Labour Organization (ILO). Tripartite dialogue was essential to the rebuilding of the Dutch economy in the 1980s and 1990s (the polder model) and in the development of modern labor and employment laws and policy in post-apartheid South Africa.

Labor protection contracts in Mexico have long been highlighted by the ILO Committee of Experts and Committee on Freedom of Association as violations of Mexico's obligation to guarantee the fundamental labor rights of freedom of association and collective bargaining. Almost all of the numerous petitions filed about Mexico under the NAFTA labor side agreement

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since 1994 relate to the practice. Petitioners in these cases argue that, by allowing previously registered labor protection contracts to effectively deny workers the chance to register their own independent unions, the Mexican government has failed to enforce its own labor laws.

As discussed by John L. Sander, Joseph J. DiPalma, and Steven D. Baderian in their December 2017 article on the labor aspects of the recent NAFTA negotiations, the elimination of the labor protection contract system has been a key objective of the United States Trade Representative (USTR) in the renegotiation of the NAFTA and the negotiation of the Trans-Pacific Partnership (TPP). *See* John L. Sander et al., *Labor Aspects in North America Free Trade Agreement (NAFTA) Renegotiation*, UPDATE (Jackson Lewis P.C.), Dec. 6, 2017. Critics point out that the prevalence of unrepresentative trade unions has led to the suppression of wages in Mexico's manufacturing sector.

In recent years, the practice has garnered the attention of adherents to the practice of ethical corporate behavior in global supply chains and multistakeholder initiatives implementing corporate codes of conduct. In 2015, the Fair Labor Association (FLA) issued guidance to its members and auditors asserting that the labor protection contract system is a violation of the FLA Workplace Code of Conduct because the presence of a labor protection contract indicates that a trade union is not truly representative of the workers. In its guidance, the FLA highlighted several indicators that a labor protection contract is present in a workplace.

There is little publicly available information about the method or manner in which companies engage with "official" trade unions to secure labor protection contracts—what the quid is for the quo of signing of a labor protection contract with the representative of an "official" trade union is largely unknown. Anecdotal evidence indicates that the practice involves payments by the company directly to the trade union or its representatives. For example, in January 2010, the Mexican policy magazine *Proceso* reported that a company in Mexico paid the head of a trade union 2,000 pesos a month for "paperwork processing."

While payments to trade unions and trade union officials in Mexico may seem unsavory and unethical, it is not immediately clear that the practice is unlawful under U.S. law. Section 302 of the U.S. National Labor Relations Act (NLRA) prohibits payments by employers to employee representatives or labor organizations, including loans or monetary gifts, or any other thing of value. Illicit payments by U.S. companies and company officials to trade union representatives do, however, result in reputational damage and possibly criminal penalties, as reported by *The Wall Street Journal* this year regarding the guilty plea of a Fiat Chrysler executive who made illegal payments to certain leaders of the United Auto Workers union (UAW).

The 1957 U.S. Supreme Court case *Benz v. Compania Navierra Hidalgo S.A.* held that the NLRA does not have extraterritorial application. In a 2009 law review article, John McDonald points out that the statute is silent whether the NLRA applies extraterritorially. *See* John McDonald, *Note: Don't Cross That Line! The Case for the Extraterritorial Application of the National Labor Relations Act*, 64 U. Miami L. Rev. 369 (2009).

The FCPA does not explicitly prohibit direct payments to trade unions or trade union officials—though an

Practice Tip

Fair Labor Association

Indicators that a labor protection contract is present in a workplace:

- Lack of general assembly elections and worker participation
- Lack of meetings in which workers participate and develop agendas
- No indication that workers receive notice of collective agreement negotiations or are aware of who their trade union representative is or that they are represented by a trade union
- Automatic enrollment of workers in the union upon hiring
- Collective agreements that are not provided to workers and do not go beyond existing protections in Mexico's Federal Labor Law

argument could be made that Congress should amend the statute to address this oversight. Payments made to trade union officials may present third-party risk under Section 78dd-1(a)(3) of the FCPA if company officials are aware that all or a portion of the money or gifts provided may influence the act or decision of a foreign official. Examples include payments made to influence an official's decision to favor the company in a workplace dispute or to deny the registration application of a trade union likely to demand higher wages on behalf of employees. Payments made directly to trade unions or trade union officials may also present a risk of violating the books and records provisions under Section 78m of the FCPA, especially if a company cannot demonstrate that the payment made for union dues was authorized by its workers. The FLA's indicators of the presence of a labor protection contract can provide guidance to compliance officers on whether or not such payments to a trade union or its officials are legitimate.

Direct and third-party risks of FCPA violations are particularly acute in the case of labor protection contracts because of the current configuration of tripartite local and federal labor boards under Mexican labor law. Payments made directly by company officials to trade unions or trade union officials may actually be payments to a government official since trade union officials are actively involved in resolving workplace disputes on tripartite labor boards at the local and federal level under current Mexican labor law.

Thus, any payment made to an official trade union representative as a quid pro quo in exchange for the signing and registration of a protection labor contract may in fact be a payment to a government official or to a third party within the trade union who has influence over the trade union representative sitting on the local labor board. The illicit benefits from making payments directly or indirectly to the trade union representative on a local labor board can result in various labor-related benefits to a company, including the outcome of individual workplace disputes or rejection by the labor board of the registration of an independent, representative trade union that may request higher wages and benefits on behalf of the company's workers.

In early 2017, the Mexican Congress amended the Constitution of Mexico to replace local and federal labor boards with specialized, neutral labor courts with independent judges. The replacement of local and federal tripartite labor boards with independent labor courts and judges would go a long way to eliminating the FCPA and corporate compliance risk posed by labor protection contracts in Mexico. The 2018 congressional session, however, closed without passage of legislation implementing the constitutional reforms. Until such implementing legislation is passed, the conflicts of interest and compliance risk posed by protection labor contracts and tripartite labor boards remain. For additional information, read my recent article:
Mexican Congressional Session Closes without Passing Legislation Implementing Labor Justice Reform, Int'l Comm. Newsletter (ABA Section of Labor & Emp't L.), June 2018.

As N. Isabelle Figaro noted in her article in the Spring 2018 Newsletter of the Section's International Anti-Corruption Committee, companies can no longer ignore corruption in their supply chains. *See* N. Isabelle Figaro, *Can Supply Chains Use Blockchain as a Tool for FCPA Compliance?* Int'l Anti-Corruption Comm. Newsletter (ABA Section of Int'l L.), Spring 2018 at 17.

This includes both obvious risks—as with the payment of bribes by subcontractors to building inspectors in Bangladesh—and the more subtle risks involved with the common but contested practice of making payments to trade unions and trade union representatives in exchange for labor protection contracts in Mexico. ◆

This article is also published in the Summer 2018 Newsletter of the International Anti-Corruption Committee of the ABA Section of International Law.

ABA International Conference, Mexico City

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International Law News
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FEATURE ARTICLE

Structuring Employment Contracts for Border-Crossing Employees

By Donald C. Dowling, Jr.

Because multinationals operate internationally, they often post staff overseas. Properly documenting an international assignment is the most important step to shore up an employer's position that the selected expatriate structure is legitimate.

Expatriate postings traditionally came about when a multinational tapped an employee to go work abroad for one of three reasons: to support a foreign affiliate, as a broadening assignment, or to work overseas for the home-country employer's own benefit. Today, though, multinationals increasingly see these "traditional" expatriate assignments as less effective—employers these days turn to new mobility models like commuter assignments, extended business travel, rotational assignments, and "local-plus assignments."

We now see more "floating employees" moving abroad to work in countries where the employer has no registered entity, and we see more employee-driven international moves—expats convincing their managers to let them work overseas and telecommute for personal reasons, such as, for example, employees who have to move back to their home countries to nurse a sick relative, and so-called "trailing spouses" married to other companies' expats.

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My article in the Spring Edition provided an overview of who is and who is not a business expatriate, the common expatriate structures, and tips on how to select the best structure for an international assignment. *See* Donald C. Dowling, Jr., *Advising Clients with Globally Mobile Workforces: Going Beyond Immigration Law*, 46 INT'L L. NEWS 1 (ABA Spring 2018).

After settling on the best structure for a given expatriate assignment, you then need to decide how to memorialize or document the posting.

Two Common Types of Expatriate Agreements

There are two very different kinds of written expatriate agreements, also commonly referred to as expat agreements. You can document an expat assignment using one or both agreements, as appropriate.

1. **Expat assignment agreement.** This is an agreement between the expat and the employer. The employer can be the home country entity, host country entity, or both.
2. **Inter-affiliate assignment arrangement.** This is an agreement between a home country employer entity and host country employer to which the expat is not a party.

Expat assignment letters or agreements with expats themselves are important in most all expat postings, whereas inter-affiliate assignment documents tend to be relevant only in assignments structured as secondments and co-/dual-/joint-employment postings.

In crafting inter-affiliate assignment agreements, factor in balance-of-power issues. For example, in a secondment, the nominal (home country) employer usually retains the ultimate power to make employment decisions like setting pay/benefits, imposing discipline/termination, and determining length of assignment.

Two vital issues in documenting an expat assignment are "hibernating" home country employment agreements and choice-of-law clauses.

"Hibernating" Home Country Employment Agreements

The primary agreement of a co-/dual-/joint-employee expat is often with the host country employer entity, but by definition a co-/dual-/joint-employee expat retains privity of employment contract with the home country employer.

The expat's home country employment arrangement may become dormant or may "hibernate," but it is not extinguished. Hibernating home country agreements complicate expat dismissals when they "spring back to life." Be careful to suspend or hibernate home country employment arrangements in a way that will not surprise anyone later. Guard against unintended hibernating home country employment agreements—the scenario of the employer that had tried to structure a temporary transfer/localization but inadvertently failed to extinguish the home country employment agreement.

The problem of the hibernating home-country employment agreement unexpectedly springing back to life tends to arise in the situation of an employer that had thought it was temporarily localizing an expat but inadvertently ended up allowing the expat to work as a co-/dual-/joint-employee. Any employer intending to localize an expat must extinguish the underlying home-country employment contract, such as by having the expat sign a resignation letter resigning from the home country entity when simultaneously "onboarding" with the host country employer (usually getting retroactive service credit).

Practice Tip

Any employer intending to localize an expat must extinguish the underlying home country employment contract, such as by having the expat sign a resignation letter resigning from the home country entity when simultaneously "onboarding" with the host country employer.

Choice-of-Law Clauses

Too many expat assignment documents, expat benefits plans, and expat restrictive covenants contain home country choice-of-law clauses that might ultimately backfire against the employer.

As soon as an expat's place of employment becomes a new host country, local (host country) employee protection laws—laws regulating work hours, overtime, vacation, holidays, wages, benefits, payroll, health/safety, unions, restrictive covenants, discrimination, harassment, and severance—usually attach and protect the expat by force of public policy.

Think carefully before sticking a home-country choice-of-law clause into expat documents, because the clause may well pull in home country employee protection laws without shutting off the mandatory application of host country employment protections. (There are some exceptions, such as China.)

When an expat assignment ends or when an expat gets dismissed, a home-country choice-of-law clause more often seems to help the expat rather than the employer because it empowers the assignee to cherry-pick from two sets of employment protection laws. Rather than a home-country choice-of-law clause, consider:

- a host-country choice-of-law clause
- a clause simply calling for the law of the "place of employment," or
- even no choice-of-law clause at all.

The extraterritorial reach of home country employment laws in some scenarios—such as U.S. discrimination laws attaching to U.S. citizens working abroad for U.S.-controlled employers—can be a complication, but not one that eliminates the risks of home-country choice-of-law clauses in expatriate arrangements.

Practitioner Tips

Determine Whether the Person Qualifies as an Expatriat

When structuring a cross-border assignment, posting, or secondment, first determine whether the assignee will actually be an expatriate. Globally mobile staff who do not qualify as expats—for example, business travelers, permanent transferees, and foreign hires—are easy to structure. But misclassifying an actual expatriate as a nonexpat, or misclassifying a nonexpat as an expat, increases costs and introduces complications. Expatriate postings come in many forms but ultimately fit into or among four categories: foreign correspondent, secondment, temporary transferee (localized), and co-/dual-/joint-employee.

Structure Expat Assignments Strategically

Structure each expat assignment into the most appropriate category. Address business needs and comply with legal mandates. Immigration is a primary legal issue, but also account for payroll laws, employment laws, and "permanent establishment" (host country corporate presence and corporate tax exposure).

Carefully Document the Expat Assignment

Carefully document the expat assignment to reflect the selected structure. Take other steps to shore up the position that the selected expat structure is legitimate. Unless all structural and legal issues happen to be identical, do not simply copy the documentation package of the previous expat. ◆

Read Part I of this article: Donald C. Dowling, Jr., *Advising Clients with Globally Mobile Workforces: Going Beyond Immigration Law*, 46 INT'L L. NEWS 1 (ABA Spring 2018).

An earlier version of this article was published by Littler Mendelson PC in October 2017.

International Law News
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FEATURE ARTICLE

Ethical Issues for Lawyers under the United Nations Guiding Principles on Business and Human Rights

By Steven M. Richman

We are all human rights lawyers now. Such concerns are no longer the sole province of public interest lawyers or those who otherwise specialize in human rights issues. Commercial lawyers representing private companies must be attentive to human rights issues and to the desire of companies to step up their corporate social responsibility efforts.

Further, corporate social responsibility (CSR) is no longer simply aspirational. Companies are looking at "how to get it done." Whether motivated by a responsibility to do social good, the lure of profit, demands for accountability by stakeholders, or a desire to avoid boycotts and public relations disasters, companies across multiple sectors are joining the broader movement to integrate and comply with international norms and practices throughout their operations and supply chains. In some cases, statutory disclosures and reporting are required. As such, companies are rolling out initiatives to be more socially, economically, and environmentally responsible and are honing in on investors' and consumers' perceptions of whether the company is making the world a better place.

Among the frameworks guiding companies is the United Nations Guiding Principles on Business and Human Rights (UNGP), adopted in June 2011 to help companies avoid negative societal impacts and human rights violations. They are designed to assist corporate leaders when setting internal and external policies, strategies, and activities, including managing their supply chains.

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While the UNGP themselves may be considered "soft law" and do not have mandatory strictures, certain other laws do, particularly with regard to reporting activities and in specific industries. Increasingly, we are seeing the codification of what was once merely suggestive within domestic laws and regulations and regional instruments. This codification takes many forms, most commonly as reporting and public disclosure requirements. Some laws target specific human right violations, such as child labor, human trafficking, and forced labor. Moreover, international institutions might require compliance as a condition for financial assistance. We also see where businesses are requiring compliance with human rights principles within their supply chains, meaning that the otherwise aspirational ideas become enforceable contract provisions.

Responsive to this growing focus on human rights and CSR, various international law firms have established practice groups or departments devoted to or specializing in corporate social responsibility issues. These generally tend to be structured within the international trade practice or the business department, or as a separate multidisciplinary practice group. The models vary, as do the products and services. Core services generally are related to reporting compliance, due diligence, and global investigations, but they also can include a range of emergent services, such as strategic analysis and business advice.

The growing area of human rights and corporate social responsibility provides new opportunities for lawyers in international law and with cross-border practices. Yet, as this article discusses, attorneys need to be mindful of

and carefully understand the ethical considerations related to legal advice versus business advice.

What Are the UN Guiding Principles on Business and Human Rights?

The United Nations Guiding Principles on Business and Rights were endorsed by the United Nations Human Rights Council in June 2011. *See* U.N. Office of the High Commissioner of Human Rights [OHCHR], Guiding Principles on Business and Human Rights HR/PUB/11/04 (2011).

Their purpose is to identify standards and principles to be applied by business community in relation to human rights considerations. The UNGP contains thirty-one principles, plus commentary, to implement the three fundamental pillars of the United Nations Protect, Respect, and Remedy Framework. *See* Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011).

1. Protect

Under the Protect pillar, which generally addresses the obligations of states, the principles begin with the foundational and proceed to more specifics. The foundational principles (noted here by parenthetical reference) assert that states (1) must protect against human rights abuses within their territory or jurisdiction by third parties, including businesses, and (2) set out clear expectations as to such. Further, operational principles mandate that states should (3) enforce relevant laws and policies that respect human rights, provide guidance, and seek business feedback as to compliance; (4) take additional steps regarding state-owned businesses to ensure compliance; (5) exercise adequate oversight; and (6) set examples through the state's commercial transactions. Regarding supporting business respect for human rights in conflict-affected areas, states should (7) engage with businesses early on to help businesses identify, prevent and mitigate human rights issue, provide adequate assistance, deny public support to abusive companies, and ensure efficient enforcement.

To ensure policy coherence, three principles apply. States should (8) ensure awareness through government agencies, (9) maintain adequate domestic policy space to meet objectives, and (10) when in multilateral institutions, seek to ensure institutional compliance.

2. Respect

The next set of principles address the second pillar of Respect, and this is addressed to non-state actors. Foundational principles under this pillar mandate that businesses (11) respect human rights; (12) understand what human rights are fundamental; (13) avoid causing or contributing to adverse human rights impacts and seek to prevent or mitigate same; (14) recognize the application of these principles regardless of company size, operational context, ownership, and structure; and (15) establish procedures relevant to those factors to enable implementation. As an operational principle, businesses should (16) issue a statement of policy.

As a principle of human rights due diligence, businesses should (17) carry out due diligence assessments related to current the business's activities; (18) identify actual and potential risks and engage in meaningful consultations; (19) prevent and mitigate abuses by integrating measures across the components of the business enterprise; (20) verify and track effectiveness; and (21) prepare external communiques. By way of remediation, business should (22) identify their adverse impacts. Businesses also should (23) comply with applicable law, respect international human rights, and

seek ways to honor them; and (24) where necessary, seek prevention and mitigation to prevent irremediable situations.

3. Remedy

The Remedy pillar is addressed to both state and non-state actor obligations. The main principle requires states to (25) ensure access to a remedy through judicial, administrative, legislative, or other means. Operational principles mandate that states ensure (26) state-based effective and appropriate domestic judicial mechanisms; (27) state-based effective and appropriate non-judicial grievance mechanisms; (28) non-state-based grievance mechanisms; (29) internal business grievance mechanisms; and (30) industry-wide collaborative efforts to enable implementation. Regarding the effectiveness criteria for the Remedy pillar, both state-based and non-state-based, non-judicial grievance procedures (31) should have criteria that are legitimate, accessible, predictable, equitable, transparent, rights-compatible, and a source of continuous learning. Operational-level mechanisms should be based on engagement and dialog.

Ethical Considerations for Lawyers

To the extent that legal compliance is part of the pyramid, lawyers can and should be involved in advising clients on ways to incorporate UNGP in their business practices and supply chains. International trade and business lawyers are in particularly unique positions to help clients understand the legal, regulatory, and enforcement environments in which they operate. However, as indicated at the outset, human rights are not the province of one particular set of lawyers. Lawyers also must be mindful of their professional responsibilities and their divergences across jurisdictions.

In the United States, the ABA Model Rules of Professional Conduct are simply that—model rules. Once adopted by a regulatory jurisdiction, they then have applicability. Many of their principles resonate in several jurisdictions and are used here to illustrate a few ethical considerations when providing advice to clients, particularly as to the contours of legal advice versus business advice.

ABA Model Rule 1.1 addresses competence and states that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Equally important is the obligation of diligence found in ABA Model Rule 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

ABA Model Rule 1.6 addresses confidentiality of information and prohibits the lawyer from revealing information relating to representation unless to prevent "certain death or substantial bodily harm" or the client from "committing a crime or fraud" reasonably certain to cause another financial injury, or disclosure is impliedly authorized to carry out the representation or is necessary to establish defense, detect conflict, or required by court order. The fundamental principle involved is based on trust and to encourage a full and frank discussion, including embarrassing or legally damaging subjects, to enable the lawyer to effectively represent the client and advise against further wrongful conduct. The privilege does not generally apply to business advice, but it does apply to advice for the purposes of obtaining or providing legal assistance. *See, e.g.*, Restatement (Third) of the Law Governing Lawyers § 68 (2000).

While not necessarily privileged as a communication, such communications that relate to other than purely legal issues may nonetheless be relevant for the legal advice to be given. In this regard, **ABA Model Rule 2.1** is relevant; it expressly notes the role of a lawyer as advisor in order to provide appropriate representation and states: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but also to other considerations, such as moral, economic, social, and political factors that may be relevant to the client's situation." A finite body of interpretative authority exists regarding Model Rule 2.1. However, Comment 2 makes this point:

> [2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical

> considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

Similarly, a lawyer need not be passive and may act proactively. Comment 5 makes this clear:

> [5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

The comment references **ABA Model Rule 1.4**, which addresses communications. Among other things, under 1.4(a)(2), a lawyer is obligated to "reasonably consult with the client about the means by which the client's objectives are to be accomplished." The lawyer, under 1.4(b), also must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

ABA Model Rule 4.1 governs truthfulness in statements to others, precluding false statements of material fact to third persons or failing to disclose a material fact to the third person, when the fact is necessary to avoid assisting a criminal or fraudulent act by the client, subject to the provisions of **ABA Model Rule 1.6**. Note also **ABA Model Rule 4.4**'s proscription against using means that are substantially for the purpose of embarrassment, delay, or burdening a third person.

A lawyer is not precluded from engaging in certain law reform activities, even if doing so affects a client's interests. Pursuant to **ABA Model Rule 6.4**: Law Reform Activities Affecting Client Interests:

> [a] lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

Nothing in the UNGP is meant to preclude lawyers representing clients who may not be popular or with whom the lawyer may disagree philosophically. The UNGP also do not eliminate the lawyer's obligations of confidentiality, diligence, and zealous representation. They however, do provide insight into the broader framework in which commercial companies act, which means sensitivity to the broader issues of social responsibility. Practitioners should be familiar with these and consider them in relation to their ongoing activities.

Conclusion

While the UNGP may be nonbinding, there are other hard law requirements that have either resulted from them or complement them. Even beyond that, lawyers have an obligation to act as an advisor and to be aware of economic and reputational repercussions to clients when giving advice related to corporate social responsibility. They become hard law when tied to a company's publicly stated policies and communications, as well as contractual obligations. Shareholder reaction and potential political acts, such as boycotts, may factor into the legal advice offered as part of the social fabric and new business environment. While lawyers' professional rules and obligations remain, particularly those regarding scope of representation and privilege, the impact of UNGP cannot be dismissed. ◆

An expanded version of this article will be published in the forthcoming Volume 51:3 of *The International Lawyer*, the triannual scholarly journal published by the ABA Section of International Law in cooperation with the SMU Dedman School of Law.

Online Resources

- Guiding Principles for Business and Human Rights (pdf, free download)
- FAQs on the Guiding Principles for Business and Human Rights by the Office of the High Commissioner for Human Rights (pdf, free download)
- Interpretative Guidance for the Guiding Principles for Business and Human Right by the Office of the High Commissioner for Human Rights (pdf, free download)
- ABA Model Rules of Professional Conduct, 2018 Edition

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International Updates

IMF, OECD, UN, and World Bank Group Invite Final Comments on "Taxation of Offshore Indirect Transfers of Assets" Report

Final public comments are invited on the revised draft of "The Taxation of Offshore Indirect Transfers: A Toolkit" developed by the Platform for Collaboration on Tax as a joint initiative of the IMF, OECD, the United Nations, and the World Bank Group. The toolkit will be used to help developing countries with their legislative and regulatory approaches to these transactions. The drafters are particularly interested in knowing whether the toolkit is balanced and robustly argued, whether expanding the definition of immovable property is reasonable, whether the concept of location-specific rents is pragmatically helpful, and whether the complexities in the taxation of these international transactions are adequately represented. Comments are due by September 24, 2018.

International Maritime Organization Establishes Task Force on Autonomous Ships

International Maritime Organization (IMO) Secretary-General Kitack Lim announced the formation of an interdivisional task force within the Secretariat, with the participation of the Legal Affairs Office, to look at the future of maritime autonomous surface ships (MASS). A particular focus will be the legal framework across multiple treaties and the related regulatory frameworks.

The topics span safety, security, port operations, routine maintenance operations, communications, prevention of collisions at sea, emergency procedures, search and rescue, liability in cases of accidents, insurance, and environmental protections. The IMO is undertaking a regulatory scoping exercise to determine how the operation of autonomous ships might be taken into account within IMO legal instruments. The IMO Maritime Safety Committee in May endorsed a framework for its regulatory scoping exercise, including preliminary definitions, and invites Member States and international organizations to submit proposals on how to allow the testing of autonomous ships in international waters. The input will help inform the work of the Committee at its 100th session on December 3–7, 2018. Read the IMO Press Briefing, *IMO Takes First Steps to Address Autonomous Ships*, May 25, 2018.

European Union 5th Anti-Money Laundering Directive Enters into Force

The European Union's Fifth Anti-Money Laundering Directive was published on June 19, 2018, and entered into force on July 9, 2018. The Directive strengthens safeguards against money laundering, tax evasion, and tax avoidance. The tightened measures include establishing publicly accessible beneficial ownership registers for legal entities, such as companies, and extending anti-money laundering and counterterrorism financing rules to virtual currencies, tax-related services, and persons trading in works of art. Further, individuals will no longer be guaranteed anonymity for prepaid and other electronic money products, with two narrow exceptions. Member States also will be required to establish centralized bank account registries and apply enhanced safeguards for financial transactions to and from high-risk third countries. The Directive also establishes measures to enhance cooperation of financial supervisory authorities and provide EU Financial Intelligence Units with better access to bank account information. Member States have until January 10, 2020, to amend their legislation to comply with the new Directive. Read EU Directive 2018/843.

U.S. Steel and Aluminum Duties Spark Multiple Dispute Complaints at World Trade Organization

On March 8, the United States imposed 25 percent duties on imported steel and 10 percent duties on imported aluminum, pursuant to Section 232 of the U.S. Trade Expansion Act. The United States initially exempted some countries and the European Union, but not China, one of the world's largest producers of steel and aluminum. The United States subsequently ended the exemptions for Canada, Mexico, and the European Union. Several countries reacted by filing dispute complaints with the WTO alleging that such additional duties by the United States are inconsistent with the General Agreement on Tariffs and Trade (GATT) and by imposing additional duties on certain U.S. products. The United States has requested WTO dispute consultations with China, Canada, Mexico, Turkey, and the European Union. *See* Request for Consultations by the United States on Additional Duties on Certain Products from the United States, WTO (July 19, 2018).

20th Anniversary of the Adoption of the International Criminal Court Rome Statute

The International Criminal Court (ICC) will hold commemorative events on July 16–17, 2018, in honor of the 20th anniversary of the adoption of its founding treaty, the Rome Statute. The treaty was adopted at a United Nations Diplomatic Conference on July 17, 1998, and entered into force on July 1, 2002. Former Secretary-General Kori Annan described the adoption of the Rome Statute and its establishment of the ICC as a "gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law." Under the Rome Statute, the ICC has jurisdiction to hold leaders individually criminally responsible for war crimes, crimes against humanity, genocide, and crimes of aggression. Learn more, download the Rome Statute, watch videos from the events, read the speeches, and browse the online photo exhibit on the ICC's website: "The ICC Rome Statute is 20"

Crime of Aggression Enters Into Force at the International Criminal Court

As of July 17, 2018, the International Criminal Court (ICC) will have jurisdiction over the crime of aggression for those Member States that have ratified or accepted an amendment to the Rome Statute adopted by the Assembly of State Parties to the Rome Statute. This jurisdictional limitation applies in cases referred by states and cases initiated by the ICC Prosecutor. The jurisdictional limitation does not apply to referrals from the UN Security Council. The crime of aggression was one of the four core crimes in the Rome Statute, but its activation was postponed pending future agreement on the definition and the ICC's jurisdiction over the crime. Read the amendment adopted as Resolution RC/Res.6 of the Review Conference of the Rome Statute. Explore which countries are State Parties to the Crime of Aggression.

40th Anniversary of the Entry into Force of the American Convention on Human Rights

The American Convention on Human Rights entered into force on July 18, 1978. The regional treaty, adopted by the Organization of the American States (OAS) Member States, establishes the responsibilities of states to uphold, protect, and promote human rights, in accordance with the Universal Declaration of Human Rights and consistent with the rights protected in the treaty. It also provided for enhancements to strengthen the Inter-American Commission on Human Rights and the establishment of the Inter-American Court of Human Rights. Additional protocols reinforce, complement, and expand on certain rights, including an individual's right to life free from discrimination, sexual and gender-based violence, enforced disappearance, and punishment by the death penalty. Read the American Convention on Human Rights. ◆

Country Updates

Austria

In its decision of June 27, 2018, the Constitutional Court upheld the Austrian Squeeze-Out Act, which permits what is commonly referred to as a corporate squeeze-out. The law allows the corporate majority shareholders holding at least 90 percent of the shares in a company to force out dissenting minority shareholders without supporting justification or grounds, solely on the basis of the Act. Unlike the EU law basis, a connection to a takeover is not required. The Court found persuasive that minority shareholders' interests are sufficiently protected by their entitlement to cash compensation, subject to judicial review, and that the vested interest of the majority shareholder prevails over the purely economic interest of the minority shareholder. Further, the Court found that there is a clear public interest in maintaining efficient corporate structures that allow Austrian corporations to react efficiently in rapidly changing national and international environments. Thus, the provisions enabling the majority shareholder to squeeze out minority shareholders are not disproportionate or unconstitutional. However, the Act does not apply to shareholders who hold less than 90 percent of the shares. Those shareholders will continue to find it difficult to remove dissenting minority shareholders if the company's statutes do not contain appropriate provisions. Read the Constitutional Court decision June 27, 2018 (VfGH G 30/2017-31) (in German).

❖ *Contributed by* **Katrin Hanschitz**
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Canada

The Section of International Law and the Section of Antitrust Law in May jointly submitted comments on the *Abuse of Dominance Enforcement Guidelines* for the Canadian Competition Bureau. The Sections provided recommendations for ways to refine the Guidelines, including as related to joint dominance, non-competitor in a relevant market, barriers to entry, predatory conduct, zero-monetary price services, and safe harbors. Read the comments.

Italy

The Section of International Law and the Section of Antitrust Law in June jointly submitted comments on the *Draft Guidelines on Compliance Programs* developed by the Italian Competition Authority (ICA). The comments commend the ICA's leadership to incentivize the establishment and maintenance of a culture of competition and compliance, as well transparency. The Sections provided recommendations for ways to refine the Guidelines, including as related to reporting violations, risk analysis, risk mitigation, recidivism, and liability for a violation by a subsidiary. Read the comments.

Poland

The European Union took additional steps in its infringement procedure against Poland over concerns that their judicial reforms are inconsistent with ensuring effective judicial protection and independence of national courts. Poland's reforms include the forced retirement of roughly forty percent of Supreme Court judges in July, the premature dismissal of the Supreme Court Chief Justice in contravention of the country's Constitution specifying a six-year term, the dismissal and new appointments of court presidents, and the removal of current judges from the national judicial council, which has a constitutional mandate to protect the independence of the judiciary. Further, Poland granted Parliament the authority to appoint the new replacements on the national judicial council. A new law also allows cases within the past twenty years to be re-tried by a newly created appeals chamber and permits the imposition of longer prison sentences, including for individuals previously acquitted of crimes. Read the documents released by the European Commission: Press Release on the decision to send a Reasoned Opinion to Poland regarding the Polish law on the Supreme Court (Aug. 14, 2018), Letter of Formal Notice concerning the law on the Supreme Court (July 2, 2018).

ABA President Hilarie Bass authored "Urgent Need for U.S. to Oppose Threat Against Judiciary in Poland" published in *InsideSources* on July 3, 2018.

Russia

Russia's Supreme Court has issued clarifying guidance on new amendments to the Federal Law on Insolvency (Federal Law No 127-FZ, 26 October 2002, amended by Federal Law No 266-FZ, 29 July 2017). The law covers both insolvency and bankruptcy. The new provisions allow subsidiary liability by controlling persons where the debtor has insufficient assets to resolve the debts. Among the clarifications, the Supreme Court addressed factors related to who is considered a controlling person, the scope of subsidiary liability, the determination of joint liability, and factors that the court may use to decrease liability. The guidance also deals with the statute of limitations that establishes two terms. The first term is a three-year term that begins either when declaring a company bankrupt or at the end of bankruptcy proceedings. The second is a ten-year period starting from the commission of a wrongful act. If a claimant files a lawsuit after the expiration of any of these terms, the claim may be dismissed. Notably, the Court cannot proactively act to dismiss the claim due to an expiration of the statute of limitations; it can only respond to a request to dismiss the claim based on a statute of limitations expiry when brought by the controlling person. Read the Russian Federation Supreme Court Plenary Ruling on Certain Issues regarding the Liability of Persons Controlling the Debtor in Case of Bankruptcy, No. 53, Dec. 21, 2017.

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United Kingdom

The Section of International Law and the Section of Antitrust Law in July jointly submitted comments on the *Draft Guidance Document on the CMA's Investigation Procedures in Competition Act 1998 Cases (Consultation Document)* developed by the Competition and Markets Authority. The Sections provided recommendations for ways to enhance the effectiveness of the proposed Guidelines. Read the comments. ◆

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COLUMNS

Book Review

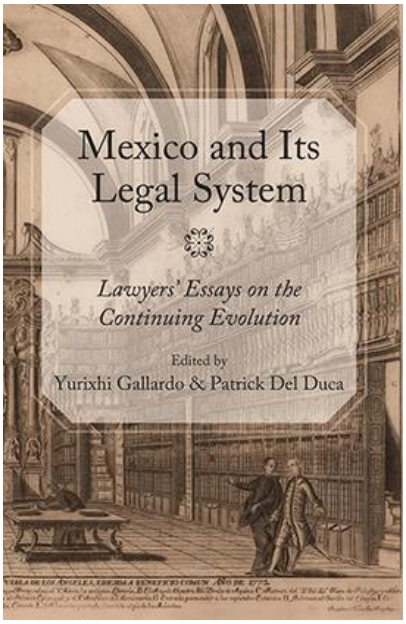
MEXICO AND ITS LEGAL SYSTEM: LAWYERS' ESSAYS ON THE CONTINUING EVOLUTION

Reviewed by Judge Manuel González Oropeza

Eight Mexican lawyers and one *visitante extranjero*, all jurists knowledgeable concerning the legal challenges associated with the realities of contemporary Mexico, share their views on some of the most interesting issues of the legal framework and situation of Mexico, ranging from family law through agrarian law, and spanning as well across constitutional law, the organization of the legal profession, judicial review, and foreign investment in *Mexico and Its Legal Systems: Lawyers' Essays on the Continuing Evolution*.

Each of these respected specialists is related to the Faculty of Law of the *Universidad Panamericana*, Guadalajara campus. Each shares professional expertise to offer an up-to-date status of the disciplines just mentioned. This work was prepared in close collaboration with the Mexico Committee of the American Bar Association Section of International Law, building on seven years of constructive interaction between the Faculty of Law and the committee.

The legal profession in the United States is one of the most cultivated



and organized of the Americas, and its close ties to Mexico reflect this valuable attribute. In affirmation of Steve Zamora's focus on the importance of developing an understanding in the United States of the legal profession in Mexico, appreciation of the legal practice and culture of Mexican law has been not only interesting but also necessary for American legal scholars and practitioners. The growth in university curricula and bibliography present in the United States relative to Mexican law demonstrates this assertion.

I hope that the example of this work, co-published by the American Bar Association and Carolina Academic Press, may also inspire the equivalent for Mexican lawyers, who likewise need to benefit from increased familiarity with law as practiced in the United States.

According to the groupings of contributions suggested by co-editor Yurixhi Gallardo in the Introduction to this book, the two contributions in the initial group are: first, a treatment of maternity and the workplace that delves deeply into the fabric of labor rights, gender discrimination, and social policies; and, second, a review of the political rights of foreigners in Mexico, painting a picture that contrasts sharply with the situation in the United States.

By promoting measures through which women with children may develop their abilities in workplaces, and that are compatible also with the possibility to work at home without their continuing

Judge Manuel González Oropeza is a former magistrate for the federal electoral commission of Mexico and is a professor in the School of Law at the National Autonomous University of Mexico [Universidad Nacional Autónoma de México, UNAM].

presence in an office so that they might devote more attention to their children, Maria Isabel Álvarez Peña depicts the achievement of gender equality policies in the broadest sense, in which equality may mean to accord distinct treatments to specific actors. In this regard, it is noteworthy to recall the 2003 adoption of Mexico's *Ley Federal para Prevenir y Eliminar la Discriminación* (Federal Law to Prevent and Eliminate Discrimination). That law proscribes the practice in the *maquiladora* industries through which potential women workers who might be pregnant were screened out of consideration by employer insistence on the conduct of pre-hire pregnancy tests.

Dealing with equality and differences between nationals, foreigners, and those whom Guillermo Alejandro Gatt Corona denominates as "Mexicans by choice," that it is to say, those naturalized as Mexicans, he offers an interesting panorama of legal problems related to nationality that is far simpler than in other latitudes. The author advocates the full enjoyment of political rights for those who are Mexicans by choice and the possibility for them to run for elective office in Mexico. This is quite plausible when taking into account Mexico's long tradition through which foreigners and nationals have enjoyed the same recognition of their fundamental rights since the nineteenth century. The enduring quality of this tradition is all the more remarkable in view of the frequency of foreign invasions of Mexico through the nineteenth century.

Jose Cecilio del Valle, born in Honduras and living in Guatemala, served as a representative in the Congress (1822), and as Minister of Foreign Affairs (1823), of Mexico. Vicente Rocafuerte, born in Ecuador, was a diplomat accredited by Mexico to represent it before various European powers (1834). A great example of Mexico's openness toward foreign citizens was the episode of colonization in Texas when Mexico gave the American *empresarios* citizenship and land to cultivate. Because of these concessions to U.S. citizens then transformed into Mexican nationals (first and foremost, Stephen–*Esteban* Austin), they were eligible for Mexican elective office even prior to the Constituent Convention that approved the first Constitution of the states of Coahuila and Texas, as part of the Mexican Federation (1827).

In accord with the full recognition of fundamental rights to all foreigners, in Mexico we do not label foreigners as "aliens," a term that would imply an extraterrestrial quality of otherness to such persons. Indeed, more and more involvement of non-Mexicans is broadly accepted, even in political issues. Since the federal elections of 1994, foreign persons and institutions have been authorized to conduct electoral observation in Mexico. They are termed *visitantes extranjeros*. This is a label that we should replace with the regular terminology of "international election observer." Co-editor and contributor Patrick Del Duca, a member of the Section of International Law and of the California Bar, expresses his insights into the election of 2015 as such a *visitante extranjero*. Regularly, Mexico and many other countries find compelling and legitimating the concept of incorporating into their electoral processes both domestic and international observations, whether to redress failures during the electoral implementation by administrative and judicial authorities or to address the defects of relevant regulation and legislation.

The second group of essays encompasses what it defines as the structural elements of the Mexican legal system, beginning first with commentary on the first century of Mexico's Constitution. Technically, however, the 1917 Constitution is a set of amendments of an older Constitution (1857). As such, the first of these essays frames some key issues raised by the *writ of amparo*, Mexico's predominant form of judicial review of the constitutionality of actions under color of law, with more than 170 years of practice in Mexico reaching back to constitutional developments in Mexico in the nineteenth century. Further essays in this group address developments relative to the modern techniques of alternative dispute resolution, as well as proposals to organize the legal profession.

From 1824, Mexico adopted a federal system with many contradictions that sharply divided the country in the first half of the nineteenth century. As of 1917, the political cleavages were resolved, but the Constitution continued, in the style of the constitutive document of a confederacy, to contain a detailed description of the legislative competences of the federal government. This form of

drafting remains the subject of revision and future amendments. Armando Cruz Covarrubias articulates the dissatisfaction that is shared by the states before an all-encompassing federal government that, once having touched a legislative subject, excludes the participation of the state governments, ever ratcheting up the degree of centralization of the system. How might this tendency that began from at least 1883 be reversed? This is the problem advanced during the celebration of the first century of the 1917 Constitution.

In the area of judicial review, the procedural rules and the various ways through which to challenge the constitutionality of any act, authority, or legal norm have developed in such a complicated fashion, as explains Alberto Estrella Quintero, that many problems remain unsolved. Indeed, they await new legal reforms or clarifications of relevant Mexico legal doctrine expressed in Mexico's articulation of *stare decisis* doctrine through the formulation of *jurisprudencia* by its courts.

In the interesting article written by Yurixhi Gallardo, the American reader will encounter the approaches to the legal profession in Mexico that are distinctly relative to those of the United States. In Mexico, a certified diploma by an accredited institution of higher education suffices to practice law throughout the country, once that title has been registered by the Ministry of Education. In contrast, in the United States, aspiring lawyers are accredited through passage of a state bar examination. The distinct approaches of Mexico and the United States have their own unique historical and cultural roots. In both countries, the link between the legal profession and the corresponding entitlement to practice has existed from the beginnings of the practice of law. In Mexico, the early practice was that aspiring lawyers were subject to an examination before the corresponding Supreme or Superior Court, submitting a paper and discussing it before the judges. As the number of would-be lawyers grew, the system evolved to fall under university responsibility. Throughout, the entitlement to practice law in Mexico has remained an individual relation, independent from the voluntary associations of lawyers in Mexico commonly known as *colegios* or *barras*.

In the last group of articles that are related to economic activities are two essays: one on foreign investment and the concluding contribution on land reform law. Since the beginning of the twentieth century, foreign investment has been fundamental to Mexico. However, in view of the dramatic declarations of change of economic policy expressed from the vantage of the United States, Mexico's approach to foreign investment and the revision of NAFTA merit thorough meditation. A key question is the extent to which foreign investment and NAFTA policies have created a dependency on foreign capital and goods (corn, for example) that may be counterproductive to real development for our country.

A fundamental reform of agrarian law occurred in 1992. As Isaías Rivera explains, the reform transmuted the structure of the *ejido* and its approach to collective property ownership, which were previously impervious to modification, so as to allow relevant landholdings to be owned as private property. However, agricultural productivity does not appear to have benefited significantly from the reform, notwithstanding the numerous governmental programs to support consumption and production.

This book is important for its content and its timeliness. It is published in the context of crossroads for two changing nations, each of which appears launched on its own, distinct transformation. Mexico after one hundred years under its Constitution of 1917, marked by abundant constitutional and legal redefinitions, needs to find its new path, while accommodating the changes, whether for better or worse, undertaken by the United States. This is a challenge to which legal scholars, and, in particular those writing in this work, may usefully contribute through their reflections in reasoned dialog with their counterparts in the corresponding profession of our neighboring partner. ◆

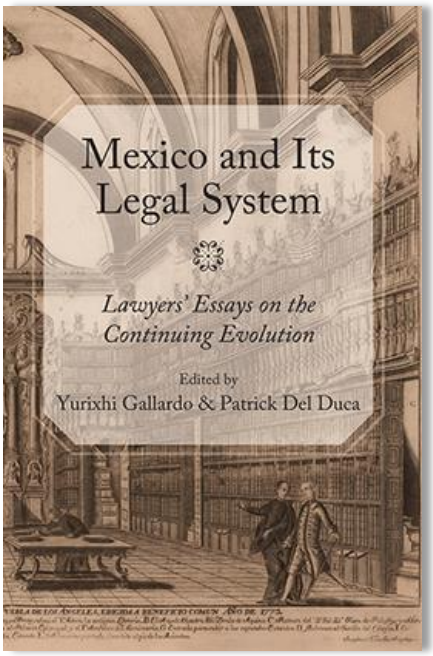
CO-PUBLISHED BY

ABA Section of International Law and Carolina Academic Press

Mexico and Its Legal System:

Lawyers' Essays on the Continuing Evolution

Mexico and Its Legal System: Lawyers' Essays on the Continuing Evolution provides concrete practice-oriented insight into key topics of Mexican law, including federalism, civil procedure, dispute resolution, immigration, foreign investment, and land ownership. Concurrently, it explores how the law approaches gender equality, assures fair and transparent elections, and shapes the role of the legal profession. The book is a rich resource for practicing lawyers and business people dealing with Mexico, but also speaks broadly to the fundamental rule of law and law reform aspirations of lawyers generally. The book affords insight relevant to current political and economic developments on both sides of the border shared by Mexico and the United States. The work is an extraordinary tool for students of law, political science, and sociology, who seek to approach Mexican law through concurrent legal and sociological perspectives.



About the Editors

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Yurixhi Gallardo is a Professor in the School of Law at Universidad Panamericana, Guadalajara Campus. She teaches in the areas of political theory and professional ethics. She earned her Ph.D at Universidad Panamericana, Guadalajara Campus. She has master's degrees in Humanistic Studies from the Universidad Abat Oliba CEU, Barcelona, and in History of Thought from Universidad Panamericana, Mexico City Campus. She has completed a specialization in Anthropology and Ethics at Universidad Panamericana, Guadalajara Campus, where she also earned her law degree.

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STATEMENT OF ABA PRESIDENT HILARIE BASS ON INTERNATIONAL CRIMINAL JUSTICE DAY

By ABA President Hilarie Bass

On International Criminal Justice Day, the American Bar Association (ABA) recognizes the vitally important efforts of the international community to combat the atrocities of genocide, crimes against humanity, and war crimes. An effective international criminal justice system, led by the International Criminal Court (ICC) and national courts throughout the world, is essential to ending impunity for individuals who engage in atrocities, bringing justice to victims and their families, and achieving lasting international peace and security.

This year marks the 20th anniversary of the adoption of the Rome Statute establishing the ICC. It provides an opportunity to reflect on the progress that has been achieved and to acknowledge the important work yet to be accomplished.

The ABA supported the establishment of a permanent international criminal justice tribunal beginning in 1978 and played an active role in the ICC's founding in 1998. We did so recognizing that accountability in international criminal law is indispensable to justice. Indeed, preventing the worst of these crimes–genocide, war crimes, crimes against humanity–is at the heart of the international order erected after the mass atrocities of World War II. Their continuation today is an affront to human dignity and a failure of human institutions.

Yet the ICC persists in its critical mission, and its hard-won successes to date give hope that justice will be served and future atrocities will be prevented.

July 17, 2018

20th Anniversary Rome Statute

International Criminal Justice Day on July 17, 2018 marks the twentieth anniversary of the adoption of the Rome Statute establishing the International Criminal Court.

International Law News
ABA Section of International Law
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NEWS

ABA JOINS GLOBAL EFFORT TO RESTRICT LEAD PAINT

By Jay Monteverde

An alarming two-thirds of countries have no restrictions on using lead in paint, according to the United Nations Environment Programme.

By not prohibiting the use of lead in paint, these countries without legal limits are placing individuals at risk of exposure to a known poison. Lead paint remains a key pathway for lead exposure, which is linked to myriad health and developmental problems costing low-income and middle-income countries roughly $977 billion international dollars annually in lost productivity.

Lead exposure is particularly harmful for young children and pregnant women because of its profound and potentially permanent adverse health effects. The legacy of lead paint also raises social and environmental justice issues. Research has linked high blood lead levels and violent behavior, showing a correlation between bans of lead in paint and gasoline with marked reductions in violent crime twenty years later. This suggests that lead paint imposes additional burdens in already disadvantaged communities and in areas of conflict.

The American Bar Association this year is expanding its work with the Global Alliance to Eliminate Lead Paint (Lead Paint Alliance), a voluntary initiative of the United Nations Environment Programme and the World Health Organization and chaired by the U.S. Environmental Protection Agency (EPA). The Lead Paint Alliance, its partners, and supporters are working with governments, regional and nongovernmental organizations, industry stakeholders, academia, and interested experts on identifying and implementing measures to take quick action on lead paint.

Among its activities, the ABA is helping raise awareness in countries lacking lead paint restrictions, offering legal resources to governments, convening in-country workshops to bring stakeholders together to identify appropriate solutions, delivering in-country training, and providing legal support to drafting efforts. In December 2017, the ABA Rule of Law Initiative (ABA ROLI) and Lead Paint Alliance partners held a workshop in Kingston, Jamaica, to introduce the Lead Paint Alliance's Model Law and Guidance and to discuss with government officials, regional and nongovernmental organizations, and industry stakeholders how Jamaica and the Caribbean region could ban lead paint. The workshop allowed the sharing of experiences from other countries that have recently banned lead paint and explored with participants opportunities for Jamaica and the region to take quick action on lead paint. All participants agreed with the urgent need to ban lead paint.

ABA ROLI, through providing hands-on assistance to countries around the world, serves as the focal point for implementing the ABA resolution on lead paint adopted in 2017. The resolution urged governments worldwide to adopt laws to phase out the manufacture, import, and sale of lead paint. It also urged lawyers, law firms, bar associations, and other professional and nonprofit organizations to provide pro bono support, educational initiatives, and other activities to help support the adoption and implementation of laws to phase out and eliminate lead paint. *See* Resolution 109B (2017).

The ABA Section of International Law sponsored the resolution. **Sara P. Sanford**, the Chair of the Section when the resolution was submitted to the House of Delegates said, "Through the resolution, the ABA advances its Goal IV on Rule of

Jay Monteverde (*jay.monteverde@americanbar.org*) is the Director of Global Environmental Programming for the American Bar Association Rule of Law Initiative (ABA ROLI).

Law, by supporting the adoption of just laws." Sandford pointed out that the resolution builds on a 2007 ABA resolution urging governments and stakeholders to consider and integrate Rule of Law initiatives with global environmental issues, and on a 2003 ABA resolution, reaffirmed in 2013, on sustainable development.

Kim Smaczniak, the Vice Chair of Rule of Law for the Section's Environmental Law Committee, led the committee effort to draft and advance the ABA resolution, which represents a statement of official ABA policy. "We know how to make paints without lead, [and] we know the health consequences of lead exposure," said Smaczniak. "What the world is lacking is good laws. Therefore, the ABA can and should show leadership by example, and help to marshal the resources within the legal profession to support a solution. The ABA lead paint policy paves the way to do exactly that. I hope the policy inspires ABA leaders, committees, and members to look for ways we can make a concrete contribution toward the goal of achieving global adoption of measures to address lead paint."

Get Involved

Help the ABA answer the global call to restrict lead paint. The ABA Rule of Law Initiative continues to receive requests from countries for legal technical support to restrict lead paint. Your help is needed so we can make a difference.

ABA members are needed for pro bono projects to help countries draft and review proposed laws, regulations, and guidelines to restrict the manufacture, sale, and importation of lead paint. Lawyers with expertise in specific countries or regions are particularly needed to support effective and sustainable solutions. Each country possesses different legal frameworks, different paint industry market characteristics, and a different combination of possible lead paint regulatory mechanisms.

With ABA members and legal professionals working with stakeholders in each country, we can achieve swift and effective progress on the global goal of greatly reducing, and eventually eliminating, the dangers from exposure to lead paint. ◆

To get involved in the ABA Rule of Law Initiative's work on lead paint, please send an e-mail with your expression of interest and the subject line "ABA Lead Paint Pro Bono Projects" to Jay Monteverde, ABA ROLI Director of Global Environmental Programming, at: jay.monteverde@americanbar.org

ABA Lead Paint Pro Bono Projects

Attorneys are need for pro bono projects to help countries restrict the manufacture, sale, and importation of lead paint.

- Draft laws, regulations, and guidelines
- Review proposed laws
- Advise on existing laws and regulations
- Advise on country and regional frameworks

Send an email with the subject line "ABA Lead Paint Pro Bono Projects" to:
jay.monteverde@americanbar.org

International Law News
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NEWS

INTERNATIONAL ANTI-CORRUPTION COMMITTEE PROGRAM ON COMPLIANCE CONCERNS IN AFRICA

By Paige Brownlow

Ana Pinelas Pinto is a Partner at the Miranda Law Firm in Lisbon, Portugal. Her practice focuses on compliance, customs matters, tax, and white collar crime, with a geographic emphasis on African countries. The firm's Miranda Alliance is an international network of law firms.

The International Anti-Corruption Committee of the ABA Section of International Law hosted a program on anti-corruption compliance concerns in the Africa region with **Ana Pinelas Pinto** on May 17, 2018.

According to the 2017 Transparency International Corruption Perceptions Index, the worst-performing region was Sub-Saharan Africa. For businesses operating in the region, making payments to public entities or officials can trigger compliance concerns. There is a high level of perceived corruption, and many of these economies are cash-based with incipient banking systems. Companies must navigate a multiplicity of applicable rules, both domestic and regional, and determine from a legal perspective what rules actually apply in reality.

Some countries apply regional regulations in addition to domestic laws. For example, countries may apply regulations from the West African Economic and Monetary Union (UEMOA), the Central African Economic and Monetary Community (CEMAC), the Organisation for the Harmonization of Corporate Law in Africa (OHADA), or the Economic Community of West African States (ECOWAS), along with local regulations and laws.

Concerning domestic legislation criminalizing corruption in different African countries, Pinto discussed the origins of such legislation and the range of criminal punishments available. The punishments for the offense of corruption vary, from up to two years in prison in the Democratic Republic of Congo to up to ten years in prison in Gabon, Cameroon, and the Republic of Congo.

Pinto provided a four-step roadmap for making lawful payments in the region. The steps are designed to help companies determine their compliance risk levels while operating in the African region.

1. Companies should confirm the request for payment is duly grounded and legally justified. This necessitates examining local legislation, regional regulations, and separate rules related to particular sectors, such as the energy sector.
2. Companies should determine how the payment can and should be made. For example, in Cameroon, Congo, and Equatorial Guinea, you cannot make payments in cash exceeding €700.
3. Companies should make the payment to the correct and legitimate beneficiary, typically the public treasury.
4. Companies should properly report and fully document the payment. Having the proper documentation can be quite challenging, but nothing should be paid without proper documentation and a receipt.

Paige Brownlow is a second-year law student at The George Washington University Law School.

Pinto ended her presentation with a discussion of two practical cases. The first case was a tax audit of a U.S. company operating in Equatorial Guinea, and the second was a customs dispute in Gabon.

In the first case, tax authorities in Equatorial Guinea were conducting a tax audit of the Equatorial Guinean branch of a foreign company, headquartered in the United States. The tax authorities sent the company a letter indicating that they would be carrying out an inspection and that the company would be required to bear the cost of travel and accommodations to the headquarters.

In this example, there was legislation in Equatorial Guinea that required the company to pay displacement costs to government officials. When tax audits are conducted outside of the country, then all costs must be borne by the taxpayer. These costs include reviewing tax law, travel expenses, and the costs of all accommodations. All expenses should be supported by receipts and not be in excess of $30,000 for one year of an audit. In cases such as these, companies will typically choose to submit payments to the Equatorial Guinean government through third parties.

In the second case, Gabonese customs authorities conducted a customs audit on a Gabonese company and identified offenses that resulted in a fine of $80,000. The authorities proposed to settle the matter for $10,000. Pinto noted that similar situations often occur in countries like Gabon, Congo, or Cameroon and, under the CEMAC, customs disputes can be subject to settlements. However, the company has to follow correct procedures and maintain required documentation of all payments. It depends on the jurisdiction and local laws, but, as a general rule, settlements should be paid to the public treasury.

Following the presentation, Pinto responded to questions, including one about the potential adoption of legislation punishing corruption-based offenses by government officials with unexplainable wealth. Pinto replied that, in most of the African countries, including Mozambique and Angola, government officials must present their tax returns. However, she acknowledged there is little enforcement of these provisions, and unexplainable wealth is generally not a criminal offense in these countries. ◆

This article is also published in the Summer 2018 Newsletter of the International Anti-Corruption Committee of the ABA Section of International Law.

See also Ana Pinelas Pinto, Lilia Azevedo, & Vincent Olivier, *Payments in Francophone African Countries: A Few Recent Trends*, Int'l Anti-Corruption Comm. Newsletter (ABA Section of Int'l L.), Spring 2018 at 5.

Join the International Anti-Corruption Committee

The International Anti-Corruption Committee seeks to facilitate efforts to deter corruption and promote transparency, the rule of law, and compliance through dialogue and the exchange of ideas across both foreign and domestic industries, organizations, and countries. Committee members benefit from and contribute to programs, publications, policy initiatives, monthly calls, and networking.

Section members can join the committee for free as a member benefit and will receive announcements about upcoming calls, educational programs, the latest committee newsletter, and ongoing updates. If you are not already a committee member, join today by logging into your ABA account online and managing your committee memberships.

The Committee Co-Chairs for 2017–2018 are **Roberto Bauzá**, **Frank Fariello**, and **Corinne Lammers**.

In August 2018, **Frank Fariello** and **Severin Wirz** will begin their terms as Committee Co-Chairs for 2018–2019.

MEET INCOMING VICE CHAIR JOSEPH L. RAIA

Joseph L. Raia
(jraia@guntster.com) is a Shareholder at Gunster and is the ABA Section of International Law Secretary/Operations Officer for 2017–2018. He will be the Section Vice Chair for 2018–2019.

What attracted you to business litigation and dispute resolution as key focus areas of your international legal practice?
Strategic planning and advocacy. Assimilating the facts, evaluating the law, and developing a strategy designed to achieve client goals are the work of the advocate. The process is challenging, energizing, and fun. And then there is the oral advocacy—the performance art—the adrenaline rush.

What are some key considerations and challenges for legal practitioners and their clients in today's global marketplace?
These are disruptive times. Multiple forces are pushing back against free trade and open borders, even international conventions and agreements. Yet, business isn't going to stop crossing borders. Goods, services, and people will continue to move in international commerce in pursuit of lower costs, expanding markets, and other opportunities.

Now more than ever, strategic planning must take account of the international rules of the game and whether they are being honored. Where do you want to resolve disputes, not just geographically but also whether in court or arbitration? If arbitration is the method, which arbitral tribunal will work best for you? How do you plan to bring your counter party within the jurisdiction of the tribunal you've selected? What amount of time will be required before you begin the court proceedings or dispute resolution process? If you obtain an award, how are you going to enforce it across borders? These are not afterthoughts. They deserve serious consideration and planning at the beginning.

How did you get involved in international law?
I am a Miami lawyer, and international work follows the many people who come here. If you know the law, see the issues, and do the work, then international law will find you.

As the Secretary/Operations Officer, what are some of your responsibilities?
Every Section officer shares the same goals of keeping the Section on the track set out in the Strategic Plan and of supporting the leadership of the Chair and the work of the Vice Chair and Chair-Elect.

I serve as the Secretary/Operations Officer. Section bylaws describe the role as, "the Chair's principal deputy for the internal operations of the Section." Consequently, the Chair shapes the role. The Secretary serves on the Administration Committee (the governing body of the Section) and on the Executive Committee (which manages operations when the Administration Committee is not in session). Consequently, the Secretary can have a voice in all Section operations. And, most fun of all, the Secretary prepares the minutes of the meetings of the Administration and Executive Committees and of the Council.

What have been some interesting projects that you enjoyed as a Section Officer?
I have assisted in updating the Section's bylaws, and I participated in the development of the Section's Strategic Plan and now the strategic communications plan. The strategic communications plan is the final component of the Section's new Strategic Plan. It includes how the Section might improve its messaging and leveraging of social media.

A principal goal of mine for this year is to help the Section adopt a strategic communications plan that will direct more effective communication of our Section's mission, purpose, and accomplishments, to our members, the big ABA, and the broader international community.

What do you see ahead for the Section and its members?
The Section will continue to move forward, and it is great to be part of the excellent work being done by its members, committees, and leaders in practicing the art of international law, advocating for the Rule of Law, and building a network of like-minded international professionals. ◆

ABA Section of International Law Executive Committee 2018–2019

CHAIR
Robert Brown practices law in Louisville, Kentucky, where he focuses on foreign investment and international trade.

CHAIR-ELECT
Lisa Ryan practices immigration law in the San Diego office of Fragomen. She has held several offices in the Section including Vice Chair and Secretary/Operations Officer. She was a co-author of the Section's Strategic Plan.

VICE CHAIR
Joseph L. Raia is a Shareholder and Co-Chair of the International Practice Group at Gunster. The Vice Chair works with committees to help them execute the Section's strategic communications plan and achieve the goals and mission of the Section.

REVENUE OFFICER
Marcos Rios is Partner at Carey in Santiago. His legal practice concentrates on cross-border transactions and compliance matters. He is admitted to practice law in Washington, D.C. and Chile.

MEMBERSHIP OFFICER
Patrick Del Duca is a Partner atZuber, Lawler & Del Duca LLP, a minority-owned business enterprise. He is co-editor of the Section's book, *The Mexican Legal System* (2018), and author of the Section's book, *Choosing the Language of Transnational Deals* (2010).

LIAISON OFFICER
Maximiliano Trujillo is the founder and President of MJT Policy LLC, a strategic government affairs firm in Washington, D.C. He has been appointed by incoming ABA President Bob Carlson to the Advisory Committee to the ABA Standing Committee on Law and National Security 2018-2019.

PROGRAMS OFFICER
Cristina Cárdenas is a Partner at Reed Smith. Her practice focuses on international litigation and arbitration, with a specialization in Latin American disputes.

SECRETARY/OPERATIONS OFFICER
David Schwartz is of counsel at Wachtell, Lipton, Rosen & Katz. His practice focuses on competition law, particularly as it applies to mergers and acquisitions.

BUDGET OFFICER
Nancy Kaymar Stafford practices in the area of women's rights, with a focus on Africa, and rule of law. She will also be Chair of the Advisory Council for the ABA Center for Human Rights for the 2018-19 year.

IMMEDIATE PAST CHAIR
Steven M. Richman, the ABA Section of International Law Chair for 2017-2018, will remain on the Executive Committee for 2018-2019 as the Immediate Past Chair. He is a Partner at Clark Hill PLC, where he practices domestic and international commercial law.
◆

MEET TECHNOLOGY OFFICER CARYL BEN BASAT

Caryl Ben Basat (cwbenbasat@gmail.com) is a Shareholder with BenBasat Law Group, P.A and is the ABA Section of International Law Technology Officer for 2017–2018.

You have more than two decades of corporate law experience. How has your interest in the law evolved over your career?

Law was actually my third career and evolved out of the other two. My first was in nonprofit management. I developed and ran the California Food Network, the country's first statewide surplus food distributor, moving millions of pounds of agricultural surplus from fields, wholesalers, and retailers to food banks and social service agencies. Through service on another nonprofit board, I met a retired naval officer who hired me to work in purchasing and logistics for an airline. He said the skills were the same, even if the commodities were different, and I launched my second career, in business management for the aviation industry. I advanced to the role of Director of Contracts there, which was my fork in the road. To continue progressing, I could either pursue marketing or go to law school. I chose law school, and thereafter my aviation business experience opened doors to in-house counsel roles with aircraft sales and leasing companies and to the corporate law departments of large firms. Throughout my years in private practice, I have advised airlines, financial institutions, and even export credit agencies on long-term equipment acquisitions worth billions of dollars. The practical experience I gained in my first two careers has given me a unique view of the real-life implications of the contract provisions I negotiate for my clients.

Can you tell us about your experience in international energy law?

My introduction to energy law came through the air transportation industry. Fuel is one of the largest, most unpredictable expenses for an airline, so operators are always trying to find ways to minimize that cost. Furthermore, jet fuel contributes to carbon emissions, which raises a different set of issues pertaining to emissions reporting and control. Against this backdrop, I became interested in solutions that renewable energy could provide, not only for aviation but also for all power generation. As a former Co-Chair of the International Energy and Natural Resources Committee, I have written and organized programs on renewable energy topics. Applying experience I gained in project planning and finance in the aviation sector to renewable energy development and use has become my passion.

What are some of the biggest changes you have seen during your legal career?

Technology has driven so many changes in the practice of law. After graduating from law school, I worked for a small Connecticut firm. The Internet was a novelty, and digital research could be conducted only through special Lexis and Westlaw terminals. Otherwise, we researched with

books, and I spent many a day in the Yale law library reviewing and Shepardizing cases. Today, we can find almost anything we need, quickly and efficiently, on our desktop computers, tablets, or even our phones. Also, in-person sale closings are a thing of the past as we now review and digitally sign documents online and then dial into closing calls.

What new international legal developments do you see coming in the next 5 to 10 years?

Technology is providing quicker, cheaper access to sources of law for lawyers and non-lawyers alike. This trend will continue. New developments in medicine and artificial intelligence, as well as space exploration and colonization, will create corresponding demands for new legal infrastructure. The movement away from fossil fuels toward renewable energy sources will change the legal architecture in the energy sector, and the increasing influence of China and India on the global stage will impact everything from treaty law to contract negotiations and dispute resolution.

Given the changes brought about by digital technologies and social networking, what should attorneys and others in the legal field consider when managing their legal practice?

Social media is an essential marketing tool; lawyers who ignore it risk invisibility in our digitally charged world. However, it is important to post carefully and thoughtfully and to be aware of any applicable ethics and legal advertising rules governing the use of social media. Also, it is important to remember that an email message is a written record and can become subject to discovery. As in the case of social media posts, emails that are angry or reactive, or that subject the reader to harassment or abuse can come back to haunt their author at a later date.

How are the ABA and the Section using technology to fulfill the goals of providing high-quality information, educational programming, and networking to members?

The Year in Review and *International Law News* are now published digitally, along with a diverse variety of committee newsletters that are available online and archived on our Section's website. Both the Section and the ABA produce many CLE and non-CLE webinars throughout the year. We have successfully live streamed some of our Section's programming over social media, and some committees are working on podcasts. The Section and many of our committees have LinkedIn and Facebook groups, and the Section is active on Twitter.

What types of online enhancements will be introduced this year for Section members?

The ABA hired Code and Theory, a digital consulting company, to help streamline and modernize the association's website and e-commerce platform. Leadership has seen previews of the new site, which may be live by the time this article is published. It will offer many enhancements, including greater visibility for the authors of Section articles, since a tagging expert has been hired to facilitate ABA-wide keyword searches. We will continue to move away from listservs and committee homepages and toward interactive Higher Logic communities as part of the modernization. The ABA has a new email initiative focusing on the reduction of outgoing e-mail volume to avoid clogging members' inboxes and is planning to launch a new email platform in the upcoming year. ◆

ABA INTERNATIONAL HUMAN RIGHTS AWARD

By ABA Media Relations

The American Bar Association honored Sudanese lawyer **Abdelrahman Al Gasim** with its 2018 ABA International Human Rights Award in recognition of his long record of representing and expanding access to justice for victims of rights violations in Sudan.

The award was presented during the Distinguished Guest Award Dinner with the Section of International Law and the Board of Governors Program at the ABA Annual Meeting in Chicago on August 2, 2018.

Al Gasim, who is now living as a refugee in Uganda, played a pivotal role in co-founding the Darfur Bar Association (DBA), an institution that has lead the way in protecting human rights and civil liberties in Sudan. Al Gasim conducts trainings on regional human rights legal systems and has grown the DBA into an internationally recognized organization. He has facilitated the DBA's participation at the Human Rights Council and the African Commission on Human and Peoples' Rights (ACHPR).

Al Gasim has taken many risks as a human rights advocate. In September of 2010, he advocated for the extension of the United Nations mandate of the Independent Expert on the human rights situation in Sudan at the United Nations Human Rights Council in Geneva, Switzerland. Because of his advocacy, Al Gasim was arrested upon his return to Sudan and detained without due process. He was tortured for information and for his connections with human rights organizations, eventually being charged with "offenses against the state," including but not limited to, the propagation of false news, criminal conspiracy, undermining the constitutional system, and espionage. Charges were later dropped due to insufficient evidence.

Once the charges against Al Gasim were dropped, he fled to Uganda to live as a refugee due to the governmental harassment he faced after his arrest. While in exile, he regularly participates in the Ordinary Sessions of the ACHPR, where he speaks about human rights violations in Sudan.

The **ABA International Human Rights Award** was established to honor and give public recognition to a lawyer, human rights luminary, or international human rights organization that has made an exceptional contribution to the advancement of human rights outside of the United States.

The award is given on behalf of the ABA Center for Human Rights, the Section of International Law, the Section of Civil Rights and Social Justice, the Section of Litigation, and the Rule of Law Initiative.

"We honor Abdelrahman Al Gasim's steadfast commitment to the protection of human rights and civil liberties for victims of rights violations in Sudan," said ABA President Hilarie Bass. "His achievements are particularly extraordinary given the tremendous obstacles, intimidation, and threats that he has faced."

"We honor Abdelrahman Al Gasim's steadfast commitment to the protection of human rights and civil liberties for victims of rights violations in Sudan."
– ABA President Hilarie Bass

Al Gasim recently submitted a resolution on the human rights situation in Sudan during an ACHPR Ordinary Session. This resolution calls upon the government to cease all violations of human rights and fundamental freedoms, particularly in Darfur, South Kordofan, and Blue Nile states to ensure all persons held in custody are granted a fair trial, and all forms of harassment against civil society and human rights defenders are stopped. The resolution also calls on ACHPR to urge the government to comply with its human rights obligations under the African Charter and international human rights treaties.

Since 2011, Al Gasim has played a crucial role in the partnership between DBA and the American Bar Association Rule of Law Initiative (ABA ROLI). With Al Gasim's facilitation, this long-term partnership led to the DBA filing a formal communication with the ACHPR in May of 2014, concerning the case of seven people sentenced to death that fell short of due process standards required by international law. The ACHPR then agreed to review the case and instructed the government of Sudan to not execute the prisoners until the final decision had been made.

Al Gasim has influenced many Sudanese lawyers, particularly those in marginalized areas, and his work has both directly and indirectly led to dozens of rights abuse cases being heard at domestic, regional, and international levels. ◆

INAUGURAL ELEANOR ROOSEVELT PRIZE FOR GLOBAL HUMAN RIGHTS ADVANCEMENT

Benjamin Ferencz
former Nuremberg War Crimes prosecutor

Hillary Rodham Clinton
former U.S. Secretary of State

The ABA Center for Human Rights will honor former Nuremberg War Crimes prosecutor Benjamin Ferencz and former Secretary of State Hillary Rodham Clinton with its inaugural Eleanor Roosevelt Prize for Global Human Rights Advancement. The award ceremony will be held at Roosevelt House in New York City on September 14, 2018.

Eleanor Roosevelt championed the foundation of modern human rights law. The Eleanor Roosevelt Prize for Global Human Rights Advancement, honors similar individuals or organizations that are having a global impact in advancing the principles outlined in the Universal Declaration of Human Rights.

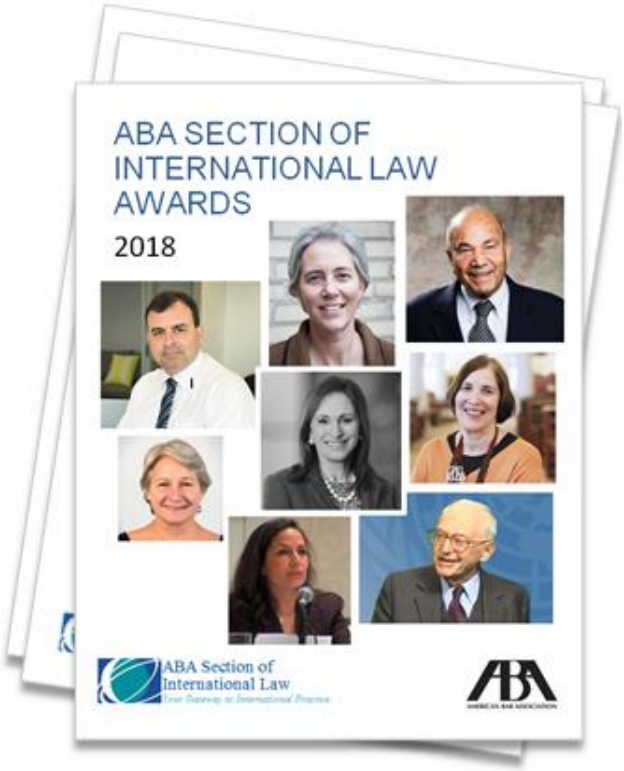
The ABA Center for Human Rights mobilizes lawyers to defend advocates facing retaliation, rallies thought leaders on cutting-edge issues, and holds governments accountable under the law. ◆

ABA SECTION OF INTERNATIONAL LAW AWARDS

The Section honored nine awardees for 2018 for their professional excellence and substantial contributions to the legal profession, international law, human rights, and a just, peaceful, and secure world under the rule of law. The awards were presented at the ABA Section of International Law Annual Conference in New York City in April 2018 and at the ABA Annual Meeting in Chicago in August 2018.

Awards 2018

World Order Under Law Award	**Elizabeth Andersen**
Francis Shattuck Security and Peace Award	**Roy Gutman**
Louis B. Sohn Award for Public International Law	**Professor Ved Nanda and Judge Stephen Schwebel**
Leonard J. Theberge Award for Private International Law	**Professor Linda Silberman**
Outstanding International Corporate Counsel Award	**Ian McDougall**
Award for the Outstanding Performance by an International Lawyer in a Government or International Organization	**Esther Olavarria**
Mayre Rasmussen Award for the Advancement of Women in International Law	**Carolyn Lamm and Lisa Grosh**



World Under Law Award

This award is presented periodically by the Section to individuals who have made a substantial contribution to and provided visionary leadership in pursuit of the American Bar Association's Goal VIII, which is "To Advance the Rule of Law in the World."

Elizabeth Andersen

Elizabeth Andersen served as the Director of the American Bar Association Rule of Law Initiative (ABA ROLI) from 2014 to 2018, and the Associate Executive Director of the ABA. She was the Executive Director of the Central European and Eurasian Law Initiative (CEELI) from 2003 to 2006.

ABA ROLI is an international development program that promotes justice, economic opportunity and human dignity through the rule of law. It was established in 2007 to consolidate the ABA's five overseas rule of law programs, including CEELI, an initiative created in 1990 after the fall of the Berlin Wall. ABA ROLI seeks to strengthen legal institutions, support legal professionals, foster respect for human rights, and advance public understanding of the law and of citizen rights. In collaboration with partners—including government ministries, judges, lawyers, bar associations, law schools, court administrators, legislatures, and civil society organizations—ABA ROLI designs programs that are responsive to local needs and that prioritize sustainable solutions to pressing rule of law challenges. ABA ROLI has roughly 500 professional staff working in the United States and abroad, including a cadre of short- and long-term volunteers and legal specialists, who in fiscal year 2015 alone contributed $1.2 million in pro bono legal assistance.

In between her CEELI and ABA ROLI service, Andersen served as the Executive Director and Executive Vice President of the American Society of International Law. She also gained rule of law experience as the Executive Director of Human Rights Watch's Europe and Central Asia Division, as legal assistant to Judge Georges Abi-Saab of the International Criminal Tribunal for the former Yugoslavia, and as a law clerk to Judge Kimba M. Wood of the U.S. District Court of the Southern District of New York. Andersen is a graduate of Yale Law School, the Woodrow Wilson School of Public and International Affairs at Princeton University, and Williams College, from which she received the College's Bicentennial Medal in 2006. Her areas of expertise are international humanitarian, human rights, and refugee law, international development, and the law of international organizations.

Francis Shattuck Security and Peace Award

The Francis Shattuck Security and Peace Award honors an American lawyer who has demonstrated significant creativity, initiative and courage in the cause of international security and peace by taking a concrete action or making a specific proposal to address an ongoing international conflict, or to strengthen international institutions of peace enforcement or justice and exemplified the promotion of security and peace through the international rule of law that was central to the career of Francis Shattuck.

Roy Gutman

Roy Gutman has been a foreign affairs journalist for four decades. He is currently based in Istanbul covering Turkey and the Middle East.

He is a former foreign editor and correspondent for *McClatchy* and *Newsday*. He joined *Newsday* in January 1982 and served for eight years as a national security reporter in Washington, D.C. While European Bureau Chief, from 1989 to 1994, he reported on the downfall of the Polish, East German, and Czechoslovak regimes, the opening of the Berlin Wall, the unification of Germany, the first democratic elections in the former Eastern Bloc, and the violent disintegration of Yugoslavia.

Gutman's honors include the Pulitzer Prize for international reporting, the George Polk Award for foreign reporting, the Selden Ring Award for investigative reporting, and a special Human Rights in Media Award from the International League for Human Rights.

In 1988, Simon & Schuster published his book, *Banana Diplomacy: The Making of American Policy in Nicaragua 1981-1987*. *The New York Times* named it one of the best 200 books of the year, and the (London) Times Literary Supplement designated it the best American book of the year. Macmillan published *A Witness to Genocide in 1993* (the Jerusalem Post called it an "indispensable" book on genocide), and the U.S. Institute of Peace published *How We Missed the Story: Osama bin Laden, the Taliban, and the Hijacking of Afghanistan* in 2008.

Gutman is the Chair of the Crimes of War Project, which brings together reporters and legal scholars to increase awareness of the laws of war. His pocket guide to war crimes, *Crimes of War: What the Public Should Know*, co-edited with David Rieff, was published by W.W. Norton in 1999 with a second edition in 2007.

Louis Sohn Award for Public International Law

In honor of ABA Section of International Law Chair Louis B. Sohn (1992–1993), this award is presented to individuals who have made distinguished, long-standing contributions to the field of public international law.

Professor Ved Nanda

Professor Ved Nanda has taught at the University of Denver since 1965. In addition to his scholarly achievements, he is significantly involved in the global international law community.

He is a former President of the World Jurist Association and now its Honorary President, former honorary Vice President of the American Society of International Law and now its counselor, and a member of the Advisory Council of the United States Institute of Human Rights. He was formerly the U.S. Delegate to the World Federation of the United Nations Associations, Geneva, and Vice-Chair of its Executive Council, and also served on the Board of Directors of the United Nations Association–USA. He also serves as an elected member of the American Law Institute and as a member of the Council for the ABA Section of International Law. Professor Nanda received his doctoral degree from Yale Law School. Professor Nanda has published widely in the areas of public international law. He has received at least two honorary doctorate degrees (India and Japan) and many other awards.

Judge Stephen Schwebel

Judge Stephen Schwebel is a jurist, counsel, and independent arbitrator. He serves as President of the World Bank Administrative Tribunal and as a member of the U.S. national group at the Permanent Court of Arbitration.

Previously, he served as President of the International Monetary Fund Administrative Tribunal (1993–2010), as President of the International Court of Justice (1997–2000), as Vice President of the International Court of Justice (1994–1997) and as Judge of the International Court of Justice (1981–2000). He served as the President of the International Court of Justice from 1997 to 2000. Prior to his tenure on the International Court of Justice, Judge Schwebel served as Deputy Legal Adviser to the U.S. Department of State (1974–1981) and as Assistant Legal Adviser to the U.S. Dept. of State (1961–1967). He has also served as a Professor of Law at Harvard Law School (1959–1961) and Johns Hopkins University (1967–1981). When he was an Assistant Professor at Harvard University in 1959, he established the Philip C. Jessup International Law Moot Court Competition and authored the first Jessup problem, titled "Cuban Agrarian Reform Case."

International Law News
ABA Section of International Law
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NEWS

Leonard J. Theberge Award for Private International Law

In memory of ABA Section of International Law Chair Leonard J. Theberge (1979–1980), this award honors those persons who have made distinguished, long-standing contributions to the development of private international law.

Professor Linda Silberman

Linda Silberman is the Martin Lipton Professor of Law at New York University (NYU) School of Law and the Co-Director of the NYU Center on Transnational Litigation and Arbitration.

She is a graduate of the University of Michigan and the University of Michigan Law School, and following graduation, a Fulbright Scholar in London, England. She joined the NYU faculty in 1971 and became the first tenured woman full-professor at the school. Professor Silberman teaches and writes in the areas of conflict of laws, civil procedure, comparative civil procedure, transnational litigation, international commercial arbitration, and international family law.

Prior to joining the NYU faculty, Professor Silberman practiced law with the Sonnenschein, Nath & Rosenthal law firm in Chicago, Illinois. From 1985 to 1986, she was Professor in Residence at the U.S. Department of Justice. She has held Visiting Professorships at Harvard, Columbia, and the University of Pennsylvania law schools. Professor Silberman has been a member of numerous U.S. State Department delegations to the Hague Conference on Private International Law and is presently a member of the U.S. State Department Advisory Committee on Private International Law.

She is also a member of the Singapore Family Justice Courts International Advisory Council, a member of the Academic Council of the Institute of Transnational Arbitration, a board member of the Institute of Judicial Administration, and a Fellow of the American Bar Foundation. Professor Silberman has been invited to give the General Course on Private International Law at The Hague Academy of International Law in 2020.

Silberman has played an important role at the American Law Institute (ALI), serving as an Adviser on three different projects: The Restatement Third of the U.S. Law of International Commercial Arbitration, the Restatement Fourth of the Foreign Relations Law of the U.S., and the Restatement Third of Conflict of Laws. Previously, she was co-reporter of American Law Institute project on the Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute. She has testified before the U.S. Congress on judgment recognition on several occasions. In 2014, Silberman was a Distinguished Research Scholar at Queen Mary University of London in the Centre for Commercial Law Studies and is now appointed as an Honorary Professor in the Centre for 2017 to 2020. She has been the Scholar-in-Residence at WilmerHale in London in Fall 2009 and again in Spring 2017. Her scholarship covers a wide variety of domestic and transnational subject areas in conflict of laws, domestic and comparative procedure, transnational litigation, in particular judicial jurisdiction and judgment recognition, class actions, international arbitration, and international child abduction. Professor Silberman is co-author of a leading casebook on *Civil Procedure: Theory and Practice* (Silberman, Stein & Wolff), now in its fifth edition, as well as a book on comparative civil procedure, *Civil Litigation in Comparative Context* (2d ed. 2017).

International Corporate Counsel Award

The award is given to a Section member who is a practicing attorney employed by a company or other entity as an in-house counsel and who has demonstrated a significant contribution to the legal profession and the furtherance of the practice of law in an international context.

Ian McDougall

Ian McDougall is the Executive Vice President and General Counsel at LexisNexis Legal and Professional, a division of Reed Elsevier.

He is the compass that has been guiding the LexisNexis Rule of Law initiatives. McDougall emphasizes that the LexisNexis corporate mission is to advance the rule of law around the globe. He tapped into his love of global history and his innate sense of fairness to organize the activities of the global company and its 10,000 employees into a cohesive program to support this corporate mission. He was driven by the desire to create a program that would make a real difference to people in parts of the world where fairness was not a given.

In researching the history behind the rule of law, he developed a four-point definition of the rule of law that LexisNexis could use for all activities and communications: equality under the law, transparency of law, independent judiciary, and accessible legal remedy. He then started to build innovative corporate actions to put the definition into practice.

He also led the LexisNexis implementation of the U.K. Bribery Act compliance and created the organization's first broad regulatory compliance review program.

As part of his personal commitment, McDougall has educated groups around the world on the elements of the rule of law and the importance of a strong rule of law for economic growth and development, stable societies, and other outcomes, such as enhanced life expectancy. In the past year, he has spoken on the rule of law, business, and human rights at various events including programs with the ABA Section of International Law, the Commonwealth Lawyers Association, the International Bar Association, the Union International des Avocats, and the International Institute of Law Association Chief Executives. He also has spoken to the Brazilian Judiciary and to law school students.

McDougall has been drawn to the elements that make up this definition of the rule of law all his life. He trained as a barrister and practiced in the courts in the United Kingdom before joining the corporate world. In the future, he seeks to expand on the corporate mission to make these efforts even more impactful. He believes it will be possible to have even more groups adopt this key definition of the rule of law; to see wider recognition and acceptance that a strong, stable rule of law underpins advances in all other aspects of society; and to have LexisNexis serve as an example for other businesses, guiding them to embrace the rule of law and, thereby, to make a lasting difference in the world.

McDougall sits on the UN Rule of Law Steering Committee and is a member of the UN General Counsel Advisory Board. His Global Legal Team received the *Financial Times* Innovative Lawyers Award 2017, in recognition of their work to advance the rule of law and access to justice around the world.

Outstanding Performance by an International Lawyer in a Government or International Organization Award

This award is presented to individuals who have demonstrated sustained, outstanding service in the field of international law to include contributing to the development of the international system or to the rule of law, for general professional excellence or for other purposes consistent with the Section's goals, priorities, or mission.

Esther Olavarria

Esther Olavarria served as a Senior Counselor to Secretary Jeh Johnson at the U.S. Department of Homeland Security from 2014 to 2016 where she helped draft the immigration administrative actions.

During 2013, she worked for the White House Domestic Policy Council on immigration legislation and policy. She previously served as Deputy Assistant Secretary for Policy at the U.S. Department of Homeland Security. From 1998 to 2007, she was Senator Edward Kennedy's chief immigration counsel on the U.S. Senate Judiciary Committee. She has also served as a senior fellow at the Center for American Progress and as a senior advisor for the UNHCR, the UN Refugee Agency. She is currently the Vice President of Institutional Affairs and Chief of Staff at the Kennedy Center. Esther began her career as an immigration attorney in Miami, Florida, working at several nonprofit organizations. Esther was born in Havana, Cuba, and raised in Florida. She has a law degree from the University of Florida.

Mayre Rasmussen Award for the Advancement of Women in International Law

The Section presents this award periodically to individuals who have achieved professional excellence in international law, encouraged women to engage in international law careers, enabled women lawyers to attain international law job positions from which they were excluded historically, or advanced opportunities for women in international law.

Carolyn Lamm and Lisa Grosh

(Left to Right) Section Chair Steven Richman, Carolyn Lamm, Lisa Grosh, Judge and USAF Colonel (ret.) Linda Strite Murnane. Judge Murnane was Chair of the Mayre Rasmussen Award Committee. Not pictured: Judge Delissa Ridgway introduced the awardees.

Mayre Rasmussen Award

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Carolyn Lamm

Carolyn Lamm is a former ABA President, a Partner at White & Case, and a renowned international arbitrator and arbitration counsel.

Her practice concentrates on international dispute resolution through international arbitration, litigation, and international trade proceedings. She advises clients in matters with International Centre for Settlement of Investment Disputes (ICSID) and its Additional Facility, and other international arbitral proceedings involving countries, as well as commercial arbitral fora including AAA/CDR, ICC, Vienna Centre, Stockholm Chamber, Swiss Chamber, and in federal court litigation. She teaches international investment arbitration at the University of Miami School of Law in the White & Case LL.M. degree program in International Arbitration. Lamm was appointed by President Clinton to the U.S. Panel and later by the Government of Uzbekistan to the Uzbek Panel of Arbitrators for ICSID arbitration. She was a member of the American Arbitration Association Executive Committee and Board. She is now a member of the ICCA Governing Board and a member of the Council of the American Law Institute (Advisory Committee for the Restatement of International Arbitration and a Counselor for the Restatement Fourth on Foreign Relations). She has served as an arbitrator in AAA International Rules, ICSID, and NAFTA Chapter 11 disputes. She is a founding member of the American Uzbekistan Chamber of Commerce and currently serves as Chairman of the Board.

Prior to joining White & Case, she was employed by the U.S. Department of Justice under the Attorney General's Program for Honor Law Graduates and served as a trial attorney in the Fraud Section, Civil Division, before obtaining the position of Assistant Director, Commercial Litigation Branch, Civil Division. When she served as ABA President, she presented the Presidential Diversity Initiative "The Next Steps." She currently is serving on a multinational task force to promote women in international arbitration and on the International Council for Commercial Arbitration (ICCA) Task Force on Diversity.

In her acceptance remarks, Lamm thanked White & Case Managing Partner Hugh Verrier for his support and extraordinary leadership. She also thanked her husband Peter, a lawyer and law school classmate, and her sons. She expressed gratitude to the women and men who took a chance on her and helped her up the ladder.

Lamm urged attendees to consider being a role model or mentor, and, when there is an opportunity, to recommend a woman to a client, within the firm, for a board position, or for a committee position. She emphasized how "each of us can work to change the bar, our justice system, and our society so that we are at a full capacity of enjoying the benefits that each of us can contribute—regardless of gender." She quoted Marian Wright Edelman, who said: "If you don't like the way the world is, you change it."

Mayre Rasmussen Award

The Section presents this award periodically to individuals who have achieved professional excellence in international law, encouraged women to engage in international law careers, enabled women lawyers to attain international law job positions from which they were excluded historically, or advanced opportunities for women in international law.

Lisa Grosh

Lisa Grosh is the Assistant Legal Adviser for International Claims and Investment Disputes at the U.S. Department of State.

In her acceptance remarks, she thanked Ronald Bettauer, her long-term mentor and an active leader in the ABA Section of International Law, for providing her "the most helpful guidance at every step along the way of my pursuit of a career in international claims and international dispute resolution in the Legal Adviser's Office at the State Department." She added, "His wisdom and guidance were instrumental in convincing me, and other women like me, how to navigate the challenges and find solutions, to show us that we belonged at the table, had a key role in diplomacy, and had a place at the podium representing the United States before international courts and tribunals." Her goal is to continue to expand the opportunities for women in international law, particularly in international dispute resolution.

Among her recommendations for increasing women's contributions in the field, Grosh suggests giving women the ability to take a role in negotiating international agreements, presenting oral arguments, and conducting witness examinations before international courts and tribunals. She also recommends appointing them as arbitrators and judges as they advance in their careers.

Grosh shared that, in hearings before the Iran-U.S. Claims Tribunal this past year, she was extremely proud to be representing the United States alongside the first female Legal Adviser of the State Department, Jennifer Newstead. Grosh was followed in oral argument by a junior female lawyer in her office, and presented before the Tribunal's second female arbitrator, Rosemary Barkett. She said, "This unquestionably brings a different and important dynamic to the proceedings and international dispute resolution more generally." She added, "Unfortunately, this kind of diversity did not exist on the other side, and all too frequently does not, particularly in state-to-state disputes."

Her concluding remarks encouraged the empowerment and inclusion of women in the legal profession. "So we must all collectively work together to see that changes," she said. "We must give those junior female lawyers a place at the table. We must give them more responsibility in helping to run cases and give them opportunities to take the podium and deliver oral argument." She urged appointing women as judges and arbitrators to broaden the field. She concluded, "I guarantee you they will rise to the occasion and show their brilliance."

UPCOMING EVENTS

June 7–10
ABA Program on the Universal Declaration of Human Rights
Paris, France

June 10–12
Life Sciences Conference
Copenhagen, Denmark

July 20
International Law 101 Bootcamp Program
Miami, Florida

August 2–5
ABA Annual Meeting
Chicago, IL

August 27–September 1
AIJA Annual Congress
Brussels, Belgium

September 5
Global Operators: Cyber Hacking and Attribution
Washington, D.C. and Teleconference

September 27
10th Annual Moscow Conference on the Resolution of International Business Disputes
Moscow, Russia

October 17–19
The New Engine of Growth! Investment and Technology Conference
Seoul, Korea

November 7–9
International Trade and Investment Conference
Mexico City, Mexico

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