



## All roads lead to Russia

Anders Fogh Rasmussen in discussion with Todd Benjamin



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# Defining genocide

Genocide case law is incoherent and securing a conviction is increasingly difficult, according to a panel on the subject yesterday morning.

The legal definition of genocide as a crime was coined by Ralph Lemkin following World War II, and ratified by the UN general assembly through the Convention on the Prevention and Punishment of the Crime of Genocide in 1951.

The definition was a legacy of the Nuremberg trials into the Holocaust, which also prompted the UN to enact so-called crimes against humanity into legislation as it sought to deter future acts of genocide.

Since Nuremberg, a number of international tribunals have been established to decide whether acts of genocide have been perpetrated. Among the most prominent cases were those for individuals accused of involvement in massacres carried out in the Gulf War, Rwanda and the former Yugoslavia.

Discussing the case law that has emerged from these trials, the panelists on 'Genocide: national, ethnical, racial, religious groups – is the 1948 definition in need of reform or would it be too dangerous to change?' agreed that some decisions have been confusing and have engendered an inconsistent body of law.

Professor William Schabas of Middlesex University cited the example of trials concerning events in the Bosnian war in the 1990s as an example of contrasting decisions that have been made.

In the trial that followed the war, it was not deemed that the mass murder of Bosnian Muslims by Bosnian Serbs was genocide. However, one event, a massacre in Srebrenica where around 8,000 men and boys were slaughtered, was ruled an act of genocide. That stayed with the case law, and was endorsed by the International Court of Justice in 2007.

"We're left with incoherent law. It's not logical to look at that conflict in Bosnia and conclude that wasn't genocide apart from those five days in Srebrenica," Schabas explained. The law will remain unless it is over-



Gregory Kehoe, partner at Greenberg Traurig and former prosecutor with US Department of Justice, and William Schabas of Middlesex University

turned at appeal, and one hearing continues today. "If this [a successful appeal] were to happen, we will have an even more incoherent body of case law," Schabas added.

### Difficult to prove

Since it became a defined crime, convictions of genocide have been relatively few because it is so difficult to prove, particularly when compared to a crime against humanity.

In terms of a hierarchy of severity of international crimes, genocide is regarded as the world's most heinous, with crimes against humanity second, and war crimes taking third position in the eyes of courts and plaintiffs.

Yet the results of a conviction are similar, and for prosecutors, there are a number of additional elements that must be proved to secure a conviction for genocide that are not necessary when the charge is a crime against humanity.

While the latter is defined as a widespread systematic attack against a civilian population, in the case of genocide, the intent to destroy, in whole or in part, a national, ethnical, racial or religious group must be demonstrated. One of the key differentiators, and also the most difficult element to prove, is the "specific intent of the individual," said Gregory Kehoe, a partner at Greenberg Traurig and former prosecutor with US Department of Justice.

Considering the challenges of securing a verdict of genocide, the benefit of seeking one over a perceived lesser charge of a crime against humanity has little merit, the panelists agreed.

Kehoe, who was part of the team prosecuting Saddam Hussein for his actions in the Gulf during the 1990s, questioned whether the difference was largely semantic. "If there are 250,000 civilians killed, which is approximately what we are aware dealing in Kurdistan when we put the case together against Saddam, does it really matter to those victims if it's genocide or a crime against humanity?"

# How climate change law must evolve

Failure to address the human rights issues posed by climate change will have devastating consequences for millions.

That was the message at yesterday morning's session 'Preventing climate chaos – the latest judicial, legal and policy developments...' in which the IBA's presidential taskforce on the topic presented the findings of its latest report and explored the role of law in combating climate change.

Most often it is the poorest countries that are the least responsible for climate change that bear the brunt of wealthier countries' actions. Working with those countries is not only a matter of justice, but a matter of law, said Stephen Humphreys of

the London School of Economics, who is academic advisor to the taskforce group on adaptation.

Climate change will ultimately make poverty reduction harder, said Professor Javier de Cendra de Larragán of IE Law School in Madrid. The taskforce seeks to pinpoint ways in which the law can help, as well as where certain laws potentially hinder progress. Focussing on promoting trade without abandoning climate standards, they are looking at international agreements such as the Transatlantic Trade and Investment Partnership (TTIP) and the Trans-Pacific Partnership (TPP).

The revolutionary new report, titled 'Achieving Justice and Human

Rights in an Era of Climate Disruption' made more than 50 recommendations to governments. While around 90 countries have implemented environmental laws, which the report commends, it urges more to follow suit. Its purpose is to provide a menu of provisions from which domestic jurisdictions can select the more appropriate recommendations, said David Estrin of the International Law Research Programme and co-chair of the IBA Model Climate Change Remedies working group.

It also identifies three key areas for the adaptation group to focus on: climate displacement, adaptation technology and food security.

## The new normal

The aftermath of Cyclone Sidr which hit Bangladesh in 2007, killing thousands and disrupting hundreds of thousands of businesses and jobs provides just one example of climate displacement. When emergency aid inevitably ran out, thousands in more remote areas had no choice but to leave their homes in search of food and work.

People would more often than not prefer to stay, said Michelle Leighton, chief of the International Migration Branch at the International Labour Organisation in



Stephen Humphreys of the London School of Economics

Geneva, but rebuilding is costly and takes time.

There are currently no legal instruments to assist in climate change migration. Existing laws are poorly suited, said Corina Gugler of Debevoise & Plimpton, secretary to the adaptation working group.

Climate displacement is not limited solely to natural disasters. Rising sea levels due to polar ice cap melting and seawater temperature increasing has already seen many communities move further inland. And it can only continue: a 2007 report by the UN Intergovernmental Panel on Climate Change (IPCC) said that sea levels were likely to rise between 18cm and 59cm this century.

Adaptation technology is especially important in that it can prevent the need for climate displacement. "Climate migration really is the adaptation strategy of last resort," said Humphreys.

The scope of needs-based technology transfer includes the installation of advanced equipment such as desalination plants, but is also about knowledge-sharing as to how to handle the new technologies. This is one area where legal barriers come in, as intellectual property (IP) protection can block the transfer in the first place.

Food security is the biggest threat to rural areas of Africa and Asia. The IPCC says that even minimal warming in dry and tropical regions reduces yield, but in reality, climate change is just one of many threats to access to food.

Land grabs – large-scale agricultural land acquisitions, 70% of which are concentrated in sub-Saharan Africa and often initiated by wealthy foreign investors and corporates – are blocking access to food in some local communities.

The right to food – a human right – stipulates that if people are deprived of food for reasons beyond their control, including after a natural disaster, the government is required to provide it directly.

Panelists explained that causation is difficult to identify. It is nearly impossible to pinpoint the exact cause of a rise in temperature or natural disaster, let alone identify a perpetrator. Handling multiple claims from various parties, as well as managing the cost – many of those affected simply cannot afford litigation – are further obstacles.

"Fundamentally, the international legal framework is not designed to address this wicked issue of climate change," said Estrin.

Earlier this year, however, *Urgenda Foundation v The State of the Netherlands* saw a civilian platform take the Dutch government to court on behalf of 886 people for failing to meet its commitment of reducing emissions by 25 percent. Baroness Helena Kennedy QC, who co-chaired the session, said that this groundbreaking verdict in the first successful climate negligence case shows exactly how the law can be used as one of the tools for fighting climate change.

## Key takeaways

- Climate change is making poverty reduction more difficult as it blocks access to food, and natural disasters drive entire communities from their homes;
- Comprehensive laws protecting against climate change – particularly violations of human rights – are lacking.



Javier de Cendra de Larragán of IE Law School in Madrid and Baroness Helena Kennedy QC

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# Lost in a digital paradise

Law firms must better utilise social media in today's digital age. Businesses, especially law firms, need to push their online presence further to harness the marketing potential at their fingertips, according to panelists at yesterday's session.

The majority of those attending this week's conference have LinkedIn profiles; it's undoubtedly an excellent tool for the business of law. But are the lawyers of the digital age using the internet to its full potential, or is passive social media activity limiting its value as a marketing tool?

In yesterday's 'Business Development *comme il faut* or how social media and new technologies

can help you step up your game,' a panel of experts discussed how small firms can improve online visibility, while expanding their business in the process.

Speaker Joanna Michaels, a social media expert from Beyond Social Buzz, a social media marketing agency based in London, suggested establishing a clear goal for a social networking strategy early on.

The aim, she said, should be to minimise damage, while finding a way to pro-actively encourage positive word of mouth. "We must embrace social media, and use it to build a reputation and make more business." According to Ceylin Beyli of CBL Law Office in Istanbul, the key to social media success



Joanna Michaels

is to put yourself out there, to clearly explain to your clients that you provide a good service: "It is important for a business to be visible, available and approachable."

Outlining the benefits of other lesser-used social media platforms, Google Plus and Pinterest, the panel discussed the importance of lawyers not limiting themselves to

an inactive LinkedIn account. It is important when using social media to be where the conversation is, and to cast a wide net.

## Spoilt for choice

However, being drowned in choice can be a problem too. How can a firm be sure that they are employing the right platform? The unanimous message from the panel was to follow your clients. "You should be where your customers are," said Michaels. "Establish where they are or you won't be talking to many people."

Michaels also outlined her strategy for being a 'social media rockstar'. When using social media, it is important to share and be sociable; to show trust and allow client relationships to breed; to add value with your content and let your client know they are on your mind. Following these principles will promote your firm positively to a captive, worldwide audience.

A member of the audience voiced his concern with this concept; law by definition is a very conservative field. "We represent a

professional type of work. Lawyers should not be rock stars." A valid protestation, it is important to stay professional, adhere the risks of social media, and always offer full disclosure, agreed the panel. Losing face online can be just as damaging as in person, if not more.

Prolific social media user Itzik Amiel of international expansion specialist EyeRon Group, highlighted another concern of the misuse of social media. One firm had tweeted the message, 'please can you give us some business', several thousand times. An uninspired practice he suggested – and far more damaging than it was practical.

With correct practice, social media can be an extremely important part of a law firm's marketing strategy. A final message in yesterday's session was the importance of quality over quantity. Amassing 10,000 irrelevant followers is not as beneficial as having a hundred relevant ones. Social media is not just a numbers game; it is about the relevance to your business, and most importantly, relevance to your clients.



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# LGBTI rights: breaking new ground

The US Supreme Court decision in June 2015 for same sex marriage and a German Federal Court of Justice ruling relating to surrogacy in December 2014 are two recent cases that have allowed many more people to have a family by law. But as speakers in this morning's session will explain, much work remains to be done. Follow-on legislation, new forward-looking laws and the re-writing of outdated discriminatory statutes are needed to extend the right to more people.

Huge inroads have been made in Argentina over recent years to promote gender equality and extend the right to a family to more sections of society.

Existing legislation provides maternity leave for mothers to one of the fathers in a homosexual relationship and supports commercial surrogacy for gay male couples, full

public access to IVF and same sex marriages with full adoption rights. The last was passed in 2010 and made Argentina the tenth country in the world to legislate for same sex marriages.

"Argentina has perhaps become the world leader on issues of gender equality," says Federico Godoy, partner in Argentinian law firm Beretta Godoy, session co-chair and co-chair of the IBA's Lesbian, Gay, Bisexual, Transgender and Intersex Law Committee, adding that these laws are "wonderful and necessary to recognise the rights of transgender persons".

According to Steve Weiner, chair of Mintz Levin's Health Law Practice and co-chair of today's session, at the core of the development in the right to have a family is the evolution of same sex marriage. "We are focussing on the legal issues around

the family as a right and looking at the variety of emerging issues concerning this right," says Weiner. "By and large one of the main issues around the world has been the same sex marriage question."

In June 2015 the US Supreme Court decision in *Obergefell vs Hodges* ruled for same sex marriage as a federal right and in so doing, says Weiner, made it possible to solve a whole range of family issues in law. From an advocacy perspective if a culturally hegemonic superpower like the US can legalise same-sex marriage, other jurisdictions will surely follow," says Godoy.

Argentina and the US still remain an exception, globally speaking. As



Steve Weiner

of 2015, only 18 countries legally recognised same sex marriage.

## Beyond same sex marriage

Although the question of same sex marriage is key in the furthering of the right to a family, much needs to be done in terms of follow-on laws,

new laws in areas relating to gender recognition and equality, new legislation to clarify positions regarding alternative ways of having a family and clearing old discriminatory laws.

Matthias Stupp, corporate partner in White & Case, Hamburg, and Leonardo Raznovich, former head of law and principal lecturer in law at Canterbury Christ Church University (CCCU), will in their presentations draw from legal and personal experience to explore the divergent approaches to surrogacy, with a particular focus on the December 2014 decision by the German Federal Court of Justice (Bundesgerichtshof) to recognise a US judgment granting legal parenthood to the parents of a child born as a result of a surrogacy arrangement, and the thorny issue of British colonial laws. "I expect that the discriminatory stance taken by an external territory of the UK on the immigration rights of homosexual couples would surprise many," says Godoy.

According to Godoy one of the many drivers behind the developments in Argentina was María Rachid, a City of Buenos Aires councillor who "pioneered several world-leading gender equality laws that have been adopted at a national level". Rachid will discuss gender rights from an advocacy perspective.

Finally, Sanford Bernardo, co-founder of Northeast Assisted Fertility Group and a specialist in

SESSION

**Having a family: a human right**

COMMITTEE

**Lesbian, Gay, Bisexual, Transgender and Intersex Law Committee, Healthcare and Life Sciences Law Committee, IBA's Human Rights Institute**

TIME/VENUE

**Today, 9:30am – 12:30pm, Room 2.95**

surrogate parenting and third party family building, will explore non-convention technologies for families and voice the case of LGBTI community members who want to have a family.

"I would like for this session to form part of the groundwork for people to stop looking at the LGBTI community by reference to its constituent L-G-B-T-I people, and start just treating them as people with the same rights as everyone else", says Godoy, hoping that those from "jurisdictions where few rights have been recognised for the LGBTI community will take the message that this is not OK".

# Africa's sustainability challenge

The environment facilitates, but also constrains. African countries have long used natural resources to fuel development, yet in an age of growing debate about what really constitutes sustainable development, commodity slumps and emerging technologies in energy and agriculture, many countries face complicated questions about their development models.

African jurisdictions have vast natural resources which provide a tried and tested economic model for development. According to the African Development Bank (AfDB), in 2012 natural resources accounted for 77% of total exports and 42% of government revenues, while mining, oil and gas accounted for 28% of the continent's GDP.

The numbers are far more dramatic in countries such as Nigeria, Zambia or Angola for instance, where the dichotomy becomes blurred. "South Africa relies heavily on extractive industries and on exporting its raw materials [but] this in effect has limited the country's development", according to Olufunmi Oluyede, co-chair of the session and partner in Nigerian firm TRLPLAW. "While in Nigeria the government has relied continually on exporting petroleum and has basically aban-

doned other natural resources that could also bring in revenue. The consequences have been traumatic."

Existing extractive models also pose daunting sustainability questions, in terms of sustainable economic development to all sections of society and sustainable environmental and social practices.

The list of environmental and social damage is long: fisherman in the Niger Delta suing Shell Petroleum for environmental damage; litigation against Anglo American on behalf of thousands of South African gold miners suffering from silicosis; claims against Trafigura over the dumping of toxic waste in Ivory Coast; and Zambian villagers taking Vedanta Resources to court for allegedly spilling sulphuric acid into the water sources. Lucrative resources and the development they promise also threaten protected areas; take the oil exploration licenses granted on land crossing into Virunga National Park, a UNESCO world heritage site in the Democratic Republic of Congo.

Nigeria has the highest primary forests deforestation rate and 81% of its old growth forests disappeared in 15 years. Ethiopia has lost 98% of its forests in the last 50 years and climate change threatens



Olufunmi Oluyede

to compound related issues of drought and flooding.

## Fruits of growth

Sustainable growth in itself is a nuanced and complex question, although intimately tied to the above. According to the African 2015 Economic Outlook (produced by the AfDB, OECD and UNDP): 'political and social stability are prerequisites for economic growth. But stability also depends on how the fruits of growth are shared. In this respect many African countries rank poorly'.

Oluyede points to positive initiatives that buck this trend, including Lagos State programmes 'Operation Green Lagos' and 'Greening and Beautification Programme', which, among other things, promote bio-diversity. "This project was so successful that within five years, the 4.3 million trees planted

at the outset have begun to improve the flood situation in Lagos state," says Oluyede. Renewable energy programmes in Kenya and Uganda and the 'Organic Agriculture' initiative also come to mind.

## Developing a strategy

This afternoon's session will have a distinct Sub-Saharan focus with foreign perspectives. The session co-chairs are Oluyede and Barnabas Tumusingize, senior partner of Sebalu & Lule Advocates in Uganda, who has deep experience in natural resource projects.

The speakers include Israel Aye, from Sterling Partnership in Lagos (a firm which has recently handled oil spillage claims against an international oil company), who will assess Nigeria's interest in the oil industry as a catalyst for development, and Sternford Moyo, from Zimbabwe firm Scanlen & Holderness, will explore Community Share Ownership Schemes in the extractive industries.

From South African firms Webber Wentzel and Werksmans Attorneys, Peter Leon and Pieter Steyn will examine the South African Promotion and Protection of Investment Bill, mineral and petroleum regulation in developing countries, black economic empowerment and

indigenisation laws, and foreign investment regulations.

From outside Africa are Ignacio Randle from Estudio Randle in Buenos Aires, Argentina, who will analyse how proper legal incentives lead to sustainable development for the community. Lastly, Laura Van Der Meer, from Kelley Drye & Warren in Brussels will explore agricultural biotechnology as part of sustainable development, the evolution in Africa of policies that open access to biotechnology for the benefit of farmers and local communities.

SESSION

**Sustaining development and developing sustainability: the African experience, challenges and prospects**

COMMITTEE

**African Regional Forum, Mining Law Committee**

TIME/VENUE

**Today, 2:30am – 5:30pm, Hall E2**

# When CCTV talks to streetlights

Being connected while remaining protected is becoming increasingly complicated, as the growth of smart technology has proven.

Recent instances where vehicles, and even smart LED lightbulbs, have been remotely hacked and controlled have brought the issue further into the public's gaze.

The Internet of Things (IoT), a term coined in 1999, is at the core of this morning's session, which is split in two and features speakers from Microsoft, Qualcomm and John Deere alongside a panel of tech lawyers and professors from the US, UK, Italy and Belgium.

The term IoT describes the growing network of 'smart' objects that can communicate with each other and complete tasks without any human involvement; it is a development of machine-to-machine technology and is reliant on the internet for remote communication.

The IoT is pithily summed up as coffee machines talking to alarm clocks, heating systems talking with motion sensors or Glasgow's plan to put sensors on streetlights and traffic lights that integrate with CCTV. But the

## SESSION

**Internet of things, machine to machine communication and other spooky things: how best to deal with smart homes, intelligent cars, computer-based automated trading and self-automated logistics**

## COMMITTEE

**Technology Law Committee, Banking Law Committee, Insurance Committee, Product Law and Advertising Committee**

## TIME/VENUE

**Today, 9:30 am – 10:45 am, Hall L2**

characterisation disguises the complexities behind the development and hides the huge amount of information and data being transmitted.

A study by tech advisory firm Gartner noted that there will be 4.9 billion smart objects by the end of 2015, 30% more than 2014, and 26 billion by 2020, with about half in the consumer sector and the biggest proportion in so-called smart homes.

Although seemingly innocuous home consumer products will be the most visible face of the IoT and issues such as privacy and data protection are key, the concerns quickly escalate at the prospect of such developments in the health-care sector, for example.

Even with more obvious consumer products such as lightbulbs and cars, experiments have shown that they can be hacked remotely and in one case hackers brought a Jeep Cherokee to a stop on a highway.

The session, in this respect, will ask how data used in the IoT is regulated and processed and what sort of legal framework and regulatory infrastructure will be at play. Speakers Hartmut Seibel, general counsel at the European Payments Council in Brussels and Ronald Zink from John Deere & Company in Iowa, US, will explore IoT in their environments.



Adam Chernichaw

## Developing case law

The IoT and other technological developments are placing a complex burden on the world of regulators and the legal community, particularly when it comes to the issue of copyright and patents, industry standards, identification and authentication and limitation of liability issues.

A recent headline case concerning programmers saw Oracle confront Google over the API. How applicability of patent and copyright law to APIs (application programming interfaces), which allow different computer programs to

communicate with each other. Both sides of the argument believe they are fighting for entrepreneurs, and the US court ruling broadly in favour of Oracle, has surprised many programmers and developers.

In the first session Jim Beveridge, senior director of International Technology Policy for Microsoft and part of Microsoft's Advanced Strategy and Research Group, will be joined by Ronald Zink, director of on-board applications at John Deere & Company and former in-house counsel with Microsoft, and Dahlia Kownator, senior manager for Government Affairs at Qualcomm Europe. They will explore trends, issues standards, antitrust and industry applications.

The second session will hear from Adam Chernichaw, partner in White & Case, New York, a specialist in patent and technology licensing; Christopher Millard, professor of privacy and information law and head of the Cloud Legal Project in the Centre for Commercial Law Studies at Queen Mary University of London; and Hartmut Seibel from the European Payments Council.



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# The start of the show

From Manuel Barroso to Benjamin, Rivkin to the Vienna Boys Choir, here are a selection of the best images from Sunday's opening ceremony



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# War crimes: a political labyrinth

Foreign combatants and the concept of universal jurisdiction are two issues at the heart of this afternoon's session, 'Policing the world: the role of national courts in extra-jurisdictional conflict crime'. It will see a broad panel discuss cases such as the prosecution of Blackwater private security guards for civilian deaths in Iraq and the decision by South Africa not to detain Sudanese president Omar al-Bashir, who is wanted by the International Criminal Court (ICC).

Some commentators, such as British diplomat Sir Christopher Meyer and Oxford University professor Margaret Macmillan, argue that the credibility, relevance and efficiency of big international institutions, including the UN, have increasingly come under question.

Meyer sees a great unravelling of international institutions set up after the Second World War, with countries reverting to their nation states. Macmillan argues that the refugee crisis has been a fundamental challenge to European values and that it has become quite clear that there is no consensus on what European values are.



Jonathan Grimes

These volatile international-national fault lines are clearly visible when it comes to the mountain of legal entanglements faced by national courts when attempting to try purportedly universally accepted war crimes committed in foreign countries. Related to this is the lack of agreement on the concept of universal jurisdiction, in which states claim criminal jurisdiction for alleged crimes against humanity regardless of the accused's nationality or country of residence.

A key question is if the credibility or validity of the ICC is in doubt and the concept of 'universal jurisdiction' is also undermined, what that will mean for complex war crime prosecutions.

According to criminal lawyer Jonathan Grimes from Kingsley Napley, the answer is simply evidence. "The landscape is constantly changing and principles that were thought to be established principles of international criminal law can fall out of favour," says Grimes, adding that with such limited jurisprudence a single case can have massive law changing consequences. Cases in point include those of Chile's Augusto Pinochet and potentially the current case involving Omar al-Bashir.

## A fraught process

Speakers in the panel include Jeremy Gauntlett SC, general counsel of the Bar of South Africa, civil liberties

solicitor Daniel Machover, of Hickman & Rose Solicitors, Michiel Pestman of Dutch firm Prakken d'Oliveira Human Rights Lawyers, David Schertler of Schertler & Onorato, Alain Werner of Civitas Maxima and Berlin-based ICC lawyer Natalie von Wistinghausen.

Moderators Grimes and Reinhard will tackle questions such as what acts on the battlefield are subject to universal jurisdiction. Is it necessary or appropriate for Western nations to act as global war crimes prosecutors and do they then risk being seen as the world's police officers? Do we run this risk that war crime prosecutions become political footballs?

The numerous litmus test cases include the sentencing by a US court in April 2015 of four Blackwater private security guards for the killing of 17 civilians in Nissour Square, Iraq, in 2007. Schertler represented one of the guards charged with manslaughter in the case. Another is that of Sudanese president Bashir, who has been indicted by the ICC for war crimes committed in Darfur. In 2015 South Africa, a member of the ICC, chose not to detain Bashir while he was in the

country and Gauntlett, a counsel for the South African government, has argued that the matter should be referred to the Supreme Court of Appeal.

Werner has been representing victims in the case against former president of Chad, Hissène Habré, in front of the Extraordinary African Chambers in Dakar, Senegal, another key current case being tried by an *ad hoc* purpose-established court in Senegal.

### SESSION

**Policing the world: the role of national courts in extra-jurisdictional conflict crime**

### COMMITTEE

**Criminal Law Committee, the War Crimes Committee**

### TIME/VENUE

**Today, 2:30pm – 5:30pm, Rooms 1.85 & 1.86**

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# More than money

All the financial investment in the world won't solve Africa's infrastructure shortage. Deep-seated market realities must change to improve projects' underlying credit

The numbers are simply staggering. Sub-Saharan Africa needs an extra \$50 billion per year to build the critical infrastructure it needs to continue its growth trajectory. If a country lacks, for example, functioning roads, investors won't waste their time. This, in turn makes it difficult for a government to pull more of its population into the middle class.

The problem prompted us to poll readers on what should be prioritised in closing sub-Saharan Africa's infrastructure gap. In line with the fact there is no single, or obvious, solution, the results are split. But a major theme that did emerge is that money isn't the primary issue. For all the focus on dollars, many believe that neither project equity nor debt funding is the main issue.

Thirty-seven percent of respondents believe that improved concession and project structures need the most attention. Many projects in Africa flounder because there is not enough joined-up thinking beforehand, to make sure they are bankable. "I have seen a real clash between the different ministries in the government," says one partner. While one department supports the deal, another claims no knowledge of it. Better coordination must also feed through to the drafting. "Very frequently you look at stuff for your bank clients and you realise they are sub-standard, full of gaps," says one partner.

Governments need to have in mind a baseline position of lenders on the particular type of project when looking at basic project risk. "Often it is either unrealistic or ill-defined allocations," says one respondent. Some don't, for example, realise that expecting a developer to buy or lease the land needed to build a transmission line – which may require haggling with hundreds of local farms – is unfeasible. Another respondent recounts a tender where the government

expected sponsors to bid without making any amends. "The documents were so deficient that they actually had to re-issue them."

Africa is plagued by business and macro risk perceptions – many of which are unfounded. Nonetheless,

**"The documents were so deficient that they actually had to re-issue them"**

less, this compounds the importance of having a project that isn't full of holes. "You actually need to make sure you are going to market with a structure that is the same or

better – but not worse – than what you expect elsewhere in the world," says one partner. Some suggest the Middle East or South-east Asia are good goals.

## A lack of credit

The five percent that voted 'other' raise similar points, but they focus more on improving the credit that



supports cashflow obligations. "The market often isn't sufficiently developed, so you fall back on governments that have crappy credits," says one London partner. He gives the example of a power plant. If the offtaker is a struggling utility, the developer's payment stream depends entirely on the guarantee of a possibly unreliable government. There are also non-technical losses – such as people stealing electricity by illegally hooking up to power lines – which, in the case of Nigeria, can lead to losses of 50%. "You can't not get paid for half of your output and hope to make any money," the partner says. "So really the maturing of those markets

someone in the government will put their hands in their pocket and make the payment."

## Private equity

Diverting private equity and infrastructure debt funds won as many votes as improved structuring, yet it was harder to pinpoint the reasons why. In 2014, \$4.1 billion was raised by Africa-focussed funds looking to invest in operational businesses. Fundraising this year will far-exceed that figure. The problem is that there aren't enough local enterprises ready to absorb that volume of capital. It's sparked speculation that the money could be pushed into infrastructure.

But for those that aren't dedicated to infrastructure, they are likely to become involved only when the project is more developed. "Most firms require a certain level of certainty on returns, there is likely a limited number of projects that are sufficiently de-risked for broader private equity funds," says one respondent.

## DFI initiatives

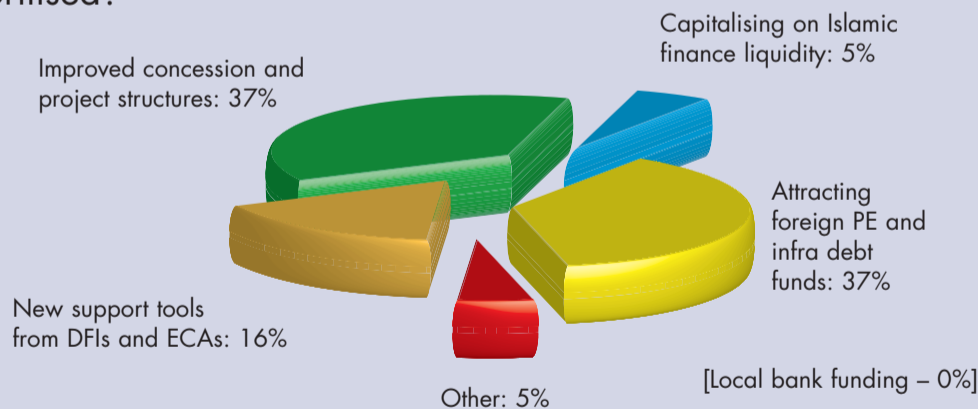
Development finance institutions (DFI) have a strong toolkit of guarantees and other support mechanisms which they are continually striving to improve. The African Development Bank (AfDB) is pushing for standardised suites of documents, and spearheaded the Africa50 fund which had its first closing in July. But 16% of respondents believe they must do more.

Part of this feeds back to the sovereign guarantees. Some DFIs don't like governments taking on these obligations as it's more debt on their balance sheet. But it's a vicious cycle; less guarantees means less development and income. "If the World Bank and IMF were a bit open-minded about what governments can and can't do, that would free up an enormous amount of time and resources for people to progress projects without having to worry about nonpayment," says one source. He also stresses that it's only a contingent liability.

Of the remaining options, Islamic finance gained five percent of the votes and local bank funding was snubbed. "That's not critical. One will get funding from South African and European banks," says one respondent.

This article first appeared in the October issue of *IFLR*.

## To close sub-Saharan Africa's infrastructure gap, what should be prioritised?



is what we need – that would solve everything else."

A bigger problem flagged by another respondent is the fact that in some countries the government doesn't provide a guarantee. "For me that's madness," he says. "There needs to be a way for lenders and investors to get comfortable that if contractual rights aren't met, then

It's already happening in South Africa, with firms such as Actis investing in the country's PFI renewable energy programme. A Johannesburg-based partner says there are other funds now looking at other power projects. "They are not quite your classic private equity funds, but still private equity of a certain ilk," he says.

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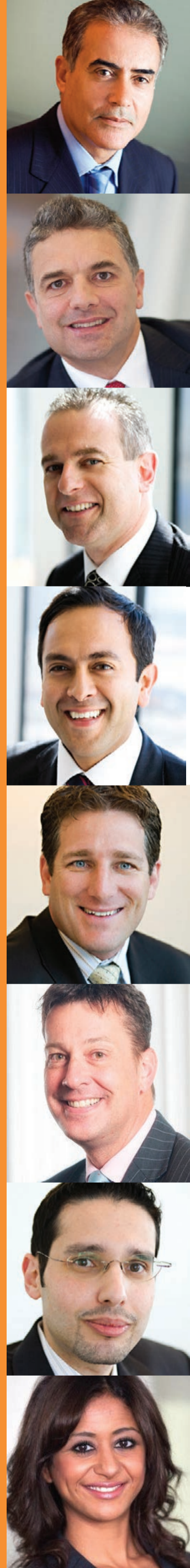
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# Regulators hit back on cartels

**P**unishments for concealing cartel offences can be just as bad as the offence itself, if not worse, according to Brent Snyder of the US Department of Justice.

Speaking in yesterday's session 'Hot topics in international cartel enforcement', Snyder was addressing the question of whether to cooperate in cartel investigations. "Cooperation benefits but covering up never does," he said, adding that obstruction of an investigation in the US carries a more severe punishment than cartel infringement, and that more countries

around the world recognise obstruction than cartels.

The session heard US, EU and Japanese regulators outline their efforts to thwart cartel behaviour in areas such as bid rigging and price fixing while private practitioners questioned the integrity of some of those efforts and queried definitions.

In the regulators' arsenal is a mix of carrot and stick approaches which include immunity, settlement and leniency programmes for self-reporting and compliant companies to heavy financial penalties and criminal measures against bullish infringers.

## The EC view

Fresh from eight cartel-related decisions since last year, in markets including LCD screens, Libor rate and animal feeds, Kris Dekeyser, from the European Commission's Directorate General for Competition, stressed that cartels remain at the top of the Commission's priorities... no matter the complexity of the market.

The Commission has lately been making its approach more sophisticated with the introduction of a

Damages Directive that potentially escalates the size of the financial penalty for infringers. It does this by giving victims easier access to information to allow them to pursue their own claims. The Commission's policies on settlement procedures and leniency applications have also recently been consolidated by test cases.

These mechanisms represent the carrot approach. However, in a recent first, in a smart car chip cartel investigation the Commission abandoned a settlement process to revert back to prosecution. "While we are willing to explore settlement we are not willing to tolerate gaming of the system," said Dekeyser.

From Tokyo, Deputy Secretary General of the Japan Fair Trade Commission (JFTC) Tashiyuki Nambu explained where the Japanese position varied marginally from the EU and US approaches.

## Hiding the evidence

A core question for companies being investigated is compliance. Snyder outlined instances where executives had written false transcripts for employees to read, at-



Tashiyuki Nambu, Japan FTC

tempted to change hand written notes, deleted email accounts and falsified certificates.

"Most common are efforts to destroy and hide documents," said Snyder, adding that "I worked on one case where an executive had buried documents in his back yard."

Aside from the risk of obstruction prosecution, such actions raise the questions over the motives for hiding the documents.

The decision can also undermine later efforts to plead for leniency.

Melanie Aitken and Andrew Ward, private practice lawyers from Bennett Jones in Canada and Cuatrecasas Gonçalves Pereira in Spain, voiced a number of concerns, in particular relating to leniency applications, with Ward indicating instances where leniency and rule of law clashed. But regulators highlighted the importance and integrity of the tool as a way of rooting out cartel activity.

From the regulators' side, drawing the lines between parallel activities (where prices coincide without amounting to market fixing) and a conspiracy, continues to be a fine art. According to Nambu, "rigging can continue for a long time and rigging conspiracies can be framed a long time ago and this means it can be very hard to prove".

"The mere fact that you discuss with your competitor future prices and strategy is enough for us to build a case," said Dekeyser. According to Ward, this left companies with little option but to simply not communicate with competitors.



Brent Snyder, US DoJ

# The legal education dilemma

**T**he legal profession is suffering from huge discrepancies between what is taught and what is practiced, according to professor David Wilkins of Harvard Law School.

Speaking at yesterday's PPID showcase 'Blurred lines, what it means to be a lawyer in the 21st century' professor Wilkins outlined how legal education is changing in the US and globally.

"We are having a crisis in legal education," he said. "There is a debate over what we are supposed to be doing in law schools. Do we need to fundamentally reshape it or tinker round the edges?"

The employment market has worsened for lawyers. Last year barely half of US law school graduates found jobs that required JDs within nine months of graduation. "This is a big problem," said Wilkins.

Courses and even educational establishments are changing everywhere. In the US, Northwestern Law has become one of the first law schools in the country to offer a two-year JD program for foreign-educated lawyers. Yale, meanwhile, has a new PHD in legal studies. More generally, there has been a proliferation of online, part-time and for-profit certificates.

## Key takeaways

- Professor David Wilkins of Harvard Law School believes the legal profession is suffering from a crisis in education;
- He argued in yesterday's session 'Blurred lines, what it means to be a lawyer in the 21st century' that there is a disconnect between what is taught and practiced;
- The employment market has worsened for lawyers. Last year barely half of US law school graduates found jobs that required JDs within nine months of graduation.

In Japan and Korea post graduate law schools are growing. In India, China and Brazil large numbers of underperforming schools are under threat of closure. There has also been a growth in elite private law schools like Jindal Global Law School, Peking School of Transnational Law and Bucerius Law School.

## The disconnect

The focus on new courses and law schools is understandable. Wilkins, who teaches several courses on lawyers, argues that this disconnect used to be manageable when firms would spend several years training graduates in a guild-like model.

"But most of you, if you are honest, don't have the time or the patience to do that. So you are turning to us [law schools] and asking for the lawyers to be hitting the ground running."

According to Wilkins, this has led to a theory versus practice debate. "Should law schools return to be more practice-focussed and give students the skills to be ready on job one? The opposite critique is that they have become more like a trade school.

Like most dichotomies it seems that neither is true and that we need more of both."

Earlier in the session, co-chair Stephen Revell, head of Freshfields Bruckhaus Deringer's Asia practice, shared his views on the future of the profession.

"Demands from clients are changing rapidly – both business clients but also on the retail side. People are simply not prepared to pay for legal services in the way they have been traditionally," said Revell.

The impact of technology will also be greater than expected, he said. "We all accept it is with us and is changing the profession. But I think we will look back in five years and think that we didn't adapt sufficiently to those changes."



David Wilkins of Harvard Law School



## QUESTION

What have you enjoyed most about Vienna?



**V J Mathew**  
V J Mathew & Co  
India

We went to the Maritime and Transport Committee excursion to the national park this week. We saw the vineyard, tasted seven wines and had a delicious lunch. We really saw the beauty of Vienna.



**Clara Ibirogba**  
Lagos State Ministry of Justice  
Nigeria

My impression is of a very old city, so you can really feel the history. I saw the cathedral at Stephansplatz yesterday which was amazing. I also think the transport system's really clear and have enjoyed taking the trains.



**Juan Felipe Bustamante**  
Bustamante & Bustamante  
Ecuador

The Spanish Riding School was fantastic. We went last night and saw the horses. It is the only institution in the world which has practiced for nearly 450 years. It was an incredible spectacle.



**Elmer Muna**  
Tark Grunte Sutkiene  
Lithuania

I haven't had much time in the city sadly. But I did manage to go to the Albertina Museum for the Edvard Munch exhibition which was fantastic. I saw his work, The Scream, obviously. The city in general is so relaxed. I admire its café culture and late closing times.



**Ade Adeyemo**  
Law Reform Commission  
Nigeria

I love the fact that there is so much art and music. I'm definitely going to try to get to the house that Mozart lived when he was a child later this week. I also like the weather. Coming from such a hot climate, this is genuinely refreshing.



**Hasmik Baroian**  
Bombardier  
Austria

As a resident of Vienna, I can speak highly of the international scope of the city. It contains the headquarters of major international bodies and is a fantastic place to do business. I adore the city centre, Stephansplatz too.



**Ilya Komarevski**  
Tsetkova Bebov Komarevski  
Bulgaria

My experience of Vienna relates to the social programme. I have been to several excellent receptions held by law firms. These include trips to the Albertina, the Imperial Palace and cultural tours too. It's a fantastic city.



**Rodrigo Fernández de Nestosa**  
Zacarias & Fernández  
Paraguay

So far the architecture has impressed me the most. All the venues for the receptions have been incredible. The natural history museum in particular was fantastic. And today I had breakfast at the opera, which was really special.



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