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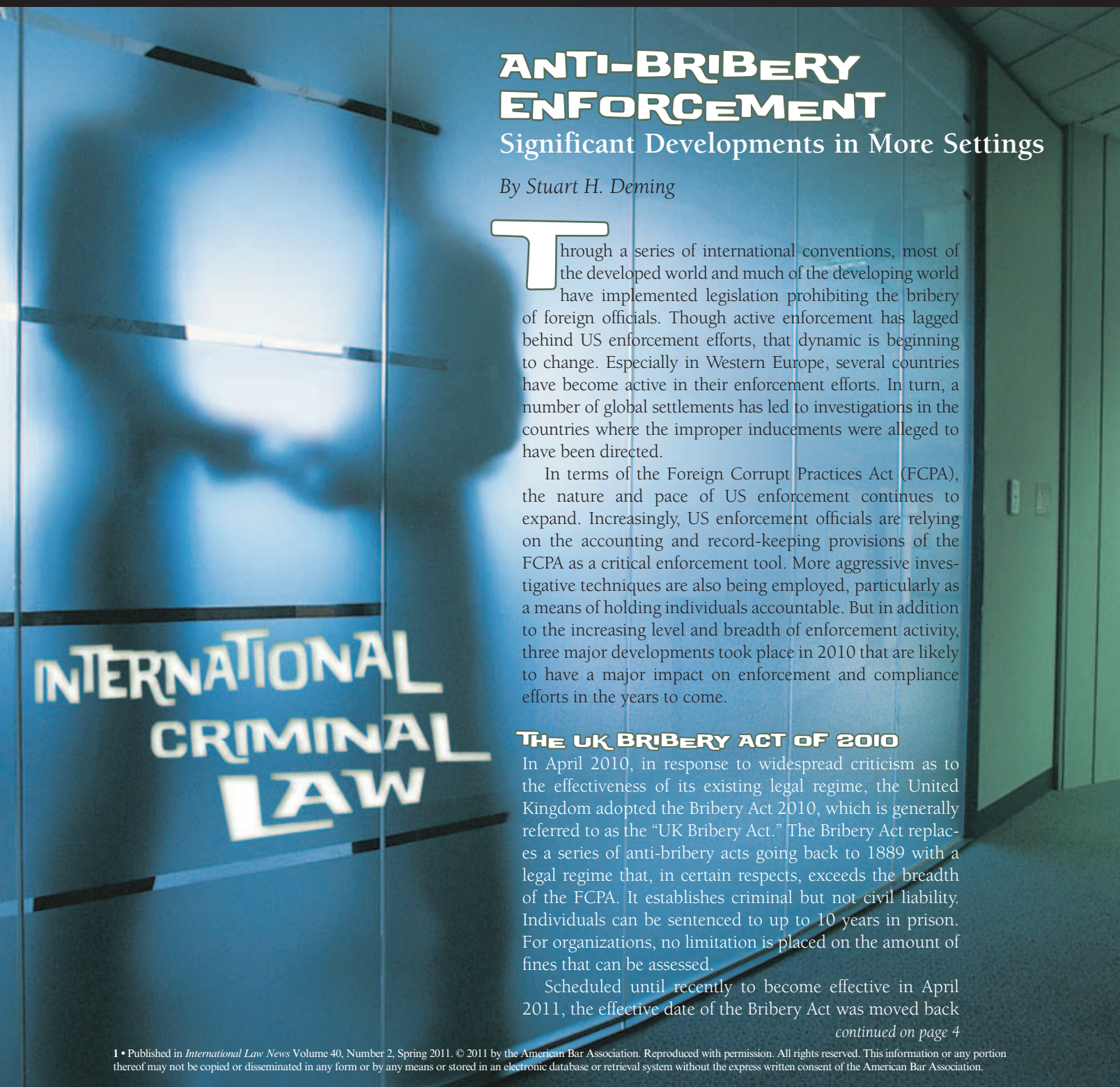

ANTI-BRIBERY ENFORCEMENT

Significant Developments in More Settings

By Stuart H. Deming

Through a series of international conventions, most of the developed world and much of the developing world have implemented legislation prohibiting the bribery of foreign officials. Though active enforcement has lagged behind US enforcement efforts, that dynamic is beginning to change. Especially in Western Europe, several countries have become active in their enforcement efforts. In turn, a number of global settlements has led to investigations in the countries where the improper inducements were alleged to have been directed.

In terms of the Foreign Corrupt Practices Act (FCPA), the nature and pace of US enforcement continues to expand. Increasingly, US enforcement officials are relying on the accounting and record-keeping provisions of the FCPA as a critical enforcement tool. More aggressive investigative techniques are also being employed, particularly as a means of holding individuals accountable. But in addition to the increasing level and breadth of enforcement activity, three major developments took place in 2010 that are likely to have a major impact on enforcement and compliance efforts in the years to come.

THE UK BRIBERY ACT OF 2010

In April 2010, in response to widespread criticism as to the effectiveness of its existing legal regime, the United Kingdom adopted the Bribery Act 2010, which is generally referred to as the "UK Bribery Act." The Bribery Act replaces a series of anti-bribery acts going back to 1889 with a legal regime that, in certain respects, exceeds the breadth of the FCPA. It establishes criminal but not civil liability. Individuals can be sentenced to up to 10 years in prison. For organizations, no limitation is placed on the amount of fines that can be assessed.

Scheduled until recently to become effective in April 2011, the effective date of the Bribery Act was moved back

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CHAIR'S COLUMN

Criminal and Cultural Considerations

As international practitioners in both private and public international law, we must take into account the growing interface and consequences of the evolution of international criminal law on our practices. We believe that this issue reflects our concern with this area of law and the challenges it presents for our members' professional activities. The issues are hot and becoming even more so as we go to press.

The new UK Bribery Act has already appeared in the contracts we are negotiating, and its scope is having an effect on the advice we give our clients regarding compliance with the Foreign Corrupt Practices Act in particular and more generally anticorruption legislation worldwide.

Our Section has closely followed the enactment and now the enforcement of the new pretrial detention law in Russia as many of us advise clients doing business in Russia; in fact, we have had ongoing conversations with the Russian judiciary since ABA President Stephen Zack met with Justice Vyacheslav Lebedev during the Section's program in Moscow in September 2010. Moreover, David Crane, a member of our Council, has convened meetings of interested members to examine the most likely criminal neglect leading to the untimely death of the attorney Sergei Magnitsky during his incarceration in a Moscow jail in 2009.

Salli Swartz (sswartz@pgparis.com)*, chair of the ABA Section of International Law, is a partner at Phillips Giraud Naud & Swartz in Paris.*

Following the enactment of the Oklahoma "Anti Sharia" Statute (as well as others either enacted or in the process of being considered by state legislatures) our Section generated a report and recommendation, which our Council approved at the Section Spring Meeting in April in Washington, D.C., and which the ABA House of Delegates will consider this summer at the ABA Annual Meeting in Toronto. For those readers who would like more information on this subject, I invite you to contact our policy officer, Ron Bettauer, at *ron.bettauer@verizon.net*.

And who of us has not encountered difficult cultural issues when advising clients doing business in China and elsewhere in the world? At our Spring Meeting, we had a number of programs highlighting sensitive cultural issues in transnational legal practice.

Finally, a teaser for our upcoming Fall (or Autumn, if you prefer) Meeting in Dublin, Ireland: "A Lawyer's Survival Guide to Dublin."

I hope you enjoy this issue, and I look forward to seeing you at our Section Retreat and Annual Meeting in Toronto. For more information, visit *www2.americanbar.org/calendar/international-law-2011-section-retreat-and-annual-meeting/Pages/default.aspx*. ✦

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Potential authors may request author guidelines and send manuscripts via email to *ILN@americanbar.org*. Please note that our articles do not contain footnotes or lengthy citations.

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ABOUT THIS ISSUE

International Criminal Law

By Catherine M. Doll, Deputy Editor

In this issue of *ILN*, we focus on the subject of international criminal law. International criminal law can encompass many things. Some think of it as a subject matter that deals with crimes against humanity and fundamental human rights, genocide, and war crimes. Others think of it as including crimes of money laundering, terrorism, and financial crimes. The correct answer, of course, is that it is both.

In the article dealing with anti-bribery enforcement, Deming, a vice-chair of the Anti-Corruption Committee of the ABA Section of International Law, discusses the UK's Bribery Act of 2010, comparing it to its American counterpart, the FCPA, and also bringing us up to speed on the new regimes being implemented by numerous multilateral lending institutions, such as the World Bank, the International Monetary Fund, and other regional development banks. Deming concludes that nowadays having an effective compliance program to deter corruption-related activities is a must for any organization involved in international business.

Dealing with another aspect of white-collar crime, Firestone writes about Russia's new law on pretrial detention. He notes that prior practice led to widespread corruption, where a simple threat of pretrial detention would make a business owner pay up. The new law, in his view, is having a positive effect on pretrial detention practices. Firestone, however, notes a surprising judicial resistance to the new law. He writes that on several occasions judges would deny applications for release on pre-textual grounds. Firestone concludes that the law of pretrial detention will have significant effect on the perception of how safe it is to do business in Russia.

Young and Wang bring us a fascinating and educational, albeit tragic, story of a young lawyer practicing in China. The authors describe how cultural differences and varying legal expectations may put one in trouble with authorities. The authors note that in China many legal protections that are taken for granted in the Western world, such as Miranda rights, simply do not exist or exist in a vastly different form. The authors caution that one must understand not just the laws but also the legal culture of China in order to avoid the fate of the unfortunate lawyer.

Olson analyzes a case of *Haradinaj* where the ICTY appeals chamber ordered the first post-acquittal retrial based on its interpretation of the right to a fair trial. The appeals chamber held that the right to a fair trial belongs not only to the defendant but to the prosecution alike. Olson argues that as a result the definition of the term in international criminal law may have been recast.

Criminal law in an Islamic context is often misinterpreted and misunderstood. Said discusses what it is, what it is not, and why misinterpretations occur. He does so in the context of the Koran and Sharia.

Deffenti and Doll give an overview of one of the most important recent decisions for international arbitrators: *Dallah v. Pakistan*. The authors discuss the UK Supreme Court decision as well as the decision of the Paris Court of Appeal, which have reached opposite results under French law.

Finally, in *Briefly Noted*, Peter Henner brings to you an overview of the case dealing with the Oklahoma statute that barred Oklahoma courts from considering Sharia and international law. The outcome of the case is yet unknown, but the implications for international law can be profound.✦

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Anti-Bribery Enforcement

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to July 1 as a result of delays associated with the issuance of interpretative guidance by the UK's secretary of state for justice. The guidance is helpful in providing greater clarity as to how the Bribery Act will be interpreted and applied. But, as opposed to the previously proposed guidance, the guidance as ultimately issued is generally viewed as suggesting a more relaxed approach toward how the new law will be interpreted and enforced. Nevertheless, the UK's Serious Fraud Office, which investigates suspected cases of serious or complex fraud, has reaffirmed its commitment to aggressive enforcement of the Bribery Act.

One of the Bribery Act's key provisions is a discrete offense prohibiting the bribery or attempted bribery of a foreign public official to obtain business or to obtain an advantage in the conduct of business. This offense largely tracks the Organisation for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The act's prohibition applies to any branch of government, at any level, as well as those exercising public functions in any public agency or public enterprise and officials or agents of public international organizations. The concept of "advantage in the conduct of business" includes not only inducements intended to secure business, but also inducements that could in any way help a business.

The Bribery Act also creates a more general prohibition on the giving and receiving of a bribe, offering or promising a bribe, and requesting or agreeing to receive a bribe. Unlike the FCPA, the prohibition applies to the bribery of public officials as well as anyone in the private sector. This more general prohibition seeks to address conduct intended to induce improper performance of a "relevant function or activity." Improper performance is intended to be induced where it is intended that, by paying the bribe, the recipient of the bribe would be expected to act other than in good faith, in an impartial manner, or in accordance with a position of trust. Expectations are judged by standards within the UK and not local standards.

Under the Bribery Act, a bribe can include a promise or anything that might be of value to the recipient. It does not matter whether the improper inducement is made in an indirect manner. The inducement in question cannot be improper if permitted by the written law of the jurisdiction in question. As long as they are reasonable and proportionate, the issued guidance expressly allows for bona fide hospitality, promotional, or other business expenditures. Yet no exception for facilitation payments is provided. Prosecutors are expected to use their discretion. Prosecutions for facilitation payments are expected to be remote. The consequences may be different if the payments become a more regular practice.

Of particular significance is the Bribery Act's creation of an entirely new offense for the failure of a commercial organization to prevent bribes being paid by anyone "associated with" the organization. Those "associated with" the organization may include anyone performing services for or on behalf of the organization. In the absence of "adequate procedures," or what may be described as an effective compliance program, an organization can be held strictly liable.

The new offense applies to all forms of commercial organizations, including any organization that does business in the UK, regardless of where the underlying act of bribery occurred. As a consequence, as long as it carries on business in the UK, a foreign company can be found liable for the failure to implement "adequate procedures" for conduct taking place in a foreign country that bears no relationship to any business that may take place in the UK. Under the issued guidance, whether a company has securities listed in the UK or has a subsidiary that carries on business in the UK is not, in itself, determinative as to whether the company does business in the UK.

Aside from demonstrating that an improper inducement was not made, an organization can also defend itself by proving that it had in place "adequate procedures" designed to prevent bribery. The meaning of "adequate procedures" is not defined in the Bribery Act. It is left to

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the secretary of state to issue "guidance" as to what constitute adequate procedures. The final guidance issued by the secretary of state relating to adequate procedures is formulated around six general principles:

1. **Proportionate procedures.** A commercial organization's procedures to prevent bribery by people associated with it are proportionate to the bribery risks it faces and to the nature, scale, and complexity of the commercial organization's activities. They are also clear, practical, accessible, effectively implemented, and enforced.
2. **Top-level commitment.** The top-level management of a commercial organization (be it a board of directors, the owners, or any other equivalent body or person) are committed to preventing bribery by people associated with it. They foster a culture within the organization in which bribery is never acceptable. They take steps to ensure that the organization's policy to operate without bribery is clearly communicated to all levels of management, the workforce, and any relevant external actors.
3. **Risk assessment.** The commercial organization assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by people associated with it. The assessment is periodic, informed, and documented.
4. **Due diligence.** The commercial organization applies due diligence procedures, taking a proportionate and risk-based approach, in respect of people who perform or will perform services for or on behalf of the organization, in order to mitigate identified bribery risks.
5. **Communication and training.** The commercial organization seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organization through internal and external communication, including training, that is proportionate to the risks it faces.
6. **Monitoring and review.** The commercial organization monitors and reviews procedures designed to prevent bribery by people associated with it and makes improvements where necessary.

For companies, particularly those that are issuers registered with the U.S. Securities and Exchange Commission (SEC), complying with the Bribery Act should not pose a serious problem. Many of the considerations for determining the adequacy of internal controls under the FCPA's accounting and record-keeping provisions will be the same as those that will be necessary to establish the "adequate procedures" defense. Similarly, for companies that are not issuers and that have truly effective and comprehensive FCPA compliance programs that meet the U.S. Federal Sentencing Guidelines, the Bribery Act should not pose a problem.

> **COMPLYING** with the UK Bribery Act should not pose a serious problem for companies, particularly those that are issuers registered with the SEC.

Nonetheless, care must be exercised to harmonize compliance policies governed by the FCPA and Bribery Act. For example, facilitations payments will need to be prohibited throughout an organization. Prohibitions on improper inducements to private individuals or entities, often described as "private bribery," will also need to be implemented throughout an organization. Unlike the accounting and record-keeping provision, the FCPA's anti-bribery provisions do not apply to foreign subsidiaries. For that reason, special care needs to be exercised to ensure that the prohibitions extend to all foreign subsidiaries and affiliates.

The Multilateral Lending Institutions

In 2010, the World Bank, the International Monetary Fund, and other regional development banks, including the African Development Bank, the Asian Development Bank, the Inter-American Development Bank, and the European Bank for Reconstruction and Development, agreed to the implementation of a cross-debarment regime among the multilateral development banks. The implications are daunting. In principle, debarment at one of the participating multilateral development banks will now automatically extend to the other participating multilateral development banks.

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Over time, the World Bank has implemented a sophisticated system of guidelines and procedures to enforce and adjudicate violations of the anti-bribery regime. In this regard, a unique voluntary disclosure program is now in place at the World Bank to encourage individuals and entities to disclose improper practices in exchange for eligibility to participate in procurement opportunities. It is a rigorous process requiring an internal investigation, full disclosure, and complete cooperation. Yet it affords a chance for an entity to make a clean break with its past in order to avail itself of procurement opportunities with the World Bank.

DODD-FRANK is significant in the context of anti-bribery enforcement because it makes the FCPA specifically subject to the SEC's jurisdiction.

Though the regional development banks have yet to take these steps, they have typically followed the model of the World Bank in terms of anticorruption policies and procedures. The reach of the anticorruption policies of the multilateral lending institutions cannot be overstated. Even entities that neither seek nor anticipate pursuing opportunities through the multilateral lending institutions may be affected. Failure to bring their business practices into compliance with these policies may bear on an individual's or entity's ability to secure business opportunities through others, whether as a subcontractor or in another capacity.

The Dodd-Frank Act

Legislation adopted in 2010, and which is commonly referred to simply as "Dodd-Frank," created programs within the SEC and the Commodity Futures Trading Commission for people to report violations of the laws and regulations subject to their jurisdiction. In the context of anti-bribery enforcement, this is significant in that the FCPA is specifically subject to the SEC's jurisdiction. When the monetary sanctions exceed $1 million, a reward from 10% to 30% of the sanctions actually recovered may be awarded.

Many of the precise contours of the Dodd-Frank legislation remain subject to implementing regulations. But, in general, a number of additional protections for whistleblowers were created. A major expansion of the relief previously afforded under Sarbanes-Oxley was included permitting direct access to federal courts, a much longer statute of limitations, and double backpay. These rights and remedies for whistleblowers cannot be waived or subject to a predispute arbitration agreement.

Significantly, Dodd-Frank also requires public disclosure by issuers to the SEC of payments made to the United States and foreign governments relating to the commercial development of oil, natural gas, and minerals. This includes exploration, extraction, processing, export, and other significant actions relating to oil, natural gas, or minerals, or to the acquisition of a license for any such activity. Also included are payments made by issuers' subsidiaries, partners, or affiliates, or by any entity under their control, to the United States or a foreign government for such development.

Changing Attitudes

Aside from the risk of prosecution, the implications relative to procurement opportunities will increasingly be a factor in changing attitudes relative to compliance and in the manner in which investigations are resolved. Whether it be the European Union's Public Procurement Directives or similar requirements imposed by other countries and many organizations, like the multilateral lending institutions, eligibility for procurement opportunities can be forfeited with a finding of involvement with corruption-related activities. For any organization engaged in any form of international business, it is now virtually mandated that it have an effective compliance program in place to deter improper inducements to foreign officials. ✦

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Business, Corruption, and Pretrial Detention in Russia

By Thomas Firestone

In 2010, the number of defendants detained before trial in Russia dropped by almost 50,000, or 25%. The reasons for this dramatic decrease and the recent history of recent pretrial detention reform in Russia provide insight into the nature of contemporary Russian corruption, the efforts of President Dmitry Medvedev and liberal reformers to combat it, and some of the obstacles to achieving significant reform.

According to human rights activists and many business owners, trumping up criminal charges and threatening a business owner with detention is one of the most common techniques by which corrupt officials extort money in Russia. Even if a case is obviously fabricated and has no future in court, the simple threat of detention before trial (especially given the notoriously bad conditions and rampant infectious diseases in Russian jails) is often sufficient to make a victim pay to close the case.

Therefore, reform of pretrial detention has long been a focus of human rights and anticorruption efforts. These efforts reached fruition in 2001, when Russia passed a new Code of Criminal Procedure (CCP), which substantially liberalized Soviet-era practices. The new CCP provided that detention could be imposed only if no other less restrictive measure was sufficient and allowed judges to release defendants on various conditions, including recognizance, bail, and house arrest.

Nevertheless, prosecutors and investigators (both of whom play a role in detention applications in Russia) continued to seek detention routinely, often on the grounds that secret "operational information" indicated that the defendant would flee if released. And judges continued to grant these applications, usually at a rate of over 90%.

In what was probably the most notorious example, former executives of the Yukos oil company Mikhail Khodorkovsky and Platon Lebedev were ordered detained as flight risks upon their arrests in 2003 even though they were charged with nonviolent claims, had known that they would be charged, and had nevertheless elected to stay in Russia. After several years of such practice, reformers sought additional changes in the law.

In 2008, Business Solidarity, a nongovernmental organization dedicated to protecting business owners against law enforcement extortion, called for a moratorium on pretrial detention in cases involving entrepreneurs and, in October 2008, organized public hearings to advance this effort. The hearings were attended by prominent lawyers and businesspeople, reform-minded Duma deputies, and foreign experts including a US magistrate judge and an expert from the European Court of Human Rights.

Following these hearings, in December 2008, the presidential administration proposed, and the Duma passed, an amendment to the CCP providing that secret "operational information" that had not been subject to verification in a court hearing could not serve as the basis of a judicial detention order. As a result of the December 2008 amendment, the frequency with which prosecutors sought detention dropped, but according to many in the legal and business communities, the abuses continued.

At follow-up hearings organized by Business Solidarity in late 2009, defense lawyers and businesspeople claimed that corrupt law enforcement officials continued to evade the law by fabricating evidence to create the appearance of risk of flight. For example, defense lawyers claimed that officers deliberately sent notices to appear to the wrong address and then used the suspect's failure to appear as grounds for obtaining an order authorizing his detention as a flight risk.

The problem of pretrial detention in Russia received more attention in November 2009 after the death in custody of lawyer Sergei Magnitsky, a partner in a Moscow-based US law firm, who represented, among other clients, Hermitage Capital Management, a London-based hedge fund that was

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once one of the largest portfolio investors in Russia.

Magnitsky was arrested and charged with criminal tax evasion after he provided testimony about an alleged scheme orchestrated by corrupt officers in the Ministry of Internal Affairs (MVD) to steal $230 million from the state budget. (According to Magnitsky, the corrupt MVD officers fabricated grounds for a search of his law offices, seized documents belonging to Hermitage investment vehicles, falsified them to insert faux directors, and then used this fraudulent control to encumber the companies with phony liabilities, which were then used as their basis for obtaining a $230 million tax refund from the Russian government.)

SERGEI MAGNITSKY was held in pretrial custody for 11 months, where he eventually died after being denied medical treatment for a pancreatic condition. His death sparked international outrage.

Magnitsky was held in pretrial custody for 11 months and, according to his former law partner, pressured to recant and give false testimony. He eventually died in pretrial custody after being denied medical treatment for a pancreatic condition, and his death sparked international outrage.

After the Magnitsky scandal and continued lobbying by the business community, President Medvedev proposed additional amendments to the CCP, which were passed by the Duma in December 2009.

These amendments were aimed at limiting abuse of criminal tax charges for extortionate purposes and prohibited pretrial detention in tax cases absent a judicial finding that the defendant (1) had no permanent place of residence, (2) could not be identified, (3) previously violated a pretrial release order, or (4) had hidden from investigators or the court. The amendments also provided that a taxpayer could be relieved of all criminal tax liability by paying all outstanding taxes due and also increased the minimum threshold amount for initiating a criminal tax prosecution, thereby making it more difficult to bring criminal tax cases.

Shortly thereafter, the president proposed more amendments, which were passed by the Duma in April 2010. The April amendments extended the special requirements for pretrial detention in tax cases to a broad list of specified crimes involving "entrepreneurial activity" including fraud, embezzlement, money laundering, illegal restriction of competition, trademark infringement, securities fraud, and bankruptcy fraud.

The April amendments also provided that bail could be offered in the form of real property (previously the law only provided for bail in the form of cash or securities), allowed that bail could be granted at any stage in criminal proceedings (previously the law excluded the possibility of release on bail once a case had been sent to court), and also required that a judge consider any bail application when considering a prosecutor's request for detention (the law previously contained no such requirement).

Available evidence suggests that the 2009 and 2010 reforms are working. According to supreme court statistics, the number of applications for initial pretrial detention (upon the defendant's arrest) dropped from 215,506 in 2009 to 164,554 in 2010. The number of applications for extension of pretrial detention (required to be filed at the 2-month, 6-month, and 12-month marks if the trial has not yet started) also decreased, from 220,911 in 2009 to 184,543 in 2010. The number of detention applications granted by courts also decreased correspondingly, from 194,396 in 2009 to 148,156 (for initial applications) and from 216,759 in 2009 to 180,686 in 2010.

In short, almost 50,000 fewer people were detained pending trial in 2010 as compared to 2009. Significantly, the decrease in the initial detention rate (about 25%) is much greater than the decrease in the total number of criminal cases filed (approximately 5%), leaving no doubt that the reduction is the result of changes in the law rather than in the number of crimes committed or criminal cases brought.

Yet, for reasons that are not entirely clear, the change in the law appears to have had a much greater effect on prosecutors and investigators than on judges. Although the number of detention applications filed by law enforcement dropped

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significantly in 2010, the percentage of detention applications granted by judges remained the same as it was in 2009: 90% for initial applications and 98% for extensions. Given the much stricter legal standards, one would expect to see some reduction in the percentage of detention applications granted by judges (even allowing for the fact that prosecutors are exercising much more restraint and discretion in asking judges for detention). But this is not the case.

Moreover, according to some, judges in certain cases affirmatively attempted to defeat the reforms by denying release applications on the dubious grounds that the charged crimes were not "entrepreneurial" and therefore did not fall within the ambit of the April amendments. For example, in one case, a judge held that the defendant's alleged fraud could not be considered "entrepreneurial activity" which, he said, necessarily involves the honest pursuit of profit, a seemingly bizarre ruling that would appear to and defeat the entire purpose of the April amendments.

Khodorkovsky and Lebedev were denied release on similar grounds, prompting Khodorkovsky to declare a hunger strike with the demand that the president be informed that the judiciary was sabotaging his reforms. (Khodorkovsky ended his hunger strike a day later after his message was reportedly delivered to the president.)

When asked about the judiciary's alleged failure to implement the reforms, Supreme Court of the Russian Federation Chief Justice Vyacheslav Lebedev denied Khodorkovsky's claim of judicial sabotage but publicly conceded that "pressure on the courts from certain individuals [whom he did not identify] probably exists." Others were even bolder, claiming explicitly that the courts' failure to fully implement the reforms was the result of a combination of a corrupt influences, including pressure from Russian law enforcement agencies seeking to keep business competitors locked up as a way of destroying their businesses.

But these theories still do not explain the discrepancy between judges' response to the reforms and the responses of prosecutors and investigators, who would presumably be subject to the same corrupt pressures that are allegedly brought to bear on judges.

The history of the battle over pretrial detention in Russia suggests several broader conclusions about reform, corruption, and the prospects for the rule of law in Russia. First, the fact that Russia had to pass a special law prohibiting detention in business cases shows the extent to which business is under attack and the extent to which human rights abuses are as driven by economic as by political motivations.

Second, the business community's success in achieving real reform suggests that, contrary to popular perception, Russian civil society initiatives, when focused on very specific ends and pursued in conjunction with liberal elites, can succeed.

The Business Community's success in achieving real reform suggests that, contrary to popular perception, Russian civil society initiatives can succeed.

Third, while President Medvedev's commitment to combating corruption is often questioned, his focus on reform of pretrial detention suggests an understanding of law enforcement corruption and a serious intention to combat it.

Fourth, while it is often contended that, in Russia, changes in the law will not have any meaningful effect without changes in the popular "mindset," the reduction in pretrial detention resulting from changes to the CCP suggests that legislative changes do have independent significance and can bring about changes in practice.

Fifth, for reasons that are not entirely clear, it appears that law enforcement agencies are much more responsive to changes in the law than the judiciary. In short, pretrial detention provides a useful barometer for measuring reform in Russia, and continued monitoring of the implementation of the new laws can provide useful insight into the prospects for establishing the rule of law in Russia. ✦

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Expatriates Face China's Criminal Law System

By Laura Wen-yu Young and Francis S.L. Wang

Once, a few years ago, the prospect of a Westerner facing China's criminal justice system was essentially a fantasy fit only for movie stars like Richard Gere. There were a few instances of violent crimes committed by Westerners, such as theft or drug dealing, and routine punishment was uncontroversial. However, the majority of foreigners came to China as investors and were thus warmly welcomed. Nonviolent transgressions were treated leniently, and Westerners were often deported rather than entered into the local justice system.

Expectations

In recent years, an increasing number of Westerners have moved to China to benefit from its economic growth and booming industry. There were nearly 250,000 foreigners registered with work permits in China as of 2009. China rarely grants work permits to uneducated foreigners, as it has no need to import manual labor. Most foreigners work as managers and executives or technicians, and most speak little, if any, Chinese. Most carry their home culture's view of right and wrong, and assume that they know enough to avoid legal trouble in China.

However, in recent years, a surprising number of foreigners is learning about Chinese justice firsthand. While there are no reported statistics on the numbers of foreign nationals in Chinese jails and detention centers, anecdotal information suggests that Chinese policy may be changing in favor of treating Westerners more like Chinese citizens, and Westerners may find their culturally shaped expectations dashed like waves upon the reality of Chinese criminal procedure.

Compared to Chinese citizens, Westerners have particularly high expectations for government to respect their individual rights. The American culture, in particular, has created expectations that defendants are entitled to protections from the power of the state, through such vehicles as *Miranda* rights and "reasonable cause" for a search warrant, and so on. For many Americans, this culture is so "normal" that it is invisible, and it is assumed to be based on universal rights and expectations. One recent case serves as an illustration that Westerners should leave their expectations at home when they move to China. Like an increasing number of foreigners in China, a young American lawyer spoke no Chinese and knew little about Chinese culture but took a job in China without understanding that Chinese regulations could be fundamentally different from his expectations.

The Crime

The lawyer worked at a foreign company as foreign legal counsel in a Chinese city. He had a work visa and was allowed to advise on the law of his home country (a broader mandate than granted by state bar authorities) but not on Chinese law.

However, when his employer was under investigation by Chinese authorities, and police appeared to conduct a warrantless search, he prevented the search. He did not understand that, because they were administrative police conducting an administrative search, they did not need search warrants. Coming from a culture that prizes restraint on authority, this lawyer thought he was taking heroic action. Instead, he ended up with a criminal record in a Chinese prison, imperiling his bar membership back home.

If this lawyer had known the history of office building regulation in China, he would have known that police have access to all offices of foreign-invested entities at all times, and foreign-invested entities may only locate their premises in buildings that have obtained approval for use by foreigners. One perhaps forgotten reason for this is so that police can readily monitor foreigners' activities and prevent activities that are harmful to Chinese society.

The police also demanded to see the young lawyer's original passport and work visa. He only had copies in his pocket, preferring to keep the original safe in his

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apartment. Chinese regulations require that one's passport and visa be carried at all times, although many people do carry only copies of them. The police demanded that he take them to his apartment to get his original passport. (The police team included a translator.) The lawyer was unwilling to go with the police and swore at them. Such righteous defiance absolutely infuriated the police, who are not used to such disobedience except from hardened criminals. They pulled him out of his chair, and a genuine physical tussle erupted, ending with two men on the ground. The lawyer was taken down to one of Beijing's detention centers after the fight.

The Criminal Procedure

Many critics complain that Chinese efforts to follow the rule of law are meaningless. However, this position starts with a cultural assumption: State power can be excessive and should be restrained to prevent abuse. If one starts with the different premise that public chaos and disorder are even greater threats than the abuse of government authority, then a strong state power is tolerable, and abuses become relatively insignificant. China's legal system, like many non-Western systems, is little concerned with the abuse of state power, instead trusting in state power as a necessary force for the greater good in order to protect ordinary citizens from malicious citizens.

There are several violations of China's Code of Criminal Procedure visible in the young lawyer's case. At least two of them are very common: Officials stretch their discretion to the limits of authority imposed by the Criminal Law and Code of Criminal Procedure and defendants have limited access to evidence. In addition, there are conditions for which Westerners may not be prepared: Defendants have very limited access to lawyers and no access to friends or family, and the trial is not the first test of the evidence. The entire process differed significantly from what his Western upbringing and legal training had led him to expect.

Stretching the Limits of Authority

Detention without charge often exceeds statutory bases. Under Chinese criminal procedure law, a suspect may be detained for up to 14 days while the facts are investigated. After 14 days, the law states that the suspect shall be released or a warrant for arrest shall be issued. In the case of the American lawyer, the police made no effort to obtain examination by the People's Procuratorate (the highest national agency in China responsible for both prosecution and investigation) within 14 days, even though the full facts of the alleged crime occurred in the presence of the police and therefore further investigation of the facts was fairly simple. There was no complicated set of facts to unravel, no missing witnesses to identify.

MOST WESTERNERS carry their home culture's view of right and wrong, and assume that they know enough to avoid legal trouble in China.

In cases where the crime is serious, such as those involving a gang or multiple crimes committed in different cities, the suspect can be held for up to 37 days without charge. In the young lawyer's case, the police held him for 37 days, without charge and without access to friends or family. It defies reason that this crime justified treatment as a "serious crime" equal to gang activity. Thus the gravity of the political consequences appeared to justify treatment of the defendant as a serious criminal, justifying extended detention.

Delays in prosecutor's indictment inquiry. Criminal suspects who have been formally arrested (as opposed to merely detained in jail) and charged are by law required to be investigated and indicted or released within 3 months (Criminal Procedure Code Article 124). Prosecutors have an additional 2 months in grave cases, and a further 2 months in cases where the punishment is 10 or more years' imprisonment (Articles 126, 127).

The police are supposed to file formal charges, and then the director of the Legal Division of the Police should release the defendant's file for transfer to the Procuratorate. By law, after 6 weeks the Procuratorate must indict the suspect or drop the charges. However, there are many days that are not included in the count. There can be weeks of time where the suspect's file is in transit and thus the clock is not running against any authority.

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Limited Right to Evidence

Prisoner's right to evidence for defense. Defendants have the right for their defense lawyers to consult, extract, and duplicate the judicial documents pertaining to the evidence against the defendant. This right begins when the People's Procuratorate notifies the defense that it has begun to examine the case for prosecution.

> **IN BALANCING** a defendant's interests against the protection of society, the individual cannot outweigh the rest of society. That would be to allow the tail to wag the dog.

Counsel's access to defense evidence is limited. There is one defense reading room, and all defense lawyers must review their clients' files in this one room, under supervision. There is a copy machine in the defense reading room, and under supervision, defense counsel is allowed to copy certain documents. Moreover, the room is only open for half of each business day, and its limited size requires that defense counsel make appointments in advance to have access to the room. It can take 7 to 14 days from the time a request is made to view the evidence to the date when defense counsel can actually view the evidence. Therefore, the earliest date at which defense counsel can see the evidence against the defendant is 2 to 3 weeks after a case is transferred by the police to the Procuratorate.

No right to copy or view all photographic and video evidence. While the law requires that the defense be allowed to copy all evidence, in practice prosecutors do not permit the defense to copy videotape evidence or photographs. The concern is that the defense might leak photos or video footage to the press or to third parties outside the government agencies involved. In balancing the interest of the state to prevent leaks against the interests of the individual defendant, individual prosecutors routinely disregard a defendant's right to have his defense team fully analyze all the evidence, including videos. In the case described, the police submitted only 3 short clips, of fewer than 15 seconds each, to represent what they described as a 1-hour event. The video of the provocations that led to the criminal acts were omitted. Out of context, the young lawyer's actions appeared unprovoked and erratic.

Limited Access

Limited right and access to counsel. Access to a lawyer is limited to only 2 instances in the 37-day pre-charge period, although a defendant is allowed to have 2 lawyers, so a total of 4 meetings with counsel is possible. However, no defense can be mounted during this stage, as there are no charges and no evidence available to the defendant. Furthermore, the defendant is not allowed to have any contact with family, friends, or non-Chinese counsel.

Once charges are filed and the case is transferred to the Procuratorate, then the defense has a right to mount a defense. The defendants are now allowed to meet with lawyers when they desire. However, most Chinese lawyers handle cases on a flat-fee basis, so there is little interest in frequent meetings. Furthermore, such meetings are not always held in a private room but sometimes with a Chinese guard standing nearby.

Limitations on outside contact. There are other restrictions that a foreigner might not expect. For example, Chinese detention centers do not allow suspects to have access to foreign newspapers, even if they include stories about the foreigner's case. Such a story might be expected to boost morale and encourage the foreigners to defend themselves more vigorously.

In addition, defense counsel is not allowed to bring out any handwriting from the defendant. Therefore, no personal notes to family members may be delivered. There is no regulation for this, but it is police practice and consistent with the purpose of causing a defendant to admit wrongdoing and accept punishment.

If a foreigner's family arranges counsel in its home country, and wishes the counsel to speak with the foreign defendant in his native language, the family will probably be disappointed. Foreigners are given no right to meet with any counsel other than the Chinese defense counsel or a staff member of the foreigner's diplomatic mission. The young lawyer did have access to his consulate, which did send someone to meet him roughly once per month and report back to his parents. However, the reality of consulate meetings is that consulate staff can do very little and

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are often not sympathetic to compatriots who get themselves arrested in China.

Prisoner's right to sign legal documents from his home country. There is no Chinese statutory basis to revoke a person's civil rights upon arrest or detention. Chinese detainees retain their political rights, such as the right to vote in elections. Only convicts lose their civil rights. However, in practice, the police frequently refuse to allow detainees to sign legal documents. As a matter of custom, a defendant is only allowed to sign powers of attorney for his Chinese counsel and documents related to the Chinese case.

Harsh physical conditions. Physical conditions in Chinese detention centers are less comfortable than Western defendants would expect and can be worse than the conditions in prisons. There are often 12 men or women to a cell. Soft mattresses are not used, as they could promote infestations of lice, etc. Daily showers are not allowed, although tooth brushing is permitted. There have been reports that shaving is performed with a shared razor, and in a country with difficulty in admitting an HIV/AIDs problem, shaving is not advised.

Outdoor access may be limited to a very small space, something like an airshaft, and so may not even qualify as daily outdoor exercise by Western standards. Diet is generally limited to cabbage and potatoes. Prisoners who get some money deposited into their jail account may buy small luxuries like soap, toothpaste, and extra food.

Trial has a different purpose. While "presumed innocent" is enshrined as a primary principle in most Western minds, Chinese law and the surrounding culture considers that principle to be one among many. The Criminal Procedure Law states that the aim of the law is to ensure "punishment of criminals and protection of the innocent against being investigated for criminal acts" (Chinese Criminal Procedure Law, Article 2).

The system does not serve a defendant who is eager to review evidence, prepare a defense, and fight the charges. The entire system is designed to punish criminals as efficiently as possible. A high priority, in order to confirm police actions, is to obtain a confession of guilt. In balancing an individual defendant's interests against the protection of society, the individual cannot outweigh the rest of society. That would be to allow the tail to wag the dog.

The US understanding of the word "trial" is as a test of the evidence. However, the Chinese word for trial is *kai-ting*, or open-the-court. The root of the word does not mean testing of evidence; it means a demonstration of the reasons that someone is punished by the state. When the court is in session, or "open," the facts are presented to the judge. However, in a significant sense, the testing of evidence is done well before the parties arrive in court. By the time the defense is allowed to be involved for trial, the only remaining issue is to determine the length of the sentence. The Chinese courts pride themselves on a near-perfect conviction rate. This is understood to show that they do not waste resources on innocent suspects.

Surprising Twist

In a twist that might surprise a Westerner, the police brought civil charges against the young lawyer. They requested the price of a new camera to replace a camera they allege was broken in the fight and minor medical bills for one police officer who showed that he received abrasions to his elbow. They also claimed damages for emotional injury. The criminal court moved the civil claims to a civil court. The lawyer's family paid the police all of their civil demands in order to settle the civil case and possibly soften the prosecution.

The young lawyer was tried, found guilty, and convicted. He was sentenced to imprisonment and banishment. Fortunately, the sentence was a relatively light seven months' imprisonment, instead of the maximum of three years. This meant he had only a month more than time already served in detention. Given his unhappy experience in China, he had no plans to return. Unfortunately, there is a growing number of foreigners who move to China to enjoy an expatriate lifestyle and are not prepared for Chinese culture. Importing Western expectations to China can cause them real harm. ✦

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NOT GUILTY? NOT SO FAST!

ICTY Appeals Chamber Orders First Post-Acquittal Retrial in ICL History

By Kyle Richard Olson

An international criminal tribunal has ordered a retrial once before, but not after the defendant had been acquitted and set free. This changed on July 19, 2010, when the appeals chamber for the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague quashed the acquittal of Kosovo's former prime minister, Ramush Haradinaj, on the grounds that the trial valued expediency at the cost of fairness. The tribunal then ordered the immediate detention of Haradinaj, along with his two codefendants, Idriz Balaj and Lahi Brahimaj. For Haradinaj and Balaj, the order meant that they would return to the same Hague detention unit they freely walked away from 27 months earlier. It is there where they rejoined Brahimaj—the lone defendant to have been found guilty—to await retrial.

The ICTY appeals chamber's ruling in *Prosecutor v. Haradinaj* represents a significant legal development in international criminal law. Never before has an international criminal tribunal so boldly defined the "right to a fair trial" as one that is not the defendant's alone. This article reviews the *Haradinaj* ruling and discusses the broader implications on the international criminal law field.

The Indictment

From March until September 1998, Haradinaj served as de facto and later official commander of the Kosovo Liberation Army (KLA)—an ethnic-Albanian guerrilla force that defied Slobodan Milosevic's Serbian troops in the Kosovo War. Haradinaj earned acclaim among Albanians, and scorn among Serbs, for his "freedom fighting" efforts, and in late 2004 he became Kosovo's prime minister. He served for 100 days until he surrendered himself to The Hague in 2005.

According to the indictment, the KLA murdered, tortured, raped, and abducted numerous civilians under Haradinaj's charge. Many of the victims were ethnic Serb, Roma, or Egyptian civilians living in Kosovo, or ethnic Albanians in Kosovo suspected to have collaborated with Serb forces. The prosecution charged Haradinaj with 37 counts of war crimes and crimes against humanity under articles 3 and 5 of the ICTY Statute. The charges hinged on the theory that Haradinaj, with Balaj and Brahimaj, led a joint criminal enterprise in the shared attempt to consolidate control over Kosovo through ethnic cleansing. The prosecution also charged the defendants on an individual basis for their alleged roles in directing the KLA crimes.

Witness Intimidation at the First *Haradinaj* Trial

The *Haradinaj* trial began in March 2007 and was plagued by witness intimidation from day one. Nine potential high-profile witnesses were reportedly killed, three while in the ICTY's witness protection program. Several other witnesses withdrew, some of whom did so even after appearing in The Hague to testify. Of the 18 subpoenas issued by the trial chamber, only 13 were honored. Two of the noncompliant witnesses, both central to the prosecution's case, refused to testify despite the legal threat of imprisonment for contempt: One witness, "Kabashi," told the ICTY via videolink that protective measures "only exist within the boundaries of the courtroom, not outside it" and that he would rather be imprisoned for contempt than testify in The Hague. The other witness, whose name was never revealed, appeared before the tribunal but did not complete his testimony out of fear for his life.

After six months, with Kabashi and the other witness still reluctant to testify, the trial chamber ruled that the deadlines had passed, rejected requests for more time, and directed the prosecution to close its case. The chamber gave this order despite Kabashi's pending contempt case, noting only that it "considered and took various steps to obtain his evidence." As for the other witness, the chamber stated that to accept his evidence in any form "would not be in the interests of justice" because he did not complete his testimony and could not be cross-examined.

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After the prosecution closed its case, the defense teams each immediately rested theirs without calling a single witness or submitting any rebuttal evidence. The gamble proved successful. The trial chamber found Haradinaj and Balaj not guilty on all counts and ordered for them both to be set free. Brahimaj was found guilty on two counts but not guilty on the remaining 35.

In the judgment, the trial chamber noted that "difficulty in obtaining evidence was a prominent feature of this trial" and that "central aspects of the case were never heard." Nevertheless, the trial chamber reasoned that it "made use of all its powers under the rules to facilitate the reception of evidence without stepping beyond its role as an impartial finder of facts." The trial chamber held that the prosecution "presented little direct evidence," unconvincing circumstantial evidence to support conviction for any of the crimes charged under a joint criminal enterprise theory, and a dearth of evidence to convict Haradinaj or Balaj on an individual liability theory.

Prosecution's Right to a Fair Trial Denied?

One month after the trial judgment, the prosecution filed an appeal against the acquittals. The primary basis for the appeal was unique: The prosecution argued that *its* right to a fair trial was denied because the trial chamber's rigid adherence to deadlines prevented crucial witnesses from shedding light on the truth. In a landmark ruling, the appeals chamber agreed.

The relevant article of the ICTY Statute is 20(1), which states: "The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses." The question on appeal, then, was "whether the Trial Chamber abused its discretion by closing the prosecution's case before Kabashi and the other witness had testified, in violation of its obligation under Article 20(1)."

Early in the judgment, the appeals chamber boldly set forth the following: "For the Tribunal to function effectively, Trial Chambers must counter witness intimidation by taking all measures that are reasonably open to them, both at the request of the parties and *proprio motu*"—on its own accord. By requiring the trial chamber to address witness intimidation *proprio motu*, the appeals chamber placed an independent duty on trial judges to confront it regardless of whether either party raised an issue. By implication, the chamber also adopted the prosecution's definition of a right to a fair trial as one that belongs to both parties. In this case it was the prosecution's right that was threatened, and the trial chamber's duty under article 20(1) was to protect it.

With these principles established, the appeals chamber in a scathing judgment found that the trial chamber abused its discretion by not doing more with its *proprio motu* powers to ensure a fair trial. Despite being "on notice regarding the serious threat to witnesses from the very opening of trial," the trial chamber "manifestly failed to take sufficient steps to ensure the protection of vulnerable witnesses and safeguard the fairness of the proceedings." The trial chamber placed "undue emphasis on ensuring that the Prosecution took no more than its pre-allotted time to present its case . . . irrespective of the possibility of securing the testimony of two key witnesses." This "misplaced priority," fumed the appeals chamber, "demonstrates that the Trial Chamber failed to appreciate the gravity of the threat that witness intimidation posed to the trial's integrity."

NEVER BEFORE

has an international criminal tribunal so boldly defined the "right to a fair trial" as one that is not the defendant's alone.

What more could the trial chamber have done? According to the appeals chamber, quite a bit. The trial chamber, for instance, "chose not to persevere in attempts to hear" Kabashi's testimony in November 2007 and instead rejected requests for more time and additional protective measures. In December 2007, the trial chamber "refused to reopen the Prosecution's case after the conclusion of its submissions, despite the fact that the Prosecution had demonstrated a strong possibility that Kabashi's testimony could finally be obtained." As for the other witness, the trial chamber knew he was "available to testify by

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video-conference link" at 6:30 p.m. on November 15 yet "chose to significantly delay his testimony on the basis of objectively less important logistical considerations."

In all, the trial chamber's "failure to show the required flexibility effectively helped to ensure that witness intimidation succeeded in denying the Prosecution an opportunity to present potentially crucial evidence in support of its case." Namely, Kabashi, a former KLA member, would have described specific acts of mistreatment by the defendants, including orders they gave to beat and kill people. The other witness would have recounted the abuse in the form of torture and mutilation he personally suffered at the hands of the defendants.

> **HARADINAJ** took a bold leap by suggesting the right to a fair trial belongs to the prosecution and defendant alike.

In the end, however, the witnesses' voices were never heard. This led the appeals chamber to conclude that the trial judges "failed to take sufficient steps to counter the witness intimidation that permeated the trial and, in particular, to facilitate the Prosecution's requests to secure the testimony" of key witnesses. These errors "undermined the fairness of the proceedings as guaranteed by the Statute and the Rules and resulted in a miscarriage of justice." As a result, the appeals chamber quashed the acquittals and ordered Haradinaj and Balaj to rejoin Brahimaj in the UN detention unit in The Hague to await retrial.

Implications of the *Haradinaj* Retrial Ruling

Only once before in international criminal law practice has there has been a retrial order. That order came from the International Criminal Tribunal for Rwanda (ICTR) in 2009 in *Prosecutor v. Muvunyi*, where the ICTR appeals chamber set aside a 2006 guilty verdict and ordered a retrial due to fair trial right concerns for the defendant. The *Muvunyi* retrial concluded on February 11, 2010, with a fresh guilty verdict and 15-year sentence.

Haradinaj is different. Unlike in *Muvunyi*, the fairness concerns that led the *Haradinaj* chamber to overturn the acquittal applied to the prosecution, whose witnesses were deemed unable to testify due to the trial chamber's "undue emphasis" on expediency. What flows from this may be profound.

Most important, the definition of a "right to a fair trial" in international criminal jurisprudence may have been recast. *Haradinaj* took a bold leap by suggesting the right to a fair trial belongs to the prosecution and defendant alike. Moreover, the *Haradinaj* chamber's broad reading of article 20(1), which does not expressly link the trial chamber's duty to ensure a fair trial to the defendant as such, sets a new standard to either be followed or distinguished by courts in the future.

At the same time, *Haradinaj* serves as a reminder that the question of *who* enjoys the "right to a fair trial" has not been fully settled. While the ICTR Statute and the Rome Statute of the International Criminal Court (ICC) share article 20(1)'s language, the Statute of the Special Tribunal for Lebanon and the Special Court for Sierra Leone do not. These latter statutes provide that "*the accused* shall be entitled to a fair trial." Although these hybrid courts differ structurally from their purely international counterparts, the distinction between their statutes and those of the ICTY, ICTR, and ICC suggest that more litigation will come on this issue.

There is also the conceptual difficulty in assigning the "right to a fair trial" to the prosecution, which unlike the defendant, is not a party in the traditional sense. The prosecution represents the international community, not any one person, and as such the "right" is amorphous and fundamentally different from a right belonging to an individual. The appeals chamber never addressed this distinction in the judgment, and possibly neglected the plain language of article 20(1)—which references only "the accused" along with the "victims and witnesses," not the prosecution.

Finally, *Haradinaj* raises weighty questions with respect to the *proprio motu* powers of international criminal trial judges. Namely, does *Haradinaj*, which requires the trial chamber to *proprio motu* ensure a fair trial under article 20(1), apply only when there is witness intimidation or does it apply more broadly? Even in situations of witness intimidation, at what point has the trial chamber discharged its duty under 20(1)? These and many more questions emerge from the *Haradinaj* ruling and no doubt will be taken up by other international tribunals in the future.

Haradinaj may be a historic ruling, but its legacy will be defined by its impact on future judgments. How *Haradinaj* is applied by international courts, and whether it is ultimately embraced or shunned, will only be answered with time. ✦

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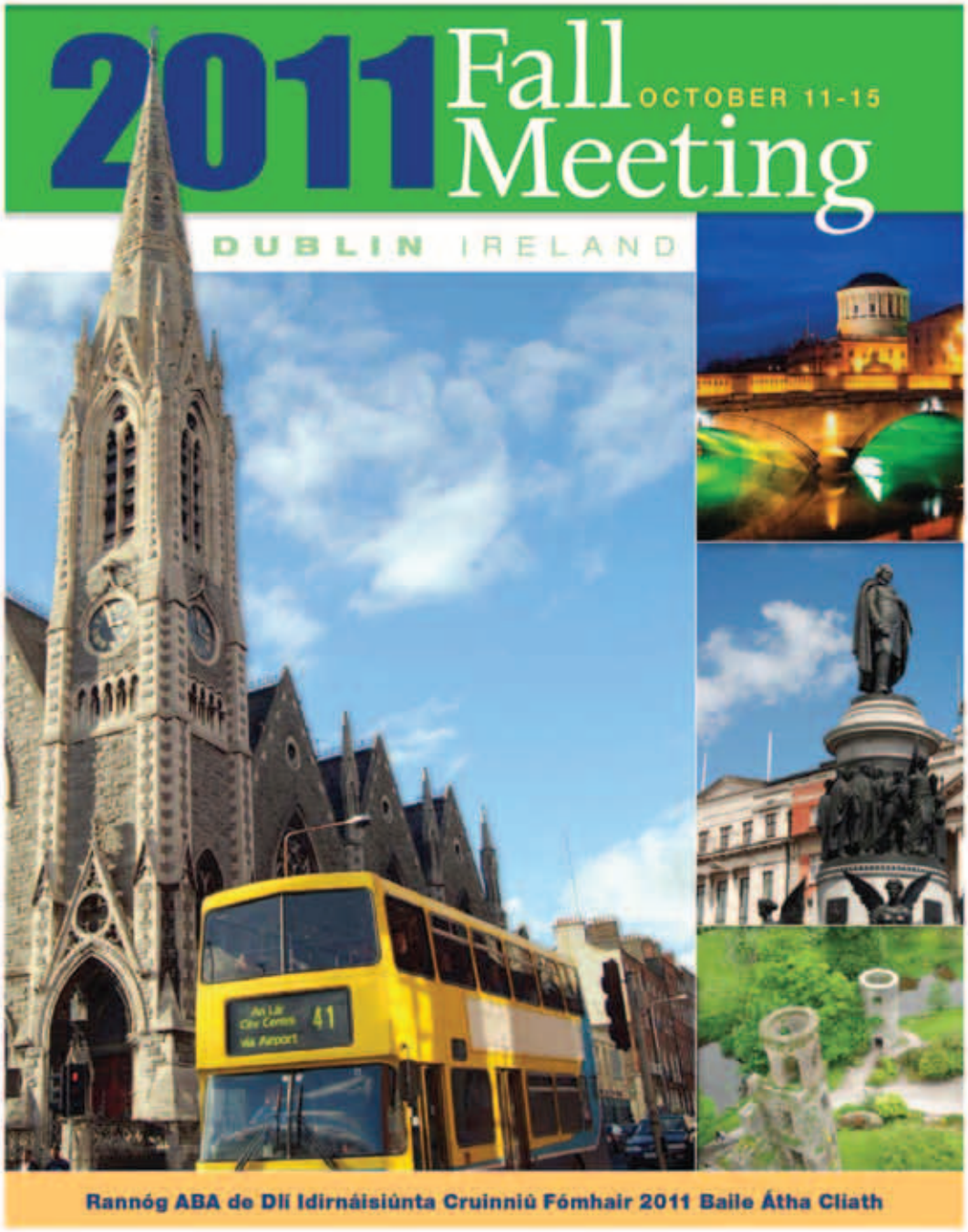

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ISLAMIC CRIMINAL LAW
Misinterpreted and Misunderstood

By Sahar Said

While the mention of Islamic criminal law might evoke, for many, certain cruel punishments such as amputation and stoning to death, the evidentiary rules that create a high legal hurdle for meting out such punishments is often overlooked. Conviction of a crime or misdemeanor is only possible if the state has met its burden of proof. It is these procedural safeguards that are most often misinterpreted and misunderstood, including among Muslim populations. The failure to focus on such safeguards reduces Muslim law and justice to a caricature. In fact, there are due process safeguards specifically set out in the Koran that must not be misapplied through reliance on other, secondary, texts.

What Is *Sharia*?

Sharia literally means "The Way" or "The Path" and is the term used to refer to Islamic jurisprudence. Within Sharia, the *Hudud* (meaning "limit" or "restriction"—the limits set by God) covers criminal laws. Crimes against God include theft, fornication, consumption of alcohol, and (some argue) apostasy.

Crimes defined by the Hudud are what common-law countries refer to as "public law," which covers public policy or decency. For example, in order to prove guilt of fornication or adultery under the Sharia, the Koran requires the testimony of four eyewitnesses to the crime, which any prudent observer would note, is only possible if the crime is committed in public. Given these evidentiary hurdles that must be met, the crime resembles crimes based on public decency and morals found in many countries.

There are four additional sources of the Sharia, in addition to the Koran, as follows:

1. ***Sunnah,*** acts and teachings of the Prophet
2. ***Ijma,*** consensus of religious scholars
3. ***Qiyas,*** analogy
4. ***Istihsan,*** equitable reasoning

The characteristic requirements of the four witnesses are found in Ijma and also, according to some, in Sunnah.

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These texts define the specific criteria that the four witnesses must meet: they must be pious, trustworthy, free/not slaves (as slaves were considered subject to the control of their owners), and male.

However, these requirements are arguably superfluous and are not expressly contained in the Koran. As such, they represent an overly restrictive interpretation of the basic text, which provides for nothing other than "evidence of four witnesses from amongst you against them" (The Koran 4:15). Nowhere in this fundamental text are these other requirements stated; there is no distinction between male and female witnesses except where specifically expressed in the Koran (see 2:282 relating to commercial transactions).

Thus, the restrictions on the types of permissible witnesses are no more than unofficial amendments that have no Koranic basis. While Sunnah and other sources of the Sharia should not be minimized, and may contribute to the evolution of the law through debate and understanding, only the Koran remains the uncontested source of the Sharia among the numerous sects of Islam today; all of the supporting texts are marginal and should be given less weight.

A Closer Look at Other Hudud (Criminal) Laws

Theft. The Koranic verse states, "Cut off (from the wrist joint) the (right) hand of the thief, male or female, as a recompense for that which they committed, a punishment by way of example from Allâh. And Allâh is All-Powerful, All-Wise." (5:38). However, the preceding verses refer to those who commit "mischief in the land" (5:33) and those who do not repent their acts (5:34). Therefore, placing this prohibition in the context and the entire paragraph, one can only conclude that petty theft is not the type of crime that should be punished by amputation.

Fornication and adultery. Fornication and adultery are often mistranslated and confused with the crime of rape. In Pakistan, for example, the laws against these three crimes were so intertwined that many rape victims were often convicted of adultery or fornication and put in jail. The problem stems from a basic misunderstanding of the

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Arabic text. This misunderstood verse talks of *fahoosh* acts, or "lewdness," which is often taken to mean "fornication/adultery" and not of *zinaa bil jabber*, which would translate into "extramarital/premarital sex by force" (rape). This, coupled with a political agenda pushed by a patriarchal state that sought widespread "Islamization" in the 1970s, led the Pakistani legislature to include rape with other sexual offenses. But in doing so, the legislature only misinterpreted its own religion and misled the masses.

Alcohol consumption. Certain authors assert that the consumption of alcohol and blasphemy are a crime within the Hudud. However, there is no verse in the Koran that provides a punishment for such conduct. Alcohol is prohibited in Islam, but no state-enforced punishment has been established in the Koran, possibly because it is a matter between God and His subject. The punishment for consumption of alcohol is attributed to various Sunnah, and it is said that the first punishment was meted at a time of Khalifah Umar.

Blasphemy and apostasy. This was not a crime at the time of the Prophet; if it were, various residents of Mecca who went as far as to throw trash on the Prophet would have been punished immediately. The Koran refers to apostasy in 6:106–109, but only with respect to the manner in which an apostate will be punished in the Hereafter: no punishment in this world is provided.

Homicide. It may be startling that one of the most heinous criminal offenses, homicide, is left out of the Hudud. This is because homicide is considered a crime against the individual who has been killed and the individual's family, and not a crime against the state (this does not include mass murders and the like, which of course are public crimes and are therefore against the state). The family can choose one of three possible solutions, and it is up to the state to ensure compliance with the family's wishes. These solutions are (1) pardon, if accepted by the entire family of the deceased, (2) *Qazf*, which is retribution along the lines of an "eye for an eye" in which death by hanging is prescribed, and (3) *Diyat*, blood money paid to the family of the deceased.

Restoring Meaning

Islam, like many of its sister faiths, is often misunderstood or misinterpreted. This is true even among its own community, who rely on less authoritative historical texts and commentary that have the effect of inadvertently changing the original intent. A return to the proper interpretation of the seminal Islamic text would rid present-day Islamic jurisprudence of many of the excesses that have distorted the original meaning of the Koran. ✦

BRIEFLY NOTED

Oklahoma Courts May Not Consider "International" Law

In the 2010 election Oklahoma adopted a ballot initiative that amended its constitution to direct state courts not to "look to the legal precepts of other nations or cultures. Specifically, the court shall not consider international law or Sharia law." A US court enjoined certification of the election results in November until constitutionality is determined. *Awad v. Ziriax*, 10-cv-1186 (W.D. Okla.).

Sharia law. Muneer Awad, executive director of the Oklahoma Council on American Islamic Relations, brought the challenget to the statute. His last will and testament incorporates Sharia law, and the amendment would prohibit the court from properly probating his will. The court found that Awad "made a strong showing that [the] amendment's primary effect inhibits religion" and the amendment "fosters an excessive government entanglement with religion."

Awad argued that Sharia does not impose legal obligations but consists of personal commitments dictated by faith and its precepts differ by country. The court agreed, finding that it "lacks legal character, and thus like plaintiff's religious traditions and faith are the only nonlegal content subject to the judicial exclusion."

International law. The prohibition against considering legal precepts of other nations or cultures may ultimately prove more problematic than the proscription of Sharia law. International law is a well-established part of federal common law (see *The Paquette Habana*, 175 U.S. 677 (1900)). Oklahoma courts are specifically directed to consider and apply federal common law. And traditional choice-of-law principles require courts to consider the law of other nations. Many Oklahoma businesses contract with businesses throughout the world, and the application and enforcement of these contracts frequently involve foreign law. The rights and obligations of Oklahoma businesses under international treaties which will no longer be enforceable in an Oklahoma state court.

Future of the ban. The district court's Sharia decision will obviously be appealed. Although a prohibition on the consideration of international law may put Oklahoma courts in a difficult position, it may not be unconstitutional. The meaning and application may play out in piecemeal litigation over years. The practical effects are at best uncertain and may have significant adverse consequences for Oklahoma businesses that participate globally. ✦

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CASENOTE

Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan

Facts. Dallah Real Estate and Tourism Holding Company made a memorandum of understanding (MoU) with the Ministry of Religious Affairs, Government of Pakistan. The MoU provided that Dallah would purchase land where housing facilities would be built and the government would take a lease over that property.

Following the signing of the MoU, a different structure emerged. Pursuant to an ordinance, the government established the Awami Hajj Trust to act as a party of the agreement that was to follow the MoU, guaranteed by the government. In accordance with the Constitution of Pakistan, new ordinances had to be issued every four months for the trust to continue to exist.

Dallah and the trust entered into an agreement, which provided that the government would guarantee the loan and that the trust could assign the rights and obligations to the government without Dallah's prior consent. The agreement contained no choice-of-law provision but contained an arbitration clause.

Due to a change of government in Pakistan, no further ordinances were promulgated and the trust ceased to exist.

Dallah instituted arbitration proceedings before the International Chamber of Commerce (ICC). Throughout the arbitration proceedings the government objected to the arbitral tribunal's jurisdiction and never waived its sovereign immunity.

Dallah obtained three ICC awards against the government (two partial awards and one final award). The awards were issued in Paris, France, the seat of the arbitration. The arbitrators applied French substantive law to the proceedings and found that in accordance with French law, "transnational law" should be applied—and that according to these principles, the government and the trust were "the same economic reality." Hence, the arbitral tribunal found that the government was bound by the arbitration obligation.

Dallah sought to have the award enforced in the United Kingdom pursuant to article V(I)(a) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 as enacted by the English Arbitration Act 1996. Dallah applied to the UK High Court and obtained *ex parte* leave to have the final award enforced. The order was set aside on an application by the government. Dallah applied to the Court of Appeal and was unsuccessful. Dallah appealed to the Supreme Court and, promptly after, applied to the French courts seeking enforcement of the award and sought a stay of Supreme Court proceedings. The stay was refused.

Questions before the UK Supreme Court. Article V(1)(a) of the convention provides, "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) […] the [arbitration] agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made."

The key questions before the Court were the role of *Kompetenz-Kompetenz* (the right of arbitrators to rule on their own jurisdiction); the application of arbitration agreements to nonsignatories in accordance with French law (including the role given to transnational law under French law); whether the convention permitted *renvoi* and whether the application of an English court to French and transnational law amounted to *renvoi*; and whether the Court should exercise its discretion not to enforce the award.

Findings. *Kompetenz-Kompetenz* had not been dealt with in detail by the Supreme Court prior to Dallah's case. The Court found that limitations on the arbitrators' power to decide over their own jurisdiction could be imposed both by the courts of the seat of the arbitration (such as is the case in France, Germany, and the United States, especially in the absence of an arbitration agreement binding the parties) as well as at the recognition and enforcement level. The Court expressly acknowledged the right of a party to challenge the jurisdiction of the arbitrators both before the arbitrators as well as before the courts and recognized that these options were not mutually exclusive.

Refuting an argument that there should be a strong presumption that the arbitrators correctly ruled on their jurisdiction, the Court found that there could be no deference to the arbitrators where there was no evidence that the party challenging jurisdiction had accepted to submit the dispute to arbitration. However, the Court accepted that the burden of proof lay with the party resisting enforcement, concluding that once this party had established that there was no arbitration agreement, the English courts were "entitled (and indeed bound) to revisit the arbitrators' decision on jurisdiction."

The Court considered that no true *renvoi* issue arose. Article V(1)(a) of the convention provided that "the law of the country where the award was made" meant that substantive law rules of the applicable law should be applied, not conflict-of-laws rules.

Further, the Court found that even though a party opposing recognition and enforcement has established that there was no valid arbitration agreement, the English courts will have the discretion whether or not the award should be enforced. This was so found because the word "may" in article V(1)(a) allowed the court "to consider other circumstances which might on

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some recognizable legal principle affect the prima facie right to have an award set aside in [article V(1)].” As to situations where the opposing party has not sought to challenge jurisdiction in the courts of the seat of the arbitration, this “would rarely, if ever, be a ground for exercising the discretion in enforcing an award made without jurisdiction.”

Finally, the Court concluded that the government had proved that under French law there was no “common intention” for it to be bound by the arbitration obligation. UK Supreme Court Justice Lord Lawrence Collins summarized the reasons for this as follows:

- Dallah had been advised by competent counsel, who knew the difference between having the government or the trust as parties to the agreement;
- from the MoU to the agreement there was a clear change of parties, and the waiver of sovereign immunity was removed;
- the trust clearly had independent legal capacity;
- the agreement was clearly between Dallah and the trust, and the government merely appeared as a guarantor;
- the standard ICC clause had been altered to refer to “the trust and Dallah” rather than “the parties”; and
- the trust had filed proceedings in Pakistan seeking a declaration that the trust had accepted Dallah’s repudiation of the agreement.

These were balanced against a letter signed by the Secretary of the Pakistan Ministry of Religious Affairs after the trust had ceased to exist, and court proceedings filed in Pakistan in the name of the government in 1998 after the initial proceedings in the name of the trust were dismissed by the Pakistani court. These were found not to be sufficient to establish, under French law, that the government was bound by the arbitration obligation.

Paris Court of Appeal. Before the UK Supreme Court issued its judgment, *Dallah* successfully obtained recognition of the award in Paris, which prompted Pakistan to file its appeal. On February 17, 2011, the Paris Court of Appeal, the seat of arbitration, ruled on the action brought by the government of Pakistan to set aside the award. In an interesting twist, the Paris court dismissed the appeal, rejecting the Pakistani government’s request to set aside the award, and ruled that the arbitrators were correct in assuming jurisdiction over Dallah’s claim.

The court found that even though the actual signatory to the arbitration agreement was a trust created by the Ministry of Religious Affairs, the actions of the Pakistani government before and after the contract was signed showed that it was a party to the arbitration agreement and that the creation of the trust was simply a matter of formality. As a result, Pakistan’s challenge to the tribunal’s decisions on jurisdiction, liability, and damages was rejected, leaving the case in a state of limbo. The parties now have an award that is enforceable in France but not in the UK.

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A Lawyer's Survival Guide to Dublin

By Wayne J. Carroll

Four Courts, Dublin, Ireland
Photo courtesy of kieranlynam (Flickr)

Stately, plump Yank Lawyer came from the stairhead at Dublin Airport, bearing a laptop bag on which a map and a copy of the *ILN* lay crossed. With apologies to James Joyce, this article and the related tips on the ABA website are meant to enhance the experience of the visitor (including the non-plump and unstately, as long as they have their *ILN* copy along) to one of Europe's most vibrant capitals.

The name Dublin originated from the term "Duv-lin," or black pool, a literal description of what the village must have originally looked like when Viking settlers and local Irish tribes set up permanent establishments in the area. For centuries, Dublin was the seat of British rule over the island, with English law in effect in greater Dublin, referred to as "the Pale" (hence the phrase "beyond the Pale").

Following independence, Dublin became the capital of the Republic of Ireland, which joined the European Community in 1973, along with the United Kingdom. Membership in the EC, combined with huge foreign direct investment (primarily from the United States), facilitated an economic boom that changed Ireland.

Sites of Special Interest

For the most part, Dublin is the center of legal activity in Ireland, particularly in relation to transnational matters. This is partly due to modern legal education having been centered in Dublin. More recently, it has become possible to pursue one's legal education in other parts of the country (such as Cork and Galway), but most senior practitioners in Ireland will have studied in Dublin.

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This common thread, combined with a relatively small size of the profession proportionate to the population as a whole, makes for a rather collegial atmosphere among lawyers compared to the sometimes anonymous environment in some large US states.

For those interested in "lawyer tourism," Dublin is the place to be. "Legal Dublin" is centered in the area around the Four Courts (of historical as well as professional interest, as the scene of some of the fighting in the Irish Civil War) along the River Liffey. There you can find the offices of various legal service providers. There are also a few aptly named pubs, like the Legal Eagle. If you have time, pay a visit to the Four Courts itself and witness how litigation is done "Irish style."

Walk a bit farther along the Liffey (away from the center) and take a right at Blackhall Street. A few hundred feet up on the left-hand side is Blackhall Place, home of the Incorporated Law Society. The society is both the regulator and voice of the solicitor branch of the legal profession and is also neighbor to the law school. Ireland still follows the English tradition of separating the two branches of the profession, although the lines have become increasingly blurred in recent years.

On the same side of town, but back more toward the center, is King's Inns, where generations of Irish barristers have been trained. During working hours you can take a stroll around the grounds, but to dine in the commons you will need an invitation from one of the members.

Business Hours and Customs

Business hours are generally equivalent to those on the Continent, though they tend to be longer at larger law firms. Many of the Dublin law firms have outgrown their earlier locations, centered around St. Stephen's Green, and have moved a bit farther from the center of the city to accommodate growth. The legendary Irish pub (and Dublin has its fair share) continues to play a central role in Irish society. It can be an ideal place for an informal chat with colleagues, either en route to, or (if you're not careful) as an alternative to, dinner.

Transportation

US citizens do not require a visa to visit Ireland. Some US airports have begun offering immigration clearance before one even leaves the United States, thus making the journey even smoother. Unless you are planning to spend some time in the west of Ireland, it is generally better to fly into Dublin than Shannon. The authorities have expanded Dublin Airport and given it a facelift to meet the growing demands of an ever-increasing traveling public. The airport is less than eight miles from the city center. ✦

SURVIVAL GUIDES ON THE WEB

For more tips from the author, please visit the Section website at www.americanbar.org/groups/international_law/publications/city_survival_guides. *There you'll find other Lawyer's Survival Guides, including Ankara, Beijing, Minsk, and Paris.*

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