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Investing in Africa: More Than Meets the Eye

By Jeffrey R. Krilla, Thomas W.Laryea, and Peter G. Feldman

International businesses and investors are focusing unprecedented attention on Africa. The continent is increasingly seen as presenting opportunities for commercial transactions that benefit the investor, local counterparts, and the wider economies of recipient countries. To be successful in such investment strategies, it is important to leverage the positive factors drawing firms to the continent and to engage the requisite legal and policy expertise to guide sound business decisions.

Africa Is Bigger Than We Think

Popular depictions of the global map significantly shrink the relative size of the African continent. With a land mass of nearly 12 million square miles, the continent of Africa would easily contain the United States, China, Japan, Russia, and Europe. Africa is much bigger than we have been made to think. The optical distortion entailed in the "standard" shrinking of Africa should not limit our perspective.

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CHAIR'S COLUMN

Rebuilding Rwanda

Seven victims per minute, every minute, every hour, every day for 100 days. At the end of 100 days, there were 1,000,000 victims; also include two million displaced persons and millions more who witnessed, but survived, the most horrific events human beings can witness. That was the pace of the 1994 Rwandan genocide.

But that's not the whole story. The whole story should include how Rwandans are rebuilding their beautiful nation, how many perpetrators of the genocide have been brought to justice, and how lawyers committed to the just implementation of the rule of law can make a difference in the lives of people around the world. There are challenges ahead. For example, there are few Rwandan lawyers with more than 18 years of experience, and the judicial system has a significant number of cases to handle. Rwanda's law schools and legal education institutions are doing an admirable job of training the next generation of lawyers. Inspiringly, NGOs and foreign lawyers are contributing their expertise to the Rwandan people.

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Under the leadership of Nancy Stafford, Gretchen Bellamy, and Victor Mroczka, this March the 2012 delegation of the International Legal Exchange Committee ("ILEX") visited with lawyers, lawyers' associations, and legal institutions in Dar es Salaam and Arusha, Tanzania, and Kigali, Rwanda. The delegation concluded with a one-day program in Kigali entitled "Women's Rights in Sub-Saharan Africa—Successes, Challenges, and the Way Forward."

Kigali was a highlight of the briefing trip for me. Our visit to the Kigali Genocide Memorial Center was powerful, and it illustrated the genocide's horror. The Memorial Center is built on a site where over 250,000 people are buried.

Our one-day conference drew more than 160 participants from East Africa and began with a very moving personal account from Lucia Nyirakwibuka, a Rwandan whose parents were killed during the 1994 genocide. During the genocide, she was raped repeatedly and impregnated, and she contracted HIV. Until 2005, she lived with her brother, but when he learned that she was HIV-positive, he chased her from their house (which belonged to her parents) and claimed all the family land as his. Lucia received training on property and inheritance laws in 2006 from ActionAid and another NGO, and she filed a complaint in the courts. The case continues and, the day after the conference, Lucia had an appointment with the magistrate to request a recommencement of the case. But for the involvement of lawyers committed to the just implementation of the rule of law, Lucia's case and cases similar to hers would not make it into the justice system.

In addition to the terrific efforts of Nancy, Gretchen, and Victor, we owe our gratitude to Christina Heid and Katie Van Geem on Section staff. We are following up on the ideas and plans developed on the ILEX trip, and we will need the assistance of many members to realize our goals.

The ILEX trip showed us not just *how* to make a difference but how we all *should* make a difference in support of the rule of law. ✦

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SECTION NEWS

FORGING TIES IN TANZANIA AND RWANDA: THE ILEX TRIP

By Gretchen C. Bellamy, Nancy K. Stafford, and Michael E. Burke

The mission of the Section of International Law's International Legal Exchange program ("ILEX") is the promotion and exchange of ideas affecting just implementation of the rule of law around the world in support of ABA Goal IV—"to promote the rule of law in the world." The ten-day 2012 ILEX briefing trip took the delegation to Dar es Salaam and Arusha in Tanzania and Kigali, Rwanda. The delegation ultimately grew to 27 members from seven nations on four continents. The trip's objectives were the following:

- Establish a framework of contacts, cooperation, and friendship among the lawyers of Rwanda and Tanzania, regional and local bar associations, and members of the Section of International Law, as well as a framework for ongoing contacts and cooperation among the Section and Rwandan and Tanzanian legal institutions;
- Learn about (i) the challenges and opportunities of integrating multiple legal traditions into a single legal system; (ii) post-conflict reconstruction, human rights, and the rule of law; and (iii) regional economic, commercial, and legal issues;
- Evaluate how the Section's technical legal assistance capacity can and should be deployed in Rwanda and Tanzania (or regionally), especially on issues such as legal training, international human rights, the role of women in law and civil society, HIV/AIDS (and other health issues) and the law, and other areas of mutual interest;
- Co-host a one-day conference in Kigali focusing on women's legal rights and the role of women in the practice of law and civil society; and
- Interact with members of the local, regional, and international community and lay the foundation for present and future joint events.

Tanzania and Rwanda offer unique opportunities to strengthen the ABA's relationship with lawyers working to develop and refine their legal systems. Tanzania was chosen because of its complex but stable legal system that integrates common law, customary law, and Islamic law and balances the interest of mainland Tanzania with those of the semi-autonomous, primarily Muslim, island of Zanzibar. Rwanda was chosen because of its rise from the genocide the country suffered 18 years ago to its current position of leadership on the continent in terms of development and commitment to women's rights (56 percent of parliament members are women—a higher percentage than in any other country in the world!).

The delegation to Tanzania (representing the United States, Canada, Uganda, France, and Argentina) met with the Tanganyika Law Society, Tanzania Women's Lawyer Association, Zanzibar Law Society, Zanzibar Female Lawyers Association, Tanzanian Minister of Justice, Chief Justice of the Supreme Court, Attorney General, Law Reform Commission, and many nongovernmental organizations and local lawyers in Dar es Salaam. In Arusha, the delegation met with the East Africa Law Society and Pan African Lawyers Union, as well as visited the East African Legislative Assembly, East African Court of Justice, International Criminal Tribunal for Rwanda, and African Court on Human and People's Rights. In Kigali, the delegation, having added members from the U.K., Côte d'Ivoire, and Ghana, met with the Rwandan

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Investing in Africa

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The vastness of the continent—with the tremendous diversity in language, culture, economies—presents both challenges and opportunities for investors navigating for business prospects.

Positive Trends

Investment decisions in Africa are appropriately informed by the growing size of markets on the continent, promising macroeconomic conditions, abundant natural resources and human capital, and positive trends enhancing the legal and institutional frameworks for doing business.

Macroeconomics

Despite the external shocks arising from the 2008 global crisis, Africa as a whole has been relatively resilient. African economies were bolstered by improvements in monetary and fiscal policies that had been made over the years, which gave room to engage in countercyclical measures. Over the past decade, six of the ten fastest-growing countries in the world were in sub-Saharan Africa. The fastest-growing economy in the world in 2011 was Ghana, which registered an approximately thirteen-percent increase. Granted, these growth figures come from a relatively low base, but they reflect significant relative data for companies looking for new markets in which to grow in light of the low growth trend in advanced economies. While much global attention has been fixed on the high growth rates in China, 10 African countries have per-capita GDPs exceeding that of China. Along with the rise of a middle class across the continent, Africa's combined consumer spending is also strengthening, from $860 billion in 2008 to a projected $1.4 trillion in 2020. The burgeoning middle class, with its discretionary spending power, will boost consumer demand across a wide range of goods, services, and technologies.

Natural Resources and Human Capital

The continent's natural resources have been a source of attraction for investors over the centuries, but it is worth noting that from 2000 to 2008 natural resources directly accounted for only 24 percent of Africa's GDP growth. Africa has approximately half of the world's gold deposits, 10 percent of its oil reserves, and a third of its diamonds, copper, platinum, and "rare earth" minerals—many of which are critical to the functionality of smart-phones, tablet computers, and flat-screen TVs. Sixty percent of the world's uncultivated arable land is in Africa, which of course provides a key input for the development of agribusiness (although maximizing potential in the agribusiness sector would depend on improvements in infrastructure elements such as power, irrigation, and transportation). The human capital on the continent also bears emphasis. By 2040, Africa will be home to one in five of the planet's young people and will have the world's largest working-age population: some 1.1 billion people. The long-standing "brain-drain" that has depleted needed human capital on the continent is thankfully a reversing trend, buoyed by a returning diaspora and the infusion of expatriates who are internationalizing many of the growing business centers on the continent.

Investment Flows

Recent investment flows into Africa are another indicator of the continent's increasingly attractive economic profile. In 2011, private equity firms raised $1.5 billion for projects on the continent. China alone is expected to invest more than $100 billion in Africa in 2012, more than

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double the $46 billion invested by India. Overall foreign investment in Africa has grown more than sixfold in the last decade. One enduring question is whether U.S. investment will catch up in the upcoming years.

While a role remains for multilateral and bilateral government financing (in some instances on concessional terms), private capital flows through foreign direct investment, portfolio investments into private equities and government securities, and remittances have become the main source of external financing for many African countries. Nonetheless, an undeniable role remains for the public sector to spur sustained investment by the private sector. Tools at the disposal of the public sector for these purposes include providing catalytic financing, enhancing risk mitigation mechanisms, reforming legal and institutional frameworks, and assisting with the implementation of best practices and local know-how. Looking ahead, there is a concern that the continuing threat to financial markets arising from unresolved debt problems in advanced economies may encourage risk aversion (including fear of the unfamiliar) and compromise private capital flows to Africa in the near term.

Legal and Institutional Reforms

Recent years have also witnessed notable enhancement in the legal regimes and institutions facilitating foreign investment. These developments include generally better public governance, although several notable exceptions remain. Measured by the World Bank's Ease of Doing Business Index, which tracks factors for starting a business such as dealing with construction permits, getting electricity, registering property, obtaining credit, protecting investors, paying taxes, trading across borders, enforcing contracts, and resolving insolvency, notable progress has been achieved in many countries in Africa.

Increased regional integration through international legal and economic cooperation has served to deepen markets by harmonizing relevant legal regimes and reducing trade barriers within the regional territories. Among the regional groupings leading this integration are the Common Market for Eastern and Southern Africa ("COMESA"), the Economic Community of Central African States ("ECCAS"), the Economic Community of West African States ("ECOWAS"), and the Southern African Development Community ("SADC"). In this context, a number of individual African countries have pushed ahead with adaptations to their legal and regulatory regimes to facilitate increased investment flows, including the creation of "free zones" in which ordinary customs and tariffs do not apply. For example:

- Tanzania has established "Special Economic Zones" and "Economic Development Zones" in which companies enjoy a liberal regulatory environment as well as a host of incentives intended to spur production, promote exports, and generate employment. Such incentives currently can include an exemption from corporate taxes for an initial period of 10 years, an exemption from various taxes on capital expenditures for machinery and equipment, and an exemption from various shipment requirements or trade duties. Tanzania has also established the Tanzania Investment Centre, a "one-stop shop" that provides administrative assistance, ensures investor protections, and offers various investment incentives, such a Certificate of Incentives that gives qualified foreign investors preferential treatment in the acquisition of land, as well as automatic approval for five work permits for expatriate employment. Notably, the Certificate of Investment also gives foreign investors the right to transfer outside of Tanzania 100 percent of their foreign exchange, profits, and capital.
- Kenya, for its part, has also undertaken to provide special incentives to help attract international investment. Kenya has established "Export Processing Zones," within which qualified companies can engage in certain manufacturing, commercial activities, or services. Among the benefits of operating in such a zone are exemptions from certain excise duties and an exemption from the payment of income tax for the first 10 years from the date of the first sale by an enterprise. Companies located in Export Processing Zones are also exempt from the payment of withholding tax on dividends and other payments to nonresidents

An undeniable role remains for the public sector to spur sustained investment by the private sector.

during the period that the company is exempt from income tax. Additionally, qualified foreign investors in Kenya may be eligible to receive an investment certificate that entitles the investor to three entry permits for management staff and three entry permits for owners, shareholders, or partners.

Notwithstanding these positive trends, the extraordinary legal and regulatory diversity in Africa, both across and within countries, presents complexity to the would-be investor. The degree of government involvement in the business environment, while generally pervasive, varies in terms of legislation, regulation, administrative oversight, government market participation, and, in some instances, government interference. Part of the planning phase of any successful investment strategy involves obtaining the necessary advice on the legal landscape and government factors that inform the viability of proposed investments.

The extraordinary legal and regulatory diversity in Africa, both across and within countries, presents complexity to the would-be investor.

Tips for Success

Against the backdrop of promising market conditions and economic indicators, markets within Africa have become an increasingly attractive destination for foreign investment and business expansion. While, as a general matter, the business climate for such investment has improved in recent years, complexities and unevenness remain. Given this diversity both across the continent as well as within certain countries, a focused analysis is critical to identifying business opportunities and addressing potential obstacles.

Companies considering investment in Africa should take into account several key factors.

Africa is not one market.
Africa consists of 54 sovereign states. While many jurisdictions or regions share common characteristics, there are substantial variations between and among the various legal, regulatory, governmental, social, and economic environments of each country. Understanding these differences can help international investors gain insight into a wider range of opportunities, as well as avoid common pitfalls.

Public-private partnership in the broad sense is key.
The private sector on the continent and foreign private investors are increasingly the main drivers of engagement and economic growth in Africa. For a private investor, often a key differentiator between success and failure is the capacity to leverage appropriate support of the public sector while maintaining a commercial orientation in investment decisions.

Sustainable investment strategy requires international and local partnerships.
Slash-and-burn approaches to investment are shortsighted. Cultivating relationships with local counterparts—suppliers, customers, employees, communities, and the public sector—will tend to increase the size of the pie for all and produce more sustainable investment returns over time.

Sophisticated legal advice is necessary.
To optimize success, investors need lawyers who understand both the legal and the strategic dimensions of investing in Africa. Advising on transactions or disputes with respect to African investment requires a deep understanding of the intersection of law and regulations combined with international and domestic expertise and credibility. ✦

Legal and Regulatory Reforms and Private Sector Development in Africa: An Overview

By Edna Udobong

The struggle for economic growth has been a major challenge in most developing countries of Africa for decades. However, the twenty-first century has brought an incomparable transformation of the legal and regulatory business environment in Africa. There has been a transformation of public institutions, as well as legal reforms that encourage free trade and attract foreign direct investment. As a result, Africa has emerged recently as a significant regional player with high potential to advance economic growth in both public- and private-sector development.

One of the principal goals of the various African independence movements in the 1960s was to take control of the entire state apparatus that ensured governance in each country, including the ownership and management of natural resources. The model for development adopted throughout Africa at the time was one based on public-sector planning and enterprise. The state controlled planning and production of all goods and services, and it adopted laws and regulations to achieve those goals. To accomplish that model, governments often enacted laws and regulations that did not promote competition and severely limited private sector development.

Today most African countries have adopted legal reforms that promote private sector development. Developing countries in Africa are turning increasingly to private market forces to allocate natural resources. The shift is now toward deregulation and the removal of obstacles to investment and private sector development. However, the level of progress in this regard has differed from country to country.

While some countries in East and West Africa with weak laws and regulations continue to experience poor economic performance, countries in the south of Africa, such as Namibia, Botswana, and South Africa, have had more consistent and stable economic growth due to policies that recognized private rights to own land and freedom of contract (*World Bank Doing Business Reports 2012*).

The judiciary throughout Africa has become increasingly effective even if there remain major challenges in the administration of justice (*Worldwide Governance Index 2011*). For example, most post–civil war countries like Liberia and Sierra Leone have made significant legal reforms since 2007 that have promoted the Rule of Law and human rights (*MOI Governance Index 2011*).

Many countries in Africa are beginning to open their economies to investment by adopting business-friendly legal and regulatory reforms. An open economic and legal system leads to wide distribution of property rights, enforcement of private contracts, and opportunities for competition in private sector development with no hindrance or legal bottlenecks that favor any particular class of the society. When laws and regulations are passed through democratic processes with the participation of stakeholders and administered transparently in a predictable manner, they lead to sound establishment of the rule of law, and they attract private investment (Shihata 1996). In addition, it is now commonly accepted that laws and regulations that encourage competition and protect contract and private property rights are essential for small-business growth. As Ibrahim Shihata noted in his article, "The Role of Law in Business Development,"The principle of competition not only makes for good economics but also makes for good law. Good economic policies allow for market forces to work, while addressing failures and excesses." (Shihata 1996).

The development of more business-oriented legislation throughout Africa has reduced reliance on the informal cash and "underground" economy. The sprawl of the informal sector in most African countries, particularly in West and East Africa, had been encouraged by unattractive and oppressive business laws and regulations, as well as high levels of unemployment. Also, barriers to starting business and the high rate of taxes on property rights in most African countries had contributed to the growth of the informal economy (*World Doing Business Reports 2012*).

Research reveals that a number of countries with

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developing economies have taken steps in recent years to reform laws and regulations that negatively impact the business environment. The indicators used by experts and economic institutions at the World Bank, the African Development Bank, the Global Integrity Index, and the World Development Index, as well as government assessments, show improvement in governance, advancement of the rule of law, independence of the judiciary, and political stability. Further, efforts have been made to address challenges and obstacles that resulted from failed policies of the past that affected regional business infrastructure and the labor and financial markets. Indeed, the success of countries in southern Africa such as Botswana, Namibia, and South Africa shows consistent and transparent systems of governance in the implementation of laws and regulations with little or no influence from government.

While trade liberalization has removed certain barriers to doing business across borders, there remain constraints that African countries, especially in the sub-Saharan region, continue to confront. There remain outdated laws and often insufficient implementation of the new forward-looking laws that have been adopted. For example, one country has granted citizens legal rights of access to public information through its freedom-of-information legislation but has not established an agency to implement the law. In other cases, new laws compete with prior conflicting laws that have not been repealed. Such difficulties and inconsistencies are obstacles to prospective investors who may wish to do business.

While challenges exist, a major development from the post-colonial period of public-sector planning and control to private-sector development is a move that supports the role of law as a tool for social change. The shift has led to efforts by some countries to remove barriers and obstacles to trade and investment. There is the recognition among governments that, when the rule of law is allowed to prevail and that law is made in the interest of all stakeholders, there is a significant change in human behavior with a related benefit for the preservation of individual property rights and contract enforcement. The rule of law bestows confidence in the independence of the judiciary, and respect for the law leads to trust in a government.

The change from the public-sector control model to private-sector development has become almost uniform in all African countries at the turn of the twenty-first century. This uniformity is also defined by multilateral and bilateral initiatives such as the World Trade Organization, as well as the globalization of trade that has benefited many emerging economies and developing countries. Developing countries in Africa have discovered the need to formulate private-sector-friendly laws and regulations that promote trade across borders with incentives for national economic growth, and they have largely responded by adopting pro-business legislation, as it has been shown time and again that policy reforms that promote responsible and sustainable development encourage foreign direct investment leading to growth and employment. ✦

"The Other" Sovereign Debt Crisis: A 30-Year Update on Sub-Saharan Africa

By Jon H. Sylvester

The phrase "sovereign debt crisis" has been in the news a lot recently, primarily because of the precarious fiscal situation of Greece and fear of dire consequences for the Eurozone and even the global economy if the Greek government defaults. In March 2012, these concerns resulted in the largest debt write-down in history, reducing Greece's principal and interest payments by about $20 billion per year after private banks and hedge funds accepted losses of approximately 75 percent on their Greek bond holdings. Although the differences are many, for some of us the Greek crisis called to mind another sovereign financial crisis that began more than 30 years ago and still has not been entirely resolved—at least so far as the nations of sub-Saharan Africa are concerned.

Long before there was a Greek debt crisis, there was a "third-world debt crisis," which was often said to have begun in 1982 when Mexico defaulted on its loan payments and made its historic declaration of inability to meet even the interest payments on its external debt. Of course, the roots of the crisis predate Mexico's declaration. Most analysts trace its origins to historic turbulence in the international oil markets during the early and mid-1970s, which resulted in a steep increase in oil prices. This dramatic escalation in oil prices was especially difficult for the many less developed countries ("LDCs") that were not oil producers. More importantly, it flooded the international financial system with excess oil profits in need of reinvestment.

Thus, the sharp increase in borrowing by LDC governments resulted more from an oversupply of lendable funds than from a sudden spike in demand on the borrowers' side. The lending was also driven by Cold War competition for the "alignment" of LDCs. Most LDCs would have realized greater benefits from foreign direct investment (assuming appropriate local regulation). Instead, many borrowed excessively, and too little of what was borrowed went to projects contributing to sustained economic growth. Some went to consumption and, worse, some went to capital flight. Even in many of the better cases, too much went to "monuments" such as new capital cities and to subsidization of often inefficient, parastatal, import-substitution ventures. The third- world debt crisis may not have "officially" started until 1982, but by 1977, Tanzania was behind on its debt payments by more than the total value of its annual exports.

By the end of the 1980s (sometimes referred to as development's "lost decade"), the combined external indebtedness of the LDCs of Latin America, Southeast Asia, and Sub-Saharan Africa ("SSA") was estimated at nearly $1.3 trillion. The various LDCs and their respective regions have fared quite differently over the decades. From the start, however, the situation in SSA was uniquely perilous. High on the list of reasons is SSA's colonial history (much more recent then), which had resulted in many marginally functional governments operating in artificially created and sometimes barely tenable states. At the time, 16 of the world's 25 poorest countries were in Africa. What has happened in the past three decades?

The World Bank recently reported that for the first time since 1981, less than half of the population of SSA is living below the adjusted poverty line of $1.25 per day. Unfortunately, it is also true that poverty in SSA remains higher than in any other region of the world. Infant mortality and rates of maternal mortality at birth are also high. Life expectancy is low, averaging in the forties and fifties in many countries, as are rates of primary school completion and access to clean drinking water. It has been estimated that more than 2,000 African children die each day for reasons associated with lack of access to clean water. The United Nations Children's Fund reports that more than two million African children suffer from severe malnutrition. Fewer than 30 percent of African roads are paved. Rates of HIV/AIDS, malaria, yellow fever, typhoid, cholera, hepatitis, and tuberculosis remain high. And there is war and genocidal violence.

None of this is new. Indeed, many of the crises in Sub-Saharan Africa have persisted for so long that it seems they no longer command the urgent attention that they warrant as genuine emergencies. Some skeptics no doubt regard

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the situation as irremediable. But to what extent is SSA's external debt a factor? What remedial efforts have been tried, and what is being done now?

Past and Current Efforts to Address the Debt Crisis in SSA

Debt rescheduling (under the auspices of the "Paris Club" for official, government, and multilateral creditors, and later the "London Club" for commercial creditors) was the initial response to the third-world debt crisis. Individual LDC debt was rescheduled more than 80 times between the mid-1970s and the mid-1980s. Rescheduling was usually at market rates, and the debt continued to increase. Creditors eventually acknowledged that heavily indebted LDCs were not merely having cash flow problems but also solvency problems.

Over the decades, the many proposals and efforts to address the problem have included the "Toronto terms," the "London terms," and the "Naples terms"; the Baker plan and the Brady plan; "debt-for-equity," "debt-for-nature," and "debt-for-development" plans; securitization; and the Miyazawa, Mitterand, and Robinson proposals, among others. Central to the current effort, however, are two initiatives and a framework.

In 1996, the International Bank for Reconstruction and Development ("World Bank") and the International Monetary Fund ("IMF") launched the Heavily Indebted Poor Counties ("HIPC") Initiative after approval at the G7 Summit in Lyon, France. In 1999, the initiative was enhanced following the G7 Summit in Cologne, Germany—significantly because the IMF and the World Bank had concluded that unsustainably high external debt had become a key constraint on development in about half of the world's 80 poorest countries.

In 2006, the enhanced HIPC Initiative was supplemented by the Multilateral Debt Relief Initiative ("MDRI"). Both now operate against the backdrop of the joint World Bank/IMF "Debt Sustainability Framework" ("DSF"), officially described as an "analytical framework used for assessing debt sustainability and allocating resources . . . given the changing macroeconomic landscape facing low-income countries." The DSF was introduced in 2005 and updated as recently as February 2012.

The program involves two steps. First, very poor countries facing unsustainable external debt burdens get interim (revocable) relief if they make sufficient progress implementing IMF and World Bank approved policies, thereby reaching the "decision point" and entering the program. Second, the "completion point" is reached when a country establishes a "track record of good performance" regarding specified governmental and fiscal reforms and demonstrates that the savings from debt relief are directed significantly to programs that benefit the poor.

Countries that reach the completion point are eligible for forgiveness of 100 percent of qualifying debt owed to the World Bank, the IMF, and the African Development Bank. This covers the majority of the debt owed by SSA governments. Thirty-three of the 40 countries involved in the HIPC/MDRI program are in Africa. The World Bank estimates that, if all 40 eligible countries were to complete the program, total debt relief provided by participating creditors would be nearly $150 billion.

As of July 2011, the World Bank reported that 32 of the 40 countries eligible for the program had reached the completion point and earned irrevocable debt relief. These countries include Afghanistan, Benin, Bolivia, Burkina Faso, Burundi, Cameroon, Central African Republic, Democratic Republic of the Congo, Ethiopia, The Gambia, Ghana, Guinea-Bissau, Guyana, Haiti, Honduras, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Nicaragua, Niger, Republic of Congo, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, Tanzania, Togo, Uganda, and Zambia. Four more countries—Chad, Comoros, Cote d'Ivoire, and Guinea—were receiving interim assistance after reaching the decision point.

On average, debt service payments for these 36 HIPCs have declined from 3.1 percent of gross domestic product in 2001 to 0.8 percent of GDP in 2010. During the same period, the same 36 countries have increased their spending on poverty-reducing programs such as health, rural infrastructure, and education from an average of 6.2 percent of GDP to an average of 9.7 percent. According to IMF projections, the debt burden of these 36 HIPCs will be reduced by about 90 percent after they receive all of the benefits of the HIPC Initiative and the MDRI. Countries that have completed the program work with the World Bank's Debt Management Facility, using the Debt Sustainability Framework to help meet development goals without again incurring unsustainable debt burdens.

Through its Debt Reduction Facility, the World Bank also works with HIPCs to reduce their commercial debt. This is a distinct problem, insofar as commercial lenders, together with some smaller multilateral institutions and non–Paris Club bilateral lenders, account for a smaller but still significant amount of the external debt owed by SSA governments.

Critics of the Current Initiatives

Critics of the HIPC Initiative and the MDRI include nongovernmental organizations, individual activists, advocacy groups, academics, and even a former head of the World Bank. Their criticisms range from technical suggestions for improving the programs to accusations that the entire IMF/World Bank enterprise is intended to transfer wealth from the world's poor countries to the rich countries that control these institutions and to, in effect, perpetuate colonialism or at least keep poor countries "in their place" politically.

Some critics suggest that the programs impose unnecessary administrative burdens on participating debtor countries, thereby decreasing the resources that would otherwise be available for poverty-reduction programs. These critics say the initiatives fail to adequately account for the impact of factors beyond the debtors' control, such as primary commodity prices, the differential between interest and growth rates, and even climate change. They also say that the IMF and World Bank "structural adjustment" programs have focused almost entirely on privatization and market liberalization at the macroeconomic level and that the savings from debt relief are being forced into long-term poverty eradication programs at the expense of the agricultural development strategies that most independent experts agree would be most beneficial to SSA in the near term.

Other critics focus on the increasingly intrusive roles that the World Bank and the IMF play in poor countries. These critics point out that when the World Bank and the IMF were established at the end of World War II, their respective roles were to assist in rebuilding post-war Europe and to monitor and regulate the international monetary system. Instead, say these critics, both institutions became political weapons during the Cold War and, since the beginning of the third-world debt crisis, they have come to focus primarily on managing the economies, policies, and policy-making processes in the developing world.

Some challenge the entire "development project" as based on a flawed concept of unilinear "modernization." These critics say that over the decades since the end of World War II and the formation of the IMF and the World Bank at Bretton Woods, New Hampshire, in 1944, the seemingly endless list of sometimes contradictory programs, proposals, and slogans has included state-led development, market-led development, law and development, basic needs, structural adjustment programs, conditionality, comprehensive development, good governance, privatization, micro-development, civil participation, sustainable development, women-centered development, and endogenous development, to name only a few. And yet, abject poverty remains rampant.

Meanwhile, LDCs collectively have sought self-determination and attempted to assert control over the development processes through a series of political and legal initiatives in movements for Permanent Sovereignty over Natural Resources, a New International Economic Order, the Right to Development, and reparations.

For reasons reflecting the spectrum of ideological positions mentioned above, many critics of the IMF/World Bank debt relief regime continue to advocate total, unconditional cancellation of the debt. The World Bank and IMF, however, have emphatically rejected the idea of unconditional debt cancellation. Their reasons, explained in a July 2001 paper entitled "100 Percent Debt Cancellation? A Response from the IMF and the World Bank," include the following.

(1) Total debt cancellation for only the very poorest countries would come at the expense of other IMF and World Bank borrowers, including those non-HIPCs that are home to 80 percent of the developing world's poor.
(2) Total debt cancellation would cripple the regional development banks because new development aid depends significantly on the repayment of previous loans.
(3) Total debt cancellation would undermine the confidence of existing and potential investors whose funds are essential to the long term development needs of poor countries.

In the same year that this IMF/World Bank position paper was published, an independent expert commissioned by the United Nations Economic and Social Council reported his assessment of the enhanced HIPC Initiative. Mr. Fantu Cheru praised the initiative's intentions but said the program was inadequate for several reasons. He said the program lacked sufficient resources and, because it does not address debts that are owed to non–Paris Club creditors, the actual debt situation of the HIPCs was worse than apparent.

The expert also reported that the HIPC governments believed they had to do whatever was necessary to please the World Bank and the IMF. Therefore, they overemphasized macroeconomic considerations, fiscal reform, and privatization measures, instead of focusing on the context and the actual impact these policies have on poverty reduction. He examined the program-required Poverty Reduction

Strategy Papers prepared by several participating countries, and he found that every one of them emphasized the need for restructuring, downsizing, cost-recovery, and reducing the pay of teachers and other government employees. He questioned whether these measures would reduce poverty.

Although the Strategy Papers are supposed to be prepared and developed through a transparent process with broad participation of the civil society, the independent expert stated that, in most of the countries examined, participation and transparency had been neglected. The expert called the program stringent, inflexible, and in some instances punitive, leaving countries with very little opportunity to produce authentic, consensus-based national poverty strategies with the essential "buy-in" of all stakeholders.

The independent expert recommended several changes to the program, including the following:

(1) Bring United Nations agencies such as UNDP, UNICEF, UNCTAD, and ILO into the process and end the World Bank/IMF monopoly on program oversight;
(2) Abolish certain functions, facilities, and subprograms consuming resources that could be directed to debt relief and/or poverty reduction; and
(3) End "conditionality" by decoupling HIPC debt relief from the Poverty Reduction Strategy Paper process, and make a clear commitment that all debts owed by HIPCs will be written off unconditionally.

Many of the U.N. expert's criticisms, as well as others summarized above, have persisted. Indeed, a few eligible countries have declined to participate in the HIPC Initiative. Nonetheless, a November 2011 report prepared by the staffs of the IMF and the World Bank concluded that "although some challenges remain, the objectives of the HIPC Initiative have largely been reached." In addition to the 32 countries that have completed the program, the report says, three of the four that are receiving interim relief will likely complete the program by early 2013. Total debt relief committed under the HPIC Initiative and the MDRI is approximately $128 billion, according to the report, which also states that some creditors have provided debt relief exceeding the requirements of the HIPC Initiative (canceling additional debt, for example, to help Haiti recover from the January 2010 earthquake).

Some critics contend that the most heavily indebted LDCs have participated in the IMF/World Bank programs because they saw no practicable alternatives. It is not clear how this is a criticism of the programs—even though it is probably true. But for at least some participating countries, this lack of alternatives may not always be the case. The 2001 IMF/World Bank position paper opposing cancellation of the debt concluded that

> [t]he debt reduction under the HIPC Initiative should be seen as a one-time action, the first step toward enabling the HIPCs to . . . become able to gain access to private international capital, including both direct investment and further borrowing. Credit is an indispensable means of financing development.

This brings us back to Greece, which got into trouble by borrowing heavily in international capital markets to fund government budget and current account deficits. Although Greece's GDP grew at an average rate higher than that of its Eurozone neighbors from 2001 through 2007, central government expenditures grew almost three times as fast as revenue. Probably in part because its membership in the Eurozone implied a stability not borne out by the facts, Greece was able to borrow large sums at low rates. In 2009, Greece's external debt was 115 percent of its GDP. By 2010, Greece was borrowing to cover maturing debt. The resultant reliance on international borrowing left Greece highly vulnerable to credit rating downgrades or subtler shifts in investor confidence.

Conclusion

It is now axiomatic that in a globalized economy, the economic policies and problems of one country can easily impact others. Although the Greek economy is only about two percent of the Eurozone's GDP, the dramatic international intervention to prevent a Greek default was prompted by concern that the Greek crisis would prove contagious and spread throughout the Eurozone, potentially affecting the global economy. By March 2012, Greece's external debt was an alarming 160 percent of GDP. The aim of the bailout is to get the debt back down to about 120 percent.

Obviously, no such massive, emergency rescue effort was mobilized for SSA. The cases are distinguishable, however. Because the aggregated debt of SSA was relatively small and mostly owed to official creditors, it simply did not threaten the international banking system the way Greece's mostly private debt did. This distinction does not negate critics' charges that the dependency resulting from SSA's debt has been exploited over the decades to serve the interest of others, but it does explain the existence of the option to do so.

Moreover, although dramatic emergency action is being

taken to rescue Greece, it would be a mistake to think that Greece is getting a "free pass." The Greek government still owes about $341 billion. Most of that debt is now held by the IMF and other "official" creditors (rather than by private lenders), and the severe austerity measures imposed on Greece by the IMF are having dramatic effects on prices, jobs, and pensions. Some have called the IMF measures "brutal" and say they are pushing the Greek economy deeper into recession. Thousands of people have taken to the streets repeatedly in sometimes violent demonstrations. Amid rising unemployment and unrest, the political survival of the current Greek government is far from certain. Many expert observers do not believe the steps taken thus far will be sufficient to resolve the Greek debt crisis. They expect Greek debt to rebound, requiring another bailout in the not-too-distant future. They are also afraid that some or all of the other countries derisively referred to as the "PIIGS" ("Portugal, Italy, Ireland, Greece, and Spain") will follow in Greece's footsteps.

Meanwhile, a decade after the 2001 IMF/World Bank position paper opposing outright cancellation of HIPC debt, the prediction regarding access to private international capital may be coming true for some SSA countries. A column recently posted by an online business, financial, and investment news service proclaimed that "It's really happening for the continent this time." Stating that "fiscal management in many African nations has improved dramatically," the column concluded that "Africa has the potential to be the growth story of the new century."

Writers connected to the investment industry often have their own motives for such exuberance. The World Bank, however, recently reported that the nations of SSA experienced average economic growth of nearly five percent per year for the last decade and that debt relief under the HIPC Initiative and the MDRI has created new borrowing capacity for its beneficiaries, some of whom are exploiting that capacity by borrowing from external, commercial lenders. Some are also borrowing domestically, or creating local debt markets. This would seem to constitute at least partial vindication of the HIPC Initiative and the MDRI. Of course, it also creates a new set of risks.

Greece's current economic crisis may foreshadow the future facing any country that borrows too heavily in the private international capital markets. It would be a deeply ironic measure of success if it turns out that some such countries are in Sub-Saharan Africa. ✦

ILEX Trip

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Minister of Justice, Kigali Bar Association, Rwanda Young Lawyers Association, and chief justice of the Supreme Court, as well as local nongovernmental organizations.

A Section-planned conference, "Women's Rights in Sub-Saharan Africa—Successes, Challenges, and the Way Forward," drew more than 160 participants from East Africa's legal community. The programs examined challenges facing women's rights in sub-Saharan Africa; relevant international human rights conventions and their enforcement; advancement of women's rights; how Rwanda can be the model of success for the advancement of women's rights in East Africa and the continent; provision of access to legal institutions; and ways of improving law enforcement. Speakers included the Honorable Connie Bwiza, Chamber of Deputies, Parliament of Rwanda; Clare Akamanzi, Chief Operating Officer, Rwanda Development Board; and panelists from nongovernmental organizations, UN Women, and local universities.

The Section will continue the dialogue with the bar associations, law societies, and individuals in Tanzania and Rwanda to construct viable and visible post-trip deliverables. Initially, a second stand-alone conference on women's rights is planned for February 2013. A writing competition for East African Community lawyers, where the winner would receive a scholarship to attend a Section meeting, is under consideration. Overall, the delegates and the stakeholders in both countries had a true exchange of ideas and thoughts, and many new friendships and relationships were begun in the short but intense visit. ✦

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Measuring and Building Safe Skies Over Africa

By Roncevert D. Almond

The opportunities of international trade cannot be fully realized without safe and secure air transportation. This is especially true for Africa, the world's second largest continent, characterized by dispersed commercial centers, poor ground transportation, and landlocked states with unreliable access to maritime ports.

Direct connections between global markets are especially critical for realizing the benefits of world trade. While air transport carries around 0.5 percent of the volume of world trade shipments, it accounts for over 35 percent by value—a result related to aviation's critical role in transporting high-value commodities, including perishable or time-sensitive goods.

Flights between the United States and Africa, however, generally bring passengers and cargo through intermediate points, often European hubs. The United States does not allow airlines from a vast majority of African states to fly to U.S. destinations. Even though the connectivity between Europe and Africa is greater, the European Union also prohibits a substantial number of African airlines from accessing its market.

These flight and trade limitations are based on the noncompliance of African states with safety and security standards under international law. According to the International Air Transport Association ("IATA"), the 2011 annual average accident rate per 1 million flights for the African region (3.27) is the world's highest and more than 100 times greater than the average rate of North America, Europe, and North Asia combined (0.03). African carriers accounted for only two percent of global traffic but generally account for over 20 percent of global Western-built aircraft losses in a given year.

Obstacles for achieving compliance in Africa include a combination of insufficient government oversight and inadequate aviation infrastructure. In response, the United States, EU and the international community in partnership with African states are taking action to build safe skies over Africa. By plugging into the global aviation network, Africa can become a full partner in the world economy. The following discussion will provide an overview of this issue.

The Convention on International Civil Aviation, also referred to as the Chicago Convention, governs global aviation safety and security. The International Civil Aviation Organization ("ICAO"), a UN specialized agency, oversees the treaty and develops international standards that serve as annexes to the treaty. Annexes cover areas such as personnel licensing, air carrier operations, aircraft maintenance, and security. With 190 member states, ICAO can claim to be one of the most successful international organizations.

The contracting states of ICAO are chiefly responsible for implementing the treaty. Compliance includes harmonizing domestic systems based on ICAO standards. Despite broad participation in ICAO, not all contracting states have uniformly and substantively complied with international safety and security standards.

As a result, in 1992 the United States took action to extraterritorially enforce the Chicago Convention and ICAO standards. More specifically, the U.S. Department of Transportation ("DOT") and the Federal Aviation Administration ("FAA"), in coordination with the U.S. Department of State, instituted an in-country audit program, the International Aviation Safety Assessment ("IASA"). The IASA program evaluates a state's adherence to ICAO standards before allowing its carriers to fly to and from U.S. territory. Subsequently in 1994, ICAO established a similar in-country audit program, but ICAO lacks the material incentive of market access to induce compliance. More recently, in 2005, the EU initiated a mechanism to enforce the Chicago Convention, the so-called EU Blacklist, by banning the operations of unsafe foreign airlines.

African states have a mixed record under the IASA program. The United States rates each state subject to an IASA audit as either being "Category 1," meaning that the state's civil aviation authority ("CAA") provides safety oversight

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of its air carrier operators in accordance with ICAO standards, or "Category 2," meaning that the state does not comply with ICAO standards.

As of January 2012, only six African states have achieved a Category 1 ranking: Cape Verde, Egypt, Ethiopia, Morocco, Nigeria, and South Africa. There are also six Category 2 African states, and they represent 25 percent of all Category 2 states worldwide. African states that have not been assessed under the IASA program do not fly to the United States and have not applied for authorization to do so. The results of the IASA program, including the list of Category 2 states, can be found at http://www.faa.gov/about/initiatives/iasa/.

The United States assigns a Category 2 if one or more of the following deficiencies are identified: (1) the state lacks laws or regulations necessary to support the certification and oversight of air carriers in accordance with minimum international standards; (2) the CAA lacks the technical expertise, resources, and organization to license or oversee air carrier operations; (3) the CAA does not have adequately trained and qualified technical personnel; (4) the CAA does not provide adequate inspector guidance to ensure enforcement of, and compliance with, minimum international standards; or (5) the CAA has insufficient documentation and records of certification and inadequate continuing oversight and surveillance of air carrier operations.

Through the IASA audit, the United States gauges good governance, institutional capability, and market development as they relate to civil aviation. A Category 2 rating may also be symptomatic of other deficiencies in state capacity.

Safely operating modern commercial aircraft requires demanding technical expertise and a capable regulator to oversee this process. Unsurprisingly, the division between the Category 1 and Category 2 states in Africa is also found in economic measures. For example, based on World Bank global rankings for gross domestic product ("GDP"), Category 1 states include the major African economic powers such as South Africa (28), Egypt (39), and Nigeria (45). In comparison, Category 2 states include some of the world's smallest economies. Three of the Category 2 states have World Bank GDP rankings, for example, of 134, 154, and 178, respectively.

Other African states rated Category 2 may be subject to government failure. For example, two of the Category 2 states collectively have a population of nearly 100 million people but have relatively small economies and weak governments due to instability and conflict. Transparency International's Corruption Perceptions Index ("CPI") ranks countries according to their perceived levels of public sector corruption. These two states have CPI scores of 168 and 154, respectively, which are two of the lowest in the world.

In comparison, South Africa, a Category 1 state and Africa's largest economy, performs relatively well on the CPI (64) and scores high on the Logistics Performance Index (28) of the World Bank. The LPI is a measure of business "friendliness" based on a worldwide survey of global freight forwarders and express carriers.

Political leadership is also important to developing a robust civil aviation system. Cape Verde is a relatively small country in terms of population and economy but is rated Category 1. Cape Verde also enjoys stability and is one of the highest-rated African states on the CPI (45), suggesting that the country possesses an effective public sector.

Safely operating modern commercial aircraft requires demanding technical expertise and a capable regulator to oversee this process.

This conclusion is supported by the findings of the U.S. Government Accountability Office ("GAO"), the nonpartisan investigative arm of Congress. In reviewing Cape Verde's achievement of Category 1 status in 2003, GAO highlighted the consistent high-level commitment to improving the country's aviation system and meeting ICAO standards. Political leadership was critical to reforms, which included updating civil aviation regulations and establishing a financially and politically independent CAA.

Benefits of Category 1 status soon followed. The national carrier, TACV Cape Verde Airlines, launched service to the United States and the tourist industry expanded about 16 percent between 2004 and 2007. Cape Verde officials report that they expect this growth to reach the benchmark of one million tourists annually by 2015, when tourism would account for as much as 30 percent of Cape Verde's GDP, compared with 18 percent in 2006.

It is important to remember that only states with air carriers seeking access to the U.S. market are subject to an IASA audit. Notable omissions from IASA findings include African states with substantial populations and economies such as Kenya, Tanzania, and Algeria. The absence of these states from IASA findings can result from a variety of factors, including a lack of market demand and/or the absence of a commitment to initiating commercial service to the United States. Some state governments may even be aware of deficiencies in their own oversight programs and have thus chosen not to apply for authorization to fly to the United States. Indeed, for whatever reasons, a numerical majority of African states have not applied for authorization.

The EU's focus on airline operational safety and the U.S. concentration on government oversight are complementary angles for addressing aviation infrastructure and state capacity in Africa.

Consequently, the IASA findings are not conclusive as to Africa's overall compliance with the Chicago Convention and ICAO standards. For an alternative measurement of African compliance, it is helpful to examine results from the EU Blacklist.

The EU has a significant interest in Africa's compliance with the safety and security requirements of the Chicago Convention. Europe and Africa share not only close geographic proximity, but also a common, if troubled, political and commercial history stemming from the colonial era. This connection is reflected in the fact that there are over 60 times more direct commercial flights per week between Europe and Africa than between the United States and Africa.

Through the EU Blacklist, the European Commission enforces an operating ban on foreign air carriers that are deemed unsafe for flights in the EU. The operating ban is based on (1) any verified evidence of serious safety deficiencies on the part of an air carrier, (2) any lack of ability and/or willingness of an air carrier to address safety deficiencies, or (3) any lack of ability and/or willingness of the authorities responsible for the oversight of an air carrier to address safety deficiencies. The EU Blacklist takes into account both the safety problems of individual air carriers and the oversight deficiencies of CAAs.

The EU Blacklist is composed of two types of limitations: air carriers subject to a complete operating ban (Annex A) and air carriers subject to operations restrictions, typically prohibitions on aircraft type (Annex B).

African airlines have a disproportionately large representation on the EU Blacklist. As of April 2012, under Annex A, the EU had declared that 284 air carriers—112 of which are from African countries (or 39.4 percent)—were noncompliant with international aviation safety standards and banned them completely from operating in the EU. Of the 11 air carriers subject to EU operating restrictions under Annex B, there are seven African air carriers (or 63.6 percent). The air carriers on the EU Blacklist, Annexes A and B, come from 31 states, of which 18 are from the African continent (or 58 percent). Overall, African air carriers represent 40 percent of EU restricted and banned airlines.

The EU Blacklist includes a ban on all carriers from 13 African states. In effect, the EU views such states as "Category 2" under its enforcement system. The EU Blacklist is updated and published quarterly in the *Official Journal of the European Union*. A list of the states currently on the EU Blacklist can be found at http://ec.europa.eu/transport/air-ban/list_en.htm.

African states subject to a full EU ban perform similarly to IASA Category 2 states on other international rankings related to government efficacy and market development. For example, three such states have the notably low CPI rankings of 154, 172, and 143, respectively. Others perform notably poorly under the LPI, while still other are considered to be both highly corrupt and not business-friendly to global logisticians. Three states fitting this description have CPI/LPI ranking combinations of 168/142, 134/153, and 177/146, respectively.

The EU's focus on airline operational safety and the U.S. concentration on government oversight provide complementary angles for addressing the problems of aviation infrastructure and state capacity in Africa. No air carrier

from an African Category 1 state is on the EU Blacklist. This suggests that the U.S. and EU approaches are also consistent with regard to measuring aviation safety in Africa.

But identifying an issue is much easier than solving a problem. Banning foreign air carriers or categorizing state oversight capability is simpler than building the capacity for African states to engage in trade and air commerce in global markets. The United States, the EU, and the international community have taken a number of actions to meet this objective.

Established in 1998 as a presidential initiative, the Safe Skies for Africa ("SSFA") program is the principal U.S. aviation safety assistance program for African states. Led by DOT and FAA, the purpose of SSFA is to promote sustainable improvements in aviation safety and security in Africa and to foster air commerce growth between the United States and Africa. Current SSFA participants include Angola, Cameroon, Cape Verde, Djibouti, Ghana, Kenya, Mali, Namibia, Tanzania, and Uganda.

Through SSFA, the United States and ICAO collaborated to develop "downloadable" legal documents to support civil aviation oversight. Participating SSFA participants may adopt and tailor model civil aviation law, regulations, and guidance material that comply with international law. To further implementation, DOT works with FAA to conduct technical reviews to establish baseline safety and security assessments and develop action plans to remedy the identified deficiencies.

Another important contribution of SSFA has been the development of regional oversight organizations. By pooling and leveraging expertise and sharing costs, African countries can address resource, human capital, and training challenges. In 2005 ICAO assisted in the development of a regional aviation oversight organization under the West African Economic and Monetary Union. Subsequently in 2007 under the SSFA program, East African Community ("EAC") states established the first fully operational regional oversight organization in Africa. The EAC Civil Aviation Safety and Security Oversight Agency is responsible for, among other things, ensuring uniform operating regulations that meet ICAO standards and standardized procedures for licensing, certificating, and supervising air carriers and other civil aviation activities.

Additionally, working with the U.S. Transportation Security Administration ("TSA"), the SSFA program conducts aviation security workshops, in addition to providing assistance with the purchase, installation, and maintenance of passenger and baggage screening equipment. In 2011, Kenyatta International Airport in Kenya, the largest airport in East and Central Africa, received TSA security clearance, an important prerequisite for U.S. commercial service.

Cape Verde, an original SSFA participant, remains the program's sole Category 1 success. This suggests that even with U.S. assistance such as FAA technical reviews, SSFA participants may lack the resources to execute corrective action plans. In comparison, Nigeria achieved a Category 1 rating in 2010, a significant landmark in U.S.-African relations, but Nigeria was not technically part of the SSFA program. Even with the receipt of similar assistance from DOT and FAA, Nigeria's success is due in part to its substantial economic resources.

The EU has also sought to build African civil aviation oversight and infrastructure. In 2009, the EU and African Union developed a "Common Strategic Framework and Action Plan" to further areas of cooperation in aviation matters. In the area of aviation safety, the main goals are to (1) significantly reduce accident rates, (2) reduce the average rates of nonconformity with ICAO standards, and (3) reduce the number of airlines affected by the EU Blacklist.

The EU provides technical assistance to air carriers placed on the EU Backlist and coordinates with the respective civil aviation authority to remedy the deficiencies that resulted in the flight ban. The EU has shown some flexibility in this regard. For example, following its civil war, Libya's civil aviation safety system no longer conformed to ICAO standards. To avoid the EU Blacklist, Libya instituted a self-imposed ban on airline operations in the EU until November 22, 2012. In turn, the EU and Libya are working cooperatively to develop a three-year corrective action plan to rebuild the Libyan CAA.

These reforms, among others involving African states, African airlines, and the international community, are beginning to take root. Africa's average accident rate, according to IATA, improved by 56 percent from 2010 to 2011 and was 40 percent less than the average for the previous five years. This trend bodes well for Africa's economic future and flying safety.

Joining the global aviation network is a prerequisite for full participation in world trade. Direct connections between states—linking emerging and industrial markets, attaching supply with demand, and moving goods and people—are particularly vital. In large part, African civil aviation remains detached from U.S. and EU markets, due to poor government oversight and inadequate aviation, as measured by international law. Yet, there is action on the ground to build safe skies over all of Africa. When this occurs, the region will take flight. ✦

Africa's Intellectual Property Conundrum: Any Way Forward?

By Uche Ewelukwa Ofodile

Africa's Unfolding IP Debates

In Kenya, a high court recently ruled on the constitutionality of the country's first-ever anticounterfeiting legislation, the Kenyan Anti-Counterfeit Act of 2008 ("Kenyan ACA"). In Uganda, the Counterfeit Goods Bill of 2010 continues to face stiff opposition despite recent amendments aimed at appeasing human rights critics. In the last 14 months, the Nigerian Copyright Commission ("NCC") has reportedly confiscated more than six million units of pirated copyright works and is reviewing the country's Copyright Act with a view to criminalizing online piracy and ensuring stiffer penalties for violators. Most recently, an intellectual property conference involving high-level officials—The African IP-Forum: Intellectual Property, Regional Integration and Economic Growth in Africa ("IP Forum") originally scheduled for April 3–5, 2012, in Cape Town, South Africa—was abruptly called off and postponed indefinitely amid allegations of conflicts of interest, lack of transparency, and lack of a public interest dimension. Meanwhile, the Treatment Action Campaign, a South African–based nonprofit organization, is running a campaign to "Fix the Patent Laws," which is aimed at pushing for the amendment of sections of South Africa's Patents Act 57 of 1978 that activists believe undermine the right to health in the country. Also in South Africa, an even greater battle is looming—a battle surrounding a proposed national intellectual property policy being developed by the Department of Trade and Industry.

Unfolding in Africa is a push for stronger intellectual property rights ("IPRs") by some stakeholder groups and a pushback from other stakeholder groups. Policymakers in Africa appear to be caught in the middle between two competing positions. On the one hand, they are facing pressure to fast-forward technological development and protect foreign investors and foreign investment by strengthening IP protection and enforcement in the continent and, on the other hand, they are met with pressure to promote sustainable development, preserve the public interest, and safeguard basic human rights. Indeed, the last decade has witnessed increased debates about the need for, and the appropriate scope of, IPR protection in Africa. Two extreme positions appear to have emerged thus far: an extreme pro-IP position and an extreme anti-IP position. Surprisingly, unlike in the past when IP debates in the continent appeared to be largely controlled by external interests, the unfolding debates today are becoming very localized and Africans are increasingly taking firm positions for or against IPR protection. For example, in March 2012, the chairman of the Copyright Society of Nigeria ("COSON") publicly called on the Nigerian government to shut down the Alaba International Market, a popular market in Lagos and one of the largest electronics markets in Africa, believed to be the den of pirates. Joined in the fight against copyright piracy in Nigeria are new creators of intellectual property in the continent, including local actors and musicians.

Africa's Raging IP Battles

In a ruling delivered on April 20, 2012, in the case of *P.A.O. & 2 others v. Attorney General*, [2012] eKLR, a Kenyan high court found the Kenyan ACA to be unconstitutional insofar as it infringes on the right to life, human dignity, and health guaranteed under Articles 26(1), 28, and 43(1) of the Kenyan Constitution. In 2009, three petitioners living with HIV had challenged the constitutionality of the Kenyan ACA, arguing that the law would undermine access to legitimate generic medicines. Although Presiding Judge Grace Mumbi Ngugi held that IPRs deserved protection and should indeed be protected, she was also of the view that IPRs "must give way to the fundamental rights of citizens" in the event of conflict. Judge Ngugi did not buy the Kenyan government's argument that the intention of the Kenyan ACA is to safeguard the public against the use of counterfeit medicines. She concluded that, on the contrary, "the tenor

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and object of the Act is to protect the intellectual property rights of individuals." According to Judge Ngugi, "[h]ad the primary intention [of the Act] been to safeguard consumers from counterfeit medicine[s], the Act should have laid greater emphasis on standards and quality."

In Nigeria, the NCC, fueled by growing calls from local musicians and actors for better protection of their IPRs, appears to have declared an all-out war on traders in the Alaba International Market. A March 18, 2012, report in *The Guardian Newsp*aper, a Nigerian daily, titled "Piracy: NCC Destroys N6.5b Items, Confiscates N1.2b," quotes the Nigerian Copyright Commissioner as stating: "The commission will no longer condone [the] use of [the] Alaba Market as a haven for piracy. In the ensuing months, we will intensify surveillance activities to ensure that all illegal activities in the market are detected and apprehended. This project will be a continuous one until we are able to sanitize the market and rid it of all piracy activities, in terms of production or distribution." In addition to the raids, the NCC has stepped up legal enforcement and reportedly has about 63 ongoing criminal and civil cases at various divisions of the Federal High Court.

The anniversary of the 2001 Doha Declaration on the TRIPS ("Trade-Related Aspects of Intellectual Property Rights") Agreement and Public Health ("Doha Declaration") has become a rallying cry for activists in Africa. In a November 16, 2011, press release titled "The Treatment Action Campaign ('TAC') Calls on Government to Amend South Africa's Patents Act and Protect Our Right to Health," TAC lamented the fact that ten years after the adoption of the Doha Declaration, South Africa had not amended its laws to fully utilize the Declaration's flexibilities to protect health but, rather, "provides patent protection beyond what is required by the TRIPS agreement." In the same vein, an article titled "Patent Trickery" in the February 2012 issue of the South African magazine *Noseweek* criticized the fact that in South Africa "patent applications are not examined, which means you can patent anything." According to the article: "It boggles the mind that in South Africa, where the need for affordable healthcare is infinitely greater than in developed countries, the authorities have not yet ensured that regulations are implemented in a manner that benefits the public rather than entrenches costly monopolies."

The unfolding IP battles in Africa are taking place in the courts of public opinion as well as in the courts of law. Moreover, the battles are not only between civil society groups and IP creators and owners, but also between brand name pharmaceutical companies and generic manufacturers. On November 14, 2011, a high court in South Africa granted an interim interdict in favor of pharmaceutical giant Bayer and against generic manufacturer Pharma Dynamics. The interdict effectively prevents Pharma Dynamics from selling an oral contraceptive called Ruby, a generic equivalent of Bayer's Yasmin. Implicated in the case is the practice of "evergreening," a common means in the pharmaceutical industry in which IPR holders extend their monopolies beyond the normally permissible period by buying out, frustrating, or threatening competitors. The case resurrects a South African debate about the appropriate standard for patentability and likely loopholes in the patent process that may make it too easy for foreign interests to obtain patents in the country.

On the criminal front, in February 2012, the Federal High Court in Kaduna, Nigeria, sentenced a trader to six months' imprisonment for copyright infringement. While criminal convictions for IP piracy might have been unthinkable in Africa a decade ago, they are becoming more common today.

A Continent in a Fix?

Thus far, African policymakers have failed to adopt a principled, strategic, and well-formulated agenda for IP protection and enforcement. The official responses to IP protection have been inconsistent, uncertain, and almost schizophrenic, and policymakers sometimes appear to take one position in multilateral settings and take the opposite position on the home front. For example, African policymakers forcefully pushed for the Doha Declaration at the World Trade Organization ("WTO"). However, since 2001, few governments in the region have made efforts to maximize the opportunities and flexibilities that the Doha Declaration affords developing countries, such as compulsory licensing provisions. To the contrary, as a least developed country ("LDC"), Uganda does not have to implement the patent section and the enforcement section of the agreement on TRIPS; yet, the past three years have seen Uganda ramping up its IP laws and stepping up enforcement. Many countries in Africa have ratified key IPR treaties such as the 1883 Paris Convention for the Protection of Industrial Property (49 ratifications), the 1886 Berne Convention for the Protection of Literary and Artistic Works (41 ratifications), and the TRIPS Agreement (42 ratifications). However, despite wide treaty ratification, internalizing international IP law remains a big challenge in the continent.

The inconsistent positions of African policymakers on

the IP question underscore the complexity of the IP challenges facing Africans and Africa. Africa currently lags behind other regions in terms of science and technology, research and development, and educational attainment. Given the emphasis on knowledge-based economies today, countries in Africa risk falling further behind those of other regions, absent effective and credible frameworks for IP protection. Africa consistently scores low on most measures of global competitiveness such as The World Bank's *Doing Business* reports and The World Economic Forum's *The Global Competitiveness Report* series. Overall, there is an undeniably strong and persuasive case for stricter IP protection in Africa. Stronger IP protection could improve the continent's attractiveness to foreign investors; stimulate innovation and research in the continent; contribute to the development of locally appropriate learning materials by incentivizing local authors and scholars; contribute to the development of the agricultural sector, Africa's economic mainstay; promote and stimulate nascent entertainment industries in different regions of the continent; and even contribute to the right to health by supporting pharmaceutical research and development in the continent. Unfortunately, IP laws and infrastructure in most countries in the continent are in need of reform. Countries in the region are currently grappling with problems related to obsolete or nonexistent laws, ill-equipped and underresourced IP agencies, lack of appropriate and up-to-date infrastructure for IP protection, and lack of or poor university education on IP.

The resistance to anticounterfeiting bills stems, in part, from the belief that these laws are driven by global pharmaceutical companies and foreign governments.

Despite the strong case for IP reform in Africa, there is a growing conviction in the continent that the rationales for stronger IP protection should not and must not overshadow the real and legitimate concerns that Africans have about the goals and methods of the global IP system and about the current agenda for IP protection and enforcement in the continent.

Intellectual Property Rights: The Real Concerns in Africa

For many in Africa, the question is not whether intellectual property is necessary or important but what are the appropriate scope and goal of an IP regime, what is the right approach to promoting respect for IPRs in Africa, who is currently driving the agenda for IP reform in the continent, and whether an IP framework that lacks a development dimension and a public interest dimension makes sense in a continent facing so many developmental challenges. There are concerns about the content of modern IP law, the sources of the law that shape the global IP system, and the motivations of the drivers of change. Overall, many in the continent are concerned about what they see as

- Africa's lack of contribution to the body of existing international IP law;
- the continent's inability to manage and/or successfully influence negotiations on future treaty commitments or to set an agenda for the future development of the global IP system;
- Africa's lack of effective participation in the main international IP institutions;
- the lack of convincing empirical evidence indicating a link between stronger IPRs and economic development and a related concern that strong IPRs will likely slow economic development, limit policy space, slow technology transfer, and support transfer of resources to IP creators and innovators in developed countries;
- the lack of a development dimension in the global IP system and in the IP technical assistance to Africa;
- the externally driven nature of Africa's IP agenda;
- the fact that the global IP system appears to be designed to primarily benefit external (to Africa) constituencies;
- the top-down approach to IP protection and enforcement in the continent;
- the economic and social costs of complying with the

minimum standards set in various treaties, including the fact that the present system compels policymakers to reallocate scarce resources away from worthy causes pertaining to life and death and into IP enforcement;
- the fact that global IPR standards do not adequately reflect local needs and priorities;
- the lack of broad and diverse stakeholder participation in the shaping of the continent's IP agenda; and
- the one-size-fits-all approach to IPR protection in the continent.

The perception that Africa's IP agenda is externally driven and geared towards protecting the interest of external actors continues to undermine efforts to protect IP in the region. The resistance to the Kenyan ACA and similar anti-counterfeiting bills that are sweeping the continent stems, in part, from the belief that these laws are driven by global pharmaceutical companies and foreign governments. In an April 10, 2010, article in *The Lancet* titled "EU Implicated in Controversial Counterfeiting Bill," Asher Mullard quotes the Ugandan Minister of Industry as stating that the "EU agreed to finance the counterfeit bill" and that a draft was given to EU officials to comment on. Surprisingly, in the same article, Harvey Rouse, head of the political and trade section for the EU's delegation to Uganda, appeared to concede the fact that European funds might have been used to draft the controversial bill. In the same vein, the push to postpone The African IP-Forum was also fueled by the perception that the conference was driven by external interests and had little to do with Africa's interest or development. Although apparently organized by the World Intellectual Property Organization ("WIPO"), The Africa IP-Forum was partly sponsored and funded by developed countries known for their strong IP positions. To critics, the lineup of private sector sponsors for the event also suggested a bias in favor of external, corporate interests. Some listed sponsors included the International Chamber of Commerce ("ICC") initiative, Business Action to Stop Counterfeiting and Piracy ("BASCAP"), Adams & Adams, Caterpillar Inc., Dolby Laboratories Inc., Eli Lily and Company, Spoor & Fisher, Microsoft Corporation, and Pfizer Inc.

Not surprisingly, in a February 7, 2012, letter to Francis Gurry, director general of WIPO, some 100 scholars and activists stressed three main concerns with The African IP-Forum: conflicts of interest, lack of development and public interest dimensions, and lack of transparency and information. Regarding conflicts of interest, the authors expressed concern that a major event such as an Africa-wide forum was being sponsored by the private sector "that clearly ha[s] a strong stake in a pro-IP protection and enforcement agenda."

The apparent lack of a development dimension and a public interest dimension in the global IP agenda and in the IP technical assistance to Africa is a major concern for many in the continent. This perception of indifference to Africa's needs and development challenges is buttressed by the fact that IP technical assistance in Africa appears to be compliance- and enforcement-driven and rarely focuses on helping countries address their long-term technological needs or helping them protect local resources and traditional knowledge. Donors of IP technical assistance focus primarily on revising domestic law, strengthening enforcement efforts, and generally modernizing IPR administration. Yet, the questions for many in Africa are: Will heightened IP protection and enforcement deliver development gains and protect vital public interest, and, if so, how? How might heightened enforcement compromise access to essential medicine, access to knowledge, freedom of expression, and other public interests? Does heightened protection for IPRs mean protection for folklore, traditional knowledge, and genetic resources—issues of specific interest to countries in the region? To date, indigenous knowledge systems in the continent remain underprotected and vulnerable to bio-piracy attacks despite the expansion of international IP protections in the last few decades. Africans are concerned about the scope of the global IP system, the sources of global IP law, the fact that important stakeholders are currently excluded from discussions about IP, and the fact that the global IP system appears to be of little local relevance. Some of these concerns are echoed in the 2011 Washington Declaration on Intellectual Property and the Public Interest that was reportedly created through a consultative process with over 180 experts from 35 countries on six continents. As is common in most post-colonial societies, legal "reception" is not a foreign concept in Africa. However, many are concerned by what they view as a grand project of globalizing IP law and a concomitant coerced "modernization" of African laws in ways that do not allow for much internal debate.

Africa is not alone in the criticism of the global IP agenda for IP protection and enforcement. Other developing countries have increasingly voiced concerns about what is perceived as the "TRIPS-Plus agenda" of some developed countries. For example, at the February 28–29, 2012, meeting of the WTO Council on TRIPS, several developing countries expressed concerns about the controversial

Anti-Counterfeiting Trade Agreement ("ACTA"). India and Bangladesh were of the view that ACTA could undermine the TRIPS Agreement and limit developing countries' access to affordable medicine. Brazil cautioned against a one-size-fits-all approach in the fight against counterfeits and Ecuador, Egypt, and Thailand also expressed related concerns.

Navigating Africa's IP Maze: 10 Suggestions for Practicing Attorneys

In Africa today, intellectual property issues are assuming center stage in discussions about law reform, foreign investment, protection for indigenous artists, industrialization, and overall economic development. Thanks to the nascent film and music industries in several countries in the region, the local relevance of IPRs is increasingly recognized. Given the ongoing IP battles in the continent, how should a foreign practicing attorney proceed? Foreign attorneys would be advised to:

1. Recognize that Africa is no longer the IP black hole it was once thought to be—but also understand that growing pains and contestations for fairness, balance, and relevance in emerging IP laws are inevitable and necessary for the long-term sustainability of IP culture in the continent.
2. Keep abreast of growing legal and policy developments in many countries in the continent. In the past decade, many countries in the region ratified major IP treaties, adopted new IP laws, and substantially revised existing laws. IP laws adopted in the last decade include The Protection Against Unfair Practices ("Industrial Property Rights") Act 2002 (Mauritius); The Trade Marks Act, 2004 (Ghana); and Trademarks Act 2010 (Uganda).
3. Recognize that in a growing number of countries, IP offices now exist as independent government agencies with growing capability for IP administration; some are accessible online.
4. Get acquainted with the two main regional bodies responsible for IP administration in Africa: the African Intellectual Property Organization ("OAPI") and the African Regional Industrial Property Organization ("ARIPO").
5. Make use of the regional system for the application of patents and the registration of utility models and industrial designs established under the 1982 Harare Protocol on Patents and Industrial Designs Within the Framework of the African Regional Industrial Property Organization. Seventeen countries have ratified this treaty. Make use of the regional system for the registration of established trademarks pursuant to the 1993 Banjul Protocol on Marks Within the Framework of ARIPO; at least nine countries have ratified this treaty.
6. Recognize that a growing number of countries (at least 12) now subscribe to the Madrid System and that an equally growing number (at least 14) have acceded to the Hague Agreement Concerning the International Registration of Industrial Designs. For example, the Geneva Act will enter into force in the Republic of Tunisia on June 13, 2012, following Tunisia's ratification on March 13, 2012.
7. In partnership with local universities and academies, as well as local IP offices, consider offering short-term courses on a broad range of IP topics.
8. Consider offering internships/summer associate opportunities to graduates of the Master of Property ("MIP") degree program offered through a few universities in the continent. Such arrangements are likely to yield win-win outcomes for all parties involved, on the one hand, helping to strengthen human resources in the continent, and on the other hand, providing access to the growing few in the content with knowledge of IP law.
9. Consider offering pro bono services to communities struggling to protect their genetic resources and other cultural innovations and contribute more generally to the search for fair benefit-sharing model contracts.
10. Consider partnering with local firms in Africa. IP law is still in its infancy in Africa and countries are just now adopting their first IP laws and establishing their first national IP offices. However, in a number of countries, including Nigeria, South Africa, and Kenya, local law firms are building up their IP practices in response to the business needs of their clients; partnerships with such local firms is often the best option for assessing local laws and processes.

IP Technical Assistance in Africa: 10 Suggestions for Multilateral, Bilateral, and Private Donors

Africa's IP struggles raise important questions about the role of intergovernmental organizations such as WIPO and professional organizations such as the American Bar Association in the development of the rule of law in

developing countries. The IP battles in Africa must not be seen as a rejection of IP in general or even a rejection of IP technical assistance. Rather, Africa's IP battles must be seen as a push for a more nuanced and balanced global IP regime; a call for effective, balanced, and sustainable IP technical assistance in Africa; a resistance to a one-size-fits-all answer in the content and delivery of IP technical assistance; and a concomitant push for greater recognition that IP-related needs of countries in Africa are different and may also differ markedly from those of the rest of the world. What then for donors of IP technical assistance to countries in Africa?

1. A development-oriented IP technical assistance that recognizes a broad and diverse range of stakeholders may be more sustainable and effective than one that is focused primarily on enforcement and compliance and targets a narrowly defined range of stakeholders.
2. IP technical assistance should be locally driven and demands/needs driven.
3. IP technical assistance is best if designed to respond to demands that are broadly shared by a wide range of stakeholders, rather than demands driven by a narrow interest group.
4. IP technical assistance should be linked to the broader economy and linked to broader development objectives, rather than focused narrowly on IP systems and administration.
5. In the delivery of technical assistance, donors should avoid the appearance of bias, rigidity, cultural indifference, and secrecy. Transparency in IP technical assistance is important and will go a long way in dispelling fears about biases and undue pressure in Africa's IP agendas. Conversely, secrecy and lack of transparency in technical assistance could fuel corruption and alienate important stakeholders.
6. IP technical assistance that targets regional initiatives and furthers the goals of regional integration is likely to yield more dividends given increasing emphasis on regional integration in Africa.
7. A one-size-fits-all approach should be avoided at all cost. The packaging and delivery of technical assistance should reflect the fact that the 54 countries in Sub-Saharan Africa are at different levels of industrial, economic, social, and technological development.
8. The scope of IP technical assistance can and should be broadened to include highlighting the difficult cost-benefit analysis and different interest-balancing that are implicated in the creation of IP regimes; helping countries understand their international IP obligations as well as the flexibilities and policy spaces available to them; helping countries deal with anticompetitive practices related to IPRs and more fully understand the interface between IPRs and competition policies; exploring technology transfer models and possibilities; assisting countries in their effort to effectively and efficiently protect community/cultural resources, traditional knowledge, and domestic innovations and inventions; helping countries evaluate the impact of IPRs on development; and sustaining curriculum development and legal education. Law schools in Africa need help designing core IP courses as well as courses that address the important questions with which developing countries are grappling (for example, seminars on IP and Development; IP and Health; IP and Human Rights).
9. Technical assistance can and should be directed at supporting inclusive, participatory, open, and transparent law/policy reforms in recipient countries and encouraging the South-South exchange of national and regional experiences on IP-related reforms and policy options.
10. Periodic, regular, and objective assessment of IP technical assistance is important to ensure fairness, effectiveness, local relevance, and lack of bias.

The limitations of IP governance in Africa and in many other post-colonial societies are many: the tension between IP concerns and development and between IP issues and human rights; the perceived normative flaws in international IP law; concerns about new forms of imperialism; and deep-rooted concerns about injustice in the global economic system—the same system that anchors and sustains international IP law. IP law reformers must, of necessity, tread carefully. Law reform efforts that deprive local communities of ownership of and control over evolving IP laws are bound to fail woefully. The danger of imposing IP laws and institutions on unwilling and unready societies are too great to be ignored; such imposition also undermines the very principles of the rule of law that law reformers seek to promote. The project of promoting IP-related law reform in Africa must be

constantly reevaluated. A measure of sensitivity in law reform in post-colonial societies is necessarily called for; this sensitivity is particularly needed in IP-related reforms where the stakes are understandably high and the development-impact is potentially quite significant. Reformers should be sensitive to the colonial history and legacies of post-colonial societies, to the level of social and economic development of each country, to the development implications of reform, to local cultures and traditions, and to the myriad threats associated with economic globalization that these societies already face.

Intellectual Property in Africa, and Africa and International IP Law: The Way Forward

Today, inherited and outdated colonial IP laws that are at odds with local cultures and experiences are common in many countries in Africa and other post-colonial countries. Also common are international obligations stemming from IP treaties that were hastily ratified without much internal debate and without a full assessment of benefits and risks or a full appreciation of associated implementation costs, as well as contemporary law reform projects that frequently lack local control or ownership. Although, individually and collectively, countries in Africa have signaled their commitment to international law in general and to the global IP system in particular, internalizing and embracing the minimum IP standards that the system mandates will remain a challenge for the foreseeable future. The landscape of IPR protection in Africa in the future is likely to be varied. In the future, we are likely to see

- More internal debates about the appropriate scope of IPRs. These debates will grow as more domestic IP creators and innovators demand better protection for their works, as knowledge of IPRs and human rights spreads in the continent, and as more IP lawyers emerge.
- A growing diversity and complexity in country approaches to IPR protection. Countries in Africa differ in their achievements concerning IP law. Further, because of their different levels of development and their different internal struggles, countries also differ in their aspirations for international IP law and their capacities to implement binding treaty commitments.
- Continuing efforts—by countries in the region individually, collectively, and in cooperation with other developing countries—at reform but not repudiation of the global IP system.
- More intense interrogation regarding the goals and methods of the global IP system and of the normative content of international IP law, taking into account the likely impact on human rights and sustainable development.
- Further attempts at multidirectional engagement with global IP institutions and additional questioning of the role of major transnational corporations and other external actors in global and domestic IP reform processes.

Rather than be viewed as retreat from the rule of law, Africa's IP struggles must be seen as critical steps towards stronger, more sustainable, and locally relevant IP systems in the continent. Africa's growing pains are inevitable and should be welcomed. Countries in Africa must, of necessity, go through these struggles and arrive at solutions that are locally relevant and appropriate. A balanced IP system involves trade-offs and important interest-balancing among the different constituencies in a country. The recent controversy in the United States surrounding the antipiracy bill, the Stop Online Piracy Act ("SOPA"), clearly demonstrates that even developed countries have yet to find the perfect balance between IPR and the public interest. As U.S. Supreme Court Justice Paul Stevens noted in 1984 in *Sony Corporation of America v. Universal City Studios, Inc.*, "The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved." Although many countries in Africa do not have IP protections written into their constitutions as is the case in the United States, the idea that a framework for IPR protection must balance private rights against public interest is keenly felt by many in the continent and is required by international human rights law and international environmental law.

Given that there are problems with the message, the messenger, and the delivery of the message, much needs to change. A comprehensive IP agenda should address cyberpiracy at the same time as it addresses bio-piracy. Such an agenda should address IPR protection and enforcement at the same time that it addresses issues relating to technology transfer and anticompetitive business practices. More importantly, a balanced agenda must build local capacities and must create awareness as to both the benefits and the trade-offs of IP protection. ✦

The Journey to a Virtual African Identity: Did ICANN Correctly Deny the African Union's Request to Include dotAfrica on the "Reserved Names List"?

By Binta P. Mamadou

The search for a virtual African identity began in 2000 when the Internet Corporation for Assigned Names and Numbers ("ICANN") announced its intention to accept applications for new generic top-level domains ("gTLDs"). During that round of applications, a number of non-African entities submitted applications to administer dotAfrica. African Union Commission ("AUC"), *Briefing Note on .Africa* (May 2011). The AUC and many other African constituencies opposed the possibility of having non-African companies administer dotAfrica—they viewed it as another example of foreigners attempting to control Africa's resources and cultural patrimony. Although the dotAfrica gTLD did not materialize in 2000, African governments and stakeholders continued to brainstorm ways through which the diverse continent's peoples and businesses could be brought together virtually under dotAfrica's umbrella.

Generally, proponents believe that dotAfrica will gain more traction than African country code top-level domains ("ccTLDs"), which have not achieved much commercial success. Moreover, supporters are optimistic that dotAfrica will help create a virtual African identity by forcing companies that conduct business in Africa to adapt their online presence to African consumers' needs and realities. In 2007, ICANN announced that it would hold a third round of applications for new gTLDs (the second round was held in 2004). Following several years of planning and multistakeholder negotiations, which included the private sector, national governments, commercial and noncommercial Internet users, and other constituencies, ICANN finalized the rules of operation and published the *gTLD Applicant Guidebook* ("the *Guidebook*"). The *Guidebook* contains the requirements that ICANN will apply to different classifications of gTLD applications (e.g., geographic versus community-based applications), including the criteria for evaluating applicants' financial and technical eligibility, as well as dispute resolution mechanisms to resolve string contentions.

This article analyzes whether ICANN correctly denied the AUC's request to place dotAfrica on the "Reserved Names List." Further, the article assesses the AUC's role in the selection process for dotAfrica's operator and the extent to which its endorsement of one particular company's application should influence ICANN's decision-making process.

What Is the African Union's Proper Role in Selecting an Operator for dotAfrica?

Since ICANN announced its intention to accept applications for new gTLDs, several entities have expressed their interest in operating the dotAfrica gTLD string. The two leading companies vying to operate an Africa-specific gTLD are DotConnectAfrica and UniForum South Africa ("UniForum SA"). *See* www.dotconnectafrica.org and www.africainonespace.org. It is worth noting, however, that the two companies' applications to ICANN are different. DotConnectAfrica has applied for the ".dotAfrica" gTLD (read as dotdotAfrica), whereas Uniforum SA has applied for the ".Africa" gTLD (read as dotAfrica). ICANN, *Applied-for New gTLD Strings* (June 13, 2012).While these companies have competing interests, they, along with the AUC, share the common view that an Africa-specific gTLD will best serve African interests if an African company administers it.

Pursuant to the Abuja Declaration, which the African Union Conference of Ministers in charge of Communication and Information Technologies ("CITMC") adopted in August 2010, the AUC initiated a "Call of Expression of Interest" to evaluate applications from entities interested

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in operating dotAfrica. The AUC stated that its application process would be the "sole mechanism for selecting and endorsing" a prospective applicant prior to the ICANN application process. AUC, *Communiqué: The African Union Commission Clarification on DotAfrica* (May 12, 2011). This statement seemed to suggest that the AUC's proverbial stamp of approval would bolster an applicant's proposal to ICANN when, in fact, ICANN is the sole entity authorized to oversee Internet governance policies by managing the domain name system ("DNS"). *See* www.icann.org. Thus, the question to be asked is, why did the AUC hold a call for applications when ICANN already had an established process? A possible answer is that the AUC thought that its request for special protections for dotAfrica would have been granted. In October 2011, several months after its application process, the AUC issued a communiqué in which it asked ICANN's board to place ".Africa" and its representation in other languages on the "Reserved Names List" so that it could in turn assign the string to an entity "selected and identified by the African Union." AUC, *Communiqué: African ICT Ministerial Round-Table on 42nd Meeting of ICANN* (Oct. 21, 2011).

ICANN issued its response to the AUC's request to place dotAfrica on the "Reserved Names List": it denied the request.

In February 2012, the AUC announced that it would endorse UniForum SA's application to administer dotAfrica. AUC, *Communiqué: dotAfrica gTLD* (2012). Several weeks later, ICANN issued its response to the AUC's request to place dotAfrica on the "Reserved Names List": it had decided to deny the request. *See* ICANN, *Response to Requests in the Communiqué of the 21 October 2011 from ICT Ministers at the African Union Commission Round-Table in Dakar* (Mar. 8, 2012). If ICANN had acquiesced to the request, it would have essentially abdicated its responsibilities to the AUC by allowing it to select a registry operator using a process that would have been independent of the ICANN process and one over which ICANN would not have had any control. Allowing the AUC to select dotAfrica's operator would have allowed it to circumvent the rules that were adopted following negotiations among various constituencies and could have resulted in a slippery-slope effect. For example, what would be the difference between the AUC's request and an environmental organization wanting to select dotEco's operator? To avoid the question of *where* to draw the line, ICANN community members who do not believe that ICANN should make exceptions to its rules have argued that it is sometimes best to avoid drawing it. Considering the importance that ICANN places on its multistakeholder model where decisions are made from the bottom up with input from its diverse international community, the AUC's role in selecting a company to operate dotAfrica ought to be minimal. Thus, in this instance, ICANN correctly refused the AUC's request to provide special protections for the dotAfrica gTLD.

Concluding that ICANN correctly denied the AUC's request is not meant to undermine the AUC's concerns or imply that it was motivated by the wrong reasons. As an intergovernmental organization, the AUC certainly has compelling reasons that would justify its wish to play a more central role in selecting dotAfrica's operator, including a desire to ensure that the selected administrator prioritizes serving the African continent and its peoples in an effective manner. While the AUC has raised legitimate concerns, special protections are simply not necessary and are difficult to justify, given ICANN's decision-making model and the protections already in place for geographic gTLDs.

DotAfrica Qualifies as a Geographic gTLD and Will Receive Special Protections Under ICANN's Application Process

Under the *Guidebook*, dotAfrica undeniably qualifies as a geographic gTLD and, as such, it would be subject to certain protections during the application process. *See* Module 2.2. The *Guidebook* provides that a proposed gTLD string will be categorized as geographic if it is "listed as a UNESCO region" or appears on the United Nations' "Composition of macro geographical (continental) regions, geographical subregions, and selected economic and other groupings" list. As a preliminary matter, applicants for geographic gTLDs are required to meet two criteria. First, the application must contain documentation of affirmative support from "at least 60% of the respective national governments in the region."

Second, there may not be more than "one written statement of objection to the application from relevant governments in the region and/or public authorities associated with the continent or the region."

The AUC's Endorsement Will Not Satisfy the "Relevant Government" Requirement

The AUC's endorsement of UniForum SA's application is not sufficient to satisfy the "relevant government" requirement. A plain reading of the requirement indicates that applicants have to submit affirmative evidence of support from relevant *national* governments. The AUC will not be able to stand in the shoes of a national government.

If there were any exceptions to the "relevant government" requirement, they would have been included in the *Guidebook*. Further, if the AUC's endorsement could have replaced the "relevant government" requirement, ICANN would have noted this in its March 8 response to the AUC. Instead, ICANN reiterated that it had established the "relevant government" requirement as an added protection to evaluate applications for geographic gTLDs to ensure that the appropriate level of consideration is given governments' interests in geographic names. Lastly, Mr. Koffi Fabrice Djossou, Africa liaison at The dotAFRICA Project, confirmed that UniForum SA had included documentation to establish that it had the support of at least 60 percent of the relevant governments in Africa, i.e., the affirmative support of at least 60 percent of Africa's 54 countries. While the AUC's endorsement will not likely hurt UniForum SA's application to ICANN, it will not exempt the company from having to establish that it has satisfied the "relevant government" requirement.

A Written Objection from the AUC Would Represent a Conflict of Interest and Should Not Disqualify DotConnectAfrica's Application to Operate an Africa-specific gTLD

To qualify as a registry operator for a geographic gTLD, there cannot be more than one written objection to the applicant's proposal from "relevant governments in the region and/or public authorities associated with the continent or the region." While the AUC would not be considered a relevant government, it could probably qualify as a "public authorit[y] associated with the continent." The *Guidebook* does not define "public authority." Assuming that the AUC qualifies as a public authority and if it, hypothetically, were to object to DotConnectAfrica's application, such an objection could theoretically disqualify the applicant from consideration. While such an outcome could be possible, an argument could be made that the AUC is now in a conflict-of-interest position given that it held an application process under which it selected UniForum SA. Considering that there is a self-dealing element, it will be interesting to see how ICANN will manage an objection from the AUC in the event it arises.

Because the AUC's endorsement creates a conflict of interest, allowing it to qualify as a public authority for the purposes of objecting would allow it to control the selection process in an indirect manner. Essentially, the AUC would be able to achieve the result that it sought to achieve when it requested special treatment for dotAfrica, i.e., the ability to select an AUC-approved registry operator. Even if the AUC has legitimate reasons for objecting to DotConnectAfrica's application, it would be difficult to convince the public that its actions are not fraught with conflicts of interest. If the AUC were to object to the dotdotAfrica application, its objecting would likely be interpreted as being a mechanism for trying to circumvent the ICANN process and indirectly expanding its role in the selection process. In light of the self-dealing element, the AUC should not be considered a public authority for the purposes of selecting an Africa-specific gTLD operator.

ICANN Correctly Limited the Scope of the AUC's Role in Selecting an Operator for dotAfrica

Based on the selection criteria for geographic gTLDs, the AUC's endorsement of UniForum SA's application is unlikely to impact ICANN's decision-making process. While the endorsement will not hurt UniForum SA's application, it does not appear that ICANN will necessarily give the application any special consideration merely because the AUC has endorsed it. The AUC's endorsement will not replace the "relevant government" requirement. Additionally, the fact that the AUC is endorsing UniForum SA creates a conflict of interest that may further limit its role and prevent it from objecting to the dotdotAfrica application.

The dotAfrica story is one to watch. ICANN published its list of all applied-for gTLD strings on June 13, 2012, and will accept objections and comments from the community for several months. It will be interesting to see whether Uniforum SA and DotConnect Africa file objections against one another's applications on the basis of a string confusion. *See gTLD Applicant Guidebook*, Module 3.2.2.1. That, however, is a topic for another article. ✦

The *Lubanga* Verdict: A Milestone for International Criminal Law in Central Africa and Around the World

By Matthew C. Kane and Anjie Zheng

In a quiet courtroom thousands of miles from home, a young witness testified before the International Criminal Court ("ICC"), the first permanent tribunal tasked with trying those most responsible for atrocity crimes. To protect the witness's identity, his face was digitally obscured, his voice was altered, and he was addressed only as "Patrick." The young man spoke curtly about the atrocities he had seen, participated in, and been victimized by as a child soldier in the Democratic Republic of the Congo ("DRC"). As reported contemporaneously by the Open Society Justice Initiative, Patrick dramatically recounted the first time he killed someone on the front lines: "When I shot and saw I had hit someone, and he fell down, it made me dizzy. Afterwards I came to. Then I said, if I run away, I am going to be in danger, so I had to continue. But it disturbed me; my mind wasn't working very well."

Patrick's story was all too familiar. During the 2002–03 conflict in Ituri, a northeastern province in the Democratic Republic of the Congo bordering South Sudan and Uganda, thousands of child soldiers were forced to join local militias and take up arms against their neighbors. Ituri is an area rich in gold mines and major trade routes. Dispute over control of the region motivated various armed militias, playing on long-standing ethnic tensions, to violent crimes. An estimated 60,000 civilians were killed during the violence; hundreds of thousands more were displaced. Under the leadership of Thomas Lubanga Dyilo, the Union des Patriotes Congolais militia ("UPC"), which claimed to support the interests of the Hema people, participated in the carnage by carrying out numerous attacks against the rival Lendu.

Ten years after the Ituri violence, the ICC delivered its first verdict. On March 14, 2012, in *The Prosecutor v. Thomas Lubanga Dyilo*, the ICC convicted Lubanga of three counts of the war crime of conscripting, enlisting, and using child soldiers under the age of 15 in armed conflict. This first completed trial was a milestone that included 204 days of hearings and a 624-page judgment. Despite the lengthy proceedings, delayed twice by procedural challenges, the *Lubanga* verdict is a monumental step for international justice, exposing the grim conditions under which child soldiers are forced to fight and laying the grounds for future cases seeking to end impunity for the most serious atrocity crimes.

In interpreting the Rome Statute of the International Criminal Court for the first time, the Trial Chamber analyzed Article 8(2)(e)(vii), which defines as a war crime "conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities." Since the Element of Crimes (a document required by Article 9 of the Rome Statute and one adopted by the Preparatory Committee for the ICC) uses disjunctive language ("or"), the Trial Chamber (as previously ruled by the Pre-Trial Chamber) recognized conscription, enlistment, and use of child soldiers under the age of 15 as three separate offenses. Moreover, the Trial Chamber found that a child need not actually be engaged in a battle or other conflict for a war crime to occur. The child must simply be used in a militia setting. It did not matter whether a child "volunteered" to join the UPC. While deploying such a volunteer would itself be illegal, the Trial Chamber determined that the Statute was intended to protect children, particularly in conflict situations where they lacked information or alternatives.

To determine what was intended by the phrase "participate actively in hostilities," the Trial Chamber again

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examined the conclusions of the Pre-Trial Chamber. The Trial Chamber concluded that focus should be placed on "whether the support provided by the child to the combatants exposed him or her to real danger as a potential target . . . the child's support and this level of consequential risk [is the basis for determining whether,] although absent from the immediate scene of the hostilities, the individual was nonetheless actively involved in them." Even though voluntary enrollment, if proven beyond reasonable doubt, could be considered as a mitigating factor in sentencing or in the reparations phase of the proceedings, a child's consent was not a defense against the criminal intent of the defendant.

Based upon the prosecution's arguments and testimony of victims, the Trial Chamber eventually found adequate evidence to find that the UPC deliberately abducted Congolese children, some as young as nine years old, from their communities. Indeed, Human Rights Watch has documented many instances in which children were forced to commit atrocities as grave as murdering their parents to deter children from returning to their communities. In order to fully inculcate children into the UPC, abductees were given a uniform and weapons upon entry into UPC training camps. Girls were often raped and forced to become wives of militia members. Both boys and girls were enlisted to fight on the front line as armed combatants, as well as to serve off the battlefield as porters, cooks, and sex slaves.

Whether Lubanga was culpable for orchestrating such crimes was harder to prove. The Elements of Crime enumerate the following five definitions for criminal intent: (1) the perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities; (2) such person or persons were under the age of 15 years; (3) the perpetrator knew or should have known that such person or persons were under the age of 15 years; (4) the conduct took place in the context of and was associated with an armed conflict not of an international character; and (5) the perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

In the *Lubanga* judgment, the Trial Chamber conducted a lengthy analysis of the mental elements of the war crime. It ultimately concluded that the prosecution had proven beyond reasonable doubt that (1) there was an agreement or common plan between the accused and at least one other co-perpetrator that, once implemented, would result in the commission of the relevant crime in the ordinary course of events; (2) the accused provided an essential contribution to the common plan that resulted in the commission of the relevant crime; (3) the accused meant to conscript, enlist, or use children under the age of 15 to participate actively in hostilities or he was aware that by implementing the common plan these consequences would "occur in the ordinary course of events"; (4) the accused was aware that he provided an essential contribution to the implementation of the common plan; and (5) the accused was aware of the factual circumstances that established the existence of an armed conflict and the link between these circumstances and his conduct.

The prosecution was severely criticized for failing to carry out investigations that led to high-quality, credible evidence and reliable victims. When the prosecutor began investigations in the DRC, there was serious concern for the safety of outside investigators, especially since the Office of the Prosecutor lacked power over domestic police forces on the ground. Coupled with the fact that the Rome Statute is not explicit on how to proceed with investigations, the prosecutor relied heavily on local Congolese to serve as "intermediaries." The prosecutor claimed that the intermediaries' only role was to direct the prosecutor to specific people and places to seek evidence; moreover, they were unaware about the specifics of the case and did not have any role in analyzing the evidence.

In the judgment, the Chamber judges highlighted the implausibility that intermediaries had such a neutral and detached role in the investigations. To the contrary, many of the intermediaries used by the prosecutor were found to be activists and knew specifics about the *Lubanga* case. Additionally, since intermediaries were paid in cash or school fees, some may have been motivated by incentives that were less than pure. In the verdict, the Chamber judges harshly criticized the prosecutor for his negligence in sufficiently scrutinizing evidence before it was presented to the Court.

Given the questions of evidence credibility, the Trial Chamber was highly concerned with factors that could have compromised Mr. Lubanga's right to a fair trial. As such, the Chamber judges ordered two stays in the proceedings in 2008 and 2010 to resolve due process issues. Specifically, the stays addressed sharing potentially exculpatory evidence with the defense and the use of intermediaries in collecting evidence. The first stay was ordered because the prosecutor failed to release roughly 200 documents of information to either the judges or the defense; the second was ordered because the prosecutor refused to disclose the identity of one specific intermediary.

Throughout the proceedings, the Trial Chamber underscored the importance of having strict guidelines on

gathering and sharing evidence, and it ultimately only considered evidence from credible victims. Ultimately, the Chamber judges found the testimonies of three witnesses, including Patrick, to be inconsistent and unreliable, and thus withdrew their rights as victims in the case.

Even though Patrick's personal story was found to lack credibility, numerous other victims provided reliable testimony akin to the stories he told in the courtroom. In the *Lubanga* trial, more than 120 victims, represented by two teams of legal representatives as well as the ICC's Office of Public Counsel for Victims, were granted the right to participate in the proceedings. As the first case has shown, the process of identifying victims through intermediaries and hearing credible victims' stories at the ICC is imperfect and will need and receive continued refinement. That said, victims' participation in court proceedings in their own right, without being called by the prosecution or defense, is a significant right the ICC gives to those who have suffered atrocity crimes. Since the defendant in this case was convicted, the participating victims are entitled to reparations that may include forms of restitution, compensation, or rehabilitation.

Due in large part to the Trial Chamber's reasoned responses on issues of due process, the Lubanga conviction is a watershed in international law and human rights. ICC documents regarding the use of intermediaries, rights of victims, collecting and sharing of evidence, and addition of charges will be very important going forward. Another major accomplishment of the *Lubanga* trial was the international attention it garnered for the use of child soldiers, a practice that is still an all-too-unfortunate occurrence in the world. The U.S. government praised Lubanga's conviction as an "historic and important step in providing justice and accountability," and one that demonstrates that the repugnant use of child soldiers is of "paramount international concern." Regardless of whether Mr. Lubanga's defense team decides to appeal the decision, victims directly affected by his crimes can obtain some form of reparations. Many more could benefit from programs provided by the ICC's Victims Restitution Fund, which has operated in central Africa for numerous years.

The ICC is one of many institutions on local, regional, and international levels working to end impunity for the most heinous atrocity crimes in the hope of fostering the possibility for peace and security in war-torn nations. Although the ICC cannot accomplish these goals alone, its proceedings play an integral role in potentially deterring future crimes. In the DRC, there is anecdotal evidence that warlords are aware of Lubanga's prosecution in The Hague, as well as the possibility of their own prosecutions. Others who seek to use force to accomplish their objectives, particularly those who use children to carry out their efforts, are now aware that they cannot commit such crimes with impunity.

Future trials at the ICC must learn from the *Lubanga* proceedings to ensure that justice is delivered in a timelier manner. As a very new international organization just a decade in the making, the ICC can savor its first judgment and look towards continued acceptance among the various nation states. Both the rewards and the missteps of the first case at the ICC show that the ICC's goals of establishing accountability, fighting against impunity, and delivering justice for victims of the most heinous atrocity crimes are successfully underway. ✦

Postscript: *Taylor* Verdict Another Important Step

On April 26, 2012, Trial Chamber II of the Special Court for Sierra Leone handed down its verdict in the matter of *The Prosecutor v. Charles Ghankay Taylor*. Having heard testimony from 115 witnesses and admitted 1,522 exhibits, the Trial Chamber found the former president of Liberia guilty on 11 counts of both aiding and abetting and planning numerous crimes against humanity and war crimes committed by the Revolutionary United Front ("RUF") and related entities against the people of Sierra Leone in 1998 and 1999.

The counts of conviction consisted of acts of terrorism, murder, rape, sexual slavery, and conscription of child soldiers, among others. While noting that Taylor had significant influence over the RUF, the Trial Chamber did not find evidence beyond a reasonable doubt that Taylor had direct command over the actions of the rebel faction or that he had met with RUF leadership to develop a common plan; thus, he was not culpable on command responsibility or joint criminal enterprise theories. Nonetheless, the conviction again reinforces the international community's rejection of head-of-state immunity as a defense to atrocity crimes. Coupled with the ICC's verdict in the *Lubanga* trial, the global focus on conscription of child soldiers has been further refined and prioritized. And, for Sierra Leone and its citizens—many who were profoundly affected by the atrocities committed by the RUF—the verdict serves both as a confirmation of Taylor's personal involvement and decisive recognition that the underlying atrocities had, in fact, occurred.

On May 30, 2012, Taylor was sentenced to 50 years in prison. He is currently appealing. ✦

A Cold Winter in North Africa: The Case of the Bahá'ís in Egypt

By Naseem Kourosh

For Egypt's tiny Bahá'í community, the coming winter may be an especially cold one. The Bahá'í Faith is an independent religion with an estimated 500 to 2,000 followers in Egypt, many of whom have faced significant discrimination in recent years. In early 2011, many expected that the Arab Spring, blooming most visibly in Egypt, would usher in a new era in the region. However, more than a year on, amidst fears that Spring in the Middle East may be turning frosty, the status of Egypt's Bahá'í community provides an important if unflattering metric of the progress of Egyptian society towards freedom, democracy, and human rights.

The History of Egypt's Bahá'í Community

The Bahá'í community in Egypt was established in the mid-1800s and, with a few notable exceptions, developed largely undisturbed for nearly a century. However, in 1960, the government issued Presidential Decree 263, which dissolved all Bahá'í institutions, seized all Bahá'í properties, and made engaging in public Bahá'í activities a criminal act punishable by imprisonment. In subsequent years, several dozen Bahá'ís were arrested and detained on the basis of the law, though none were ever found guilty.

While Article 40 of the 1971 Egyptian Constitution protects equal rights and prohibits religious discrimination, and Article 46 guarantees freedom of belief and freedom to practice religious rites, the legal status of Bahá'ís in Egypt has never been deemed equal to that of Muslims, not only because of the 1960 Presidential Decree, but also because of two important structural issues.

First, in the Egyptian legal system, matters of personal status are governed not by civil law, but by religious law—specifically the family law systems of the only three state-recognized religions: Christianity, Judaism, and Islam. Because Bahá'í law is not recognized and Islam is the official state religion, personal status for Bahá'ís has often been determined according to shari'a (Islamic family law), which does not recognize Bahá'í family relationships, or fatwas (Islamic judicial rulings), many of which are hostile to the Bahá'í Faith. Indeed, at least 15 fatwas have declared the Bahá'í Faith to be heresy and blasphemy. In 2003, the Islamic Research Center of Al-Azhar University—one of the oldest and most respected centers of Islamic learning in the world—issued a fatwa stating that Bahá'ís are apostates and that the Bahá'í Faith is a "lethal spiritual epidemic" that the state must "annihilate."

As a result of the nonrecognition of Bahá'í family law and the influence of anti-Bahá'í fatwas, Bahá'ís are not accorded equal treatment under the law: Bahá'í marriages are not recognized, Bahá'í children are regarded as illegitimate, and Bahá'ís have no means of controlling matters such as family allowances, pensions, inheritance, divorce, alimony, and custody of children.

Second, the free exercise of religion has traditionally been permitted only insofar as it has not been deemed to disturb public order and good morals—both of which have historically been defined according to Muslim clerics who believe that the Bahá'í Faith inherently violates public order and good morals because it is heresy or apostasy against Islam. Thus, a 1975 decision of the Supreme Constitutional Court held that the constitutional freedom of belief guaranteed by the constitution protected only the Bahá'ís' right to inwardly believe in their religion, and not their right to practice it.

The ID Card Controversy

The Egyptian government requires all citizens to possess standardized government ID cards, which are necessary for obtaining basic services. These ID cards, like other official documents, require the individual to list his or religious affiliation. Bahá'ís do not, as a matter of principle, misrepresent their religion. Thus, although the government only recognizes three "heavenly" religions—Judaism, Christianity, and Islam—Bahá'ís will generally not misidentify themselves as a member of one of these religions. Historically, this was not problematic, as Bahá'ís were permitted to write "Bahá'í" or insert a dash in the religion field of official

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documents. However, following the issuance of the 1960 Presidential Decree, many government officials refused to register Bahá'ís as such, and ID card registration for each Bahá'í became dependent on the actions of the particular clerk in a given government office. This led to serious inconsistencies, with Bahá'ís being variously identified as Christian, Muslim, Bahá'í, or no religion at all—or being denied ID cards altogether. In 1983, an administrative court affirmed that Bahá'ís should be allowed to list "Bahá'í" or "other" on their ID cards, but it held that a Bahá'í student who had been expelled from university for not possessing a valid ID card could still be rightfully expelled, even after receiving a valid ID card, as he was an apostate, and apostates should not be allowed to pursue education.

Bahá'í children were denied birth certificates and were unable to attend public school or receive immunizations.

In 2004, the Ministry of the Interior issued Circular 49/2004, a directive that instructed government officials not to issue a new ID card or any other new government document to any individual unless she or he identified as a member of one of the three recognized state religions. Bahá'ís were explicitly denied the right to write in "other," insert a dash, or leave the religion field blank. Bahá'ís were therefore forced to either falsely identify their religion or go without documents. Because they would not willingly misrepresent their religious identity, many Bahá'ís were unable to obtain ID cards and other official documents, which resulted in a denial of access to many essential government services. Bahá'í children were denied birth certificates and were therefore unable to attend public school or receive immunizations; Bahá'í youth and adults were denied national ID cards and were thus unable to obtain employment, attend university, obtain medical treatment at public hospitals, acquire driver's licenses, or engage in financial transactions such as opening a bank account or acquiring title to property. Bahá'ís were also unable to obtain death certificates for deceased family members, leaving their heirs unable to legally acquire inheritance.

Soon after the policy was implemented, a Bahá'í couple, unable to obtain ID cards or register their daughters for school, challenged the 2004 policy. Represented by the Egyptian Initiative for Personal Rights ("EIPR"), an independent Cairo-based NGO, the couple obtained a favorable ruling in the Court of Administrative Justice. The court's April 2006 ruling held that Bahá'ís must be allowed to identify their religion properly on government forms and that the government cannot deny them official documents if they do so. The Ministry of the Interior appealed the ruling, which was publicly decried by Al-Azhar and the Muslim Brotherhood, a conservative political movement. In December 2006, the Supreme Administrative Court overturned the lower court's decision and upheld the 2004 policy, holding that only individuals identifying themselves with Islam, Christianity, or Judaism were eligible to receive government documents.

These decisions received intense media coverage in Egypt and also garnered international attention. The U.S. State Department and the U.S. Commission on International Religious Freedom noted the December ruling with concern. In a 2007 report, Human Rights Watch and EIPR documented in detail the genesis and implementation of the new government policy; the Egyptian government's violation of its own constitution and international human rights norms, including several rights enshrined in the International Covenant on Civil and Political Rights, to which Egypt has been a state party since 1982; and the personal stories of Bahá'ís, Copts (Egyptian Orthodox Christians), converts from Islam, and others whose lives have been negatively impacted by the policy.

In 2007, a second Bahá'í couple, who were unable to obtain birth certificates for their twin daughters, challenged the policy. Once again represented by EIPR, the couple obtained another favorable ruling in the Court of Administrative Justice. The lower court's January 2008 ruling stated that, while Bahá'ís could not list "Bahá'í" as their religion on government documents, they must be permitted to insert a dash in the religion field. In March 2009, the Supreme Administrative Court dismissed an appeal, allowing the lower court's ruling to stand. The following month, the Ministry of the Interior implemented a new policy consistent with the court's ruling: government officials must place a dash (–) in the religion field of official documents of citizens who show they are followers of a religion other than the three recognized by the state. In August 2009, five years after the problematic new policy was introduced, the

government issued the first new ID cards to Bahá'ís with a dash in the religion field.

Bahá'ís in Post-Mubarak Egypt

Much has happened since 2009. On January 25, 2011, motivated by Tunisia's success in ousting President Zine El Abidine Ben Ali, millions of Egyptians took to the streets, participating in an 18-day popular uprising that ultimately led to the ouster of President Hosni Mubarak. The wave of uprisings that swept the Middle East beginning with Tunisia in late 2010 and continuing through Egypt and several other Arab countries throughout 2011 was initially dubbed the Arab Spring, in reference to an anticipated renewal of freedom, democracy, and human rights throughout the Arab world as a result of the revolutions. In the last several months, however, some commentators have rejected this label, quipping that the movement may be more aptly referred to as the Arab Winter. There has been violent, bloody, and brutal repression of uprisings in countries such as Libya, Bahrain, and Syria. And even in Egypt, where the revolution was relatively brief, largely nonviolent, and initially deemed quite successful, the year after the revolution has raised serious doubts about the democratic future of Egypt.

In this context, the future of Egypt's Bahá'í community remains particularly uncertain. First, the 1960 Presidential Decree, which criminalizes many aspects of the practice of the Bahá'í faith, remains in effect. Second, while the 2009 accommodation with respect to ID cards was a positive development, delays and complications have arisen in the implementation of the new policy. Ultimately, Bahá'ís are still denied the right to do what members of the three state-recognized religions are able to do: truthfully list their religion on government documents. Third, Bahá'ís have been the target of recent social hostilities, including a 2009 incident that remains uninvestigated in which several Bahá'í homes in a village were vandalized and a February 2011 incident in which several Bahá'í homes in the same village were torched. Finally, and perhaps of greatest concern, there are indications that Bahá'ís may be excluded from, and perhaps even specifically targeted by, the new political order. Leaders of the Muslim Brotherhood, which won the highest number of seats in the recent parliamentary elections, have stated that they have no plans to amend Article 2 of Egypt's current constitution when they draft its new one. Leaders of the Salafi movement, a fundamentalist group that won the second highest number of seats in the parliamentary elections, have made similar statements. Article 2 currently provides that Islam is the state religion and principles of Islamic law are the chief sources of legislation. Apparently, it will be incorporated into the new constitution. In addition, in February, Abdel Moneim al-Shahat, a spokesperson for the Salafi movement, publicly stated that Bahá'ís are not entitled to rights under Islam and are a threat to national security. Citing the 2003 Al-Azhar fatwa, al-Shahat asserted that Bahá'ís "do not exist" by virtue of their faith and should be prosecuted for treason. Thus, at present, the legal status of Egyptian Bahá'ís does not seem likely to improve, and may in fact worsen. If there is to be a winter in Egypt, it may be a long and cold one for the Bahá'ís.

A society's treatment of its minorities is often a barometer of its general level of freedom and equality, and its persecution of its religious minorities frequently foreshadows wider repression. Thus, those concerned about the democratic future of Egypt would do well to keep a close eye on the situation of religious minorities such as the Bahá'ís under the new régime. ✦

CASENOTE

European Court of Human Rights Holds "Kettling" Incident Did Not Deprive Protesters of Liberty

On March 15, the European Court of Human Rights delivered its much-anticipated judgment in the case of *Austin & Others v. United Kingdom*. It upheld, in the circumstances of the case, the controversial police practice of "kettling," i.e. confining or cordoning off large groups of people, usually during a protest, rally, or assembly, and potentially for long periods of time.

On May 1, 2001, after dropping her baby off at a nursery, Lois Austin joined the mass protests against globalization in London. At around 2:00 p.m., she was caught up in an unannounced police cordon ("kettle") in Oxford Circus. Three co-applicants, passers-by unaffiliated with the protests, also were caught up in the kettle. The police prohibited applicants from leaving the cordoned area until 9:30 p.m., some six or seven hours later.

The plaintiffs subsequently brought suit in the High Court seeking damages for false imprisonment and for deprivation of liberty in violation of Article 5 of the European Convention on Human Rights. The English domestic High Court dismissed the false imprisonment claim. After a thorough analysis of the facts, Mr. Justice Tugendhat did find that the kettling resulted in a deprivation of liberty. However, he found the deprivation permissible under Article 5 § 1(c). This provision allows the detention of persons who have committed an offense or whose detention the police reasonably believe is necessary to prevent an offense from being committed. The Court of Appeals and House of Lords disagreed, finding that the plaintiffs never suffered a deprivation of liberty.

The plaintiffs then brought their Article 5 case before the European Court of Human Rights. The Court emphasized that its analysis was limited to the "specific and exceptional facts" of the case, but it noted that Article 5 could not be interpreted in a way to make it impracticable for police to exercise discretion in maintaining order and protecting the public (§§ 67, 56). The Court characterized the difference between restriction on freedom of movement and deprivation of liberty as one of "degree and intensity, and not of nature or substance" (§ 57).

The Court found that the coercive nature of the kettle, its duration, the applicants' inability to leave, and the applicants' physical discomfort pointed to a deprivation of liberty (§ 64). It balanced these facts against the type of restraint and the manner of its implementation. The Court was persuaded by the threats of physical injury and property destruction and by the ongoing police review of the cordon. It found that under these circumstances, kettling was the "least intrusive and most effective" type of restraint possible (§ 66). Significantly, it noted that absent such threats to public order, kettling likely would have been a deprivation of liberty (§ 68). By a 14–3 majority, the Court ultimately held that there was never a moment in which the lawful restriction on applicants' freedom of movement became a deprivation of liberty.

The dissent found that the police kettle deprived applicants of their liberty. It criticized the majority for surreptitiously creating a "public order" exception to Article 5, for disregarding the fact that three applicants were not involved in the protest at all, and for departing from relevant precedent.

Submitted by Vivian Costandy, New York City

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A Starwood Luxury Collection Hotel ☕
54 11 4318 9390

FLORENCE
★ St. Regis Florence
800-872-6811
The Westin Excelsior Hotel
800-325-3535

HONG KONG
★ The Langham Hong Kong
852 2375 1133
★ The Ritz-Carlton, Hong Kong
852 2263 2100

LONDON
Sheraton Park Tower,
A Starwood Luxury Collection Hotel
800-325-3589

MADRID
The Westin Palace, Madrid
34 91 360 7777

MEXICO CITY
The St. Regis Mexico City
5255 5228 1818

MILAN
The Westin Palace, Milan
39 02 6336 2200

PANAMA CITY
★ Le Méridien Panama
507-340-9890

PARIS
The Westin Paris Vendôme
33 1 44 77 10 02

ROME
The St. Regis Grand Hotel Rome
39 06 4709 7911
The Westin Excelsior Rome
39 06 4708 7911

SANTIAGO, CHILE
San Cristobal Tower,
A Starwood Luxury Collection Hotel ☕
56 2 707 1000

SHANGHAI
Le Royal Méridien Shanghai
86 21 3318 9999

TOKYO
The Ritz-Carlton, Tokyo
81 3 3423 8000

VENICE
★ The Westin Europa & Regina
800-325-3589

★ New in 2012 ☕ Breakfast Included
⌇ In room High Speed Internet Access Included

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Upcoming Activities

SAVE THE DATES

AUGUST | 2012

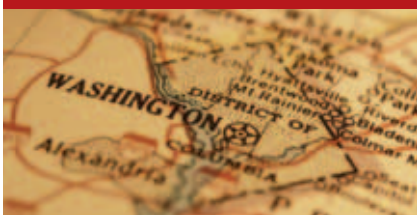
Aug 1–2, 2012
Section Leadership Retreat
Chicago, IL

Aug 3–5, 2012
ABA Annual Meeting
Chicago, IL

SEPTEMBER | 2012

Sept. 21, 2012
Fourth Annual Conference on the Resolution of CIS-Related Business Disputes
Moscow, Russia

OCTOBER | 2012



Oct. 2, 2012
Thirteenth Annual "Live from the SEC"
Washington, DC

Oct. 16–20, 2012
Section Fall Meeting
Miami Beach, FL

For all Section programs and events, visit *www.americanbar.org/groups/international_law/events_cle.html.*