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the legal profession®

# Pro Bono Committee News

Newsletter of the International Bar Association Public and Professional Interest Division

**SEPTEMBER 2015 NO 3**



# International Bar Association Conferences 2015–2016



**4 NOVEMBER 2015** JAKARTA, INDONESIA

Asia Pacific Arbitration Group Training Day – Best Practices in International Arbitration

**12 NOVEMBER 2015** MOSCOW, RUSSIA

7th Annual Mergers and Acquisitions in Russia and CIS Conference

**12 NOVEMBER 2015** LONDON, ENGLAND

Private Equity Transactions Symposium

**13 NOVEMBER 2015** SÃO PAULO, BRAZIL

Celebrating Magna Carta and the Rule of Law

**14–15 NOVEMBER 2015** LONDON, ENGLAND

IBA-ELSA Law Students' Conference 2015

**18–20 NOVEMBER 2015**

LIVINGSTONE, ZAMBIA

Building on the Foundations for a Successful Future: Economic Development and the Rule of Law in Africa

**18–20 NOVEMBER 2015** LONDON, ENGLAND

7th Biennial Global Immigration Conference

**19–20 NOVEMBER 2015**

SEOUL, SOUTH KOREA

Mergers & Acquisitions in the Technology Sector: Current Asian and International Trends

**3 DECEMBER 2015** LONDON, ENGLAND

Third Party Funding and International Arbitration: a 360 degree perspective

**3–4 DECEMBER 2015** MEXICO CITY, MEXICO

The New Era of Taxation: The keys to providing legal advice on tax law in a rapidly changing world

**4 DECEMBER 2015** MOSCOW, RUSSIA

9th Annual Law Firm Management Conference

**4 DECEMBER 2015** PARIS, FRANCE

The Rise of Ethics and Transparency in Mediation and ADR: Fighting Corruption and Abuses Through New Means

**5 DECEMBER 2015** NEW DELHI, INDIA

Magna Carta 800th Anniversary – Foundation of Democracy and the New Trends of Dispute Resolution in India

**27–29 JANUARY 2016** MEXICO CITY, MEXICO

Mexico's Energy Reform: The Bidding Has Begun

**30–31 JANUARY 2016**

THE PEACE PALACE, THE HAGUE

Legal Challenges of Modern Warfare

**3–5 FEBRUARY 2016** TOKYO, JAPAN

IBA/ABA International Cartel Workshop

**8–9 FEBRUARY 2016** LONDON, ENGLAND

5th Annual IBA Taxation Conference

**11–12 FEBRUARY 2016** PARIS, FRANCE

4th IBA European Corporate and Private M&A Conference

**17–19 FEBRUARY 2016**

ADELAIDE, AUSTRALIA

Innovation in Legal Practice

**29 FEBRUARY – 1 MARCH 2016**

LONDON, ENGLAND

21st Annual International Wealth Transfer Practice Law Conference

**4 MARCH 2016** SHANGHAI, CHINA

19th Annual International Arbitration Day

**6–8 MARCH 2016** LONDON, ENGLAND

17th Annual International Conference on Private Investment Funds

**9–11 MARCH 2016** RIO DE JANEIRO, BRAZIL

Biennial Latin American Regional Forum Conference

**10–11 MARCH 2016** SINGAPORE

2nd Asia-based International Financial Law Conference

**7–8 APRIL 2016** BERLIN, GERMANY

7th World Women Lawyers' Conference

**14–15 APRIL 2016** COPENHAGEN, DENMARK

8th Annual Real Estate Investment Conference

**14–15 APRIL 2016** MEXICO CITY, MEXICO

IBA Annual Employment and Discrimination Law Conference

**17–20 APRIL 2016** NEW YORK, USA

Biennial Conference of the Section on Energy, Environment, Natural Resources and Infrastructure Law

**27–29 APRIL 2016** SAN FRANCISCO, USA

IBA Annual Litigation Forum 2016

## IN THIS ISSUE

<b>From the Chair</b>	<b>4</b>
<b>From the Communications Officer</b>	<b>5</b>
<b>Committee officers</b>	<b>6</b>
<b>IBA Annual Conference Vienna, 4–9 October 2015 – Our committee’s sessions</b>	<b>7</b>
<b>A look ahead: IBA Annual Conference 2015</b>	<b>8</b>
<b>IBA Pro Bono Award nominees 2015</b>	<b>9</b>
<b>Snapshots: Pro Bono in Practice</b>	
Pro bono in international proceedings at the Permanent Court of Arbitration	<b>11</b>
<b>Articles</b>	
Pro bono pursuit of judicial review for Kenyan victims at the International Criminal Court	<b>13</b>
A major step forward for pro bono in Brazil	<b>16</b>
<b>Meet the Officer</b>	
Patricia Blair, Advisory Board Member	<b>17</b>

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[advertising@int-bar.org](mailto:advertising@int-bar.org)

This newsletter is intended to provide general information regarding recent developments relating to pro bono. The views expressed are not necessarily those of the International Bar Association.

# IBA Annual Conference and the IBA Pro Bono Award

**Tim Soutar**

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**B**efore we know it, many of us will be gathering in Vienna for this year's IBA Annual Conference. The highlight of the week for the Committee will be our session, this year focusing on cross-border work and entitled 'International pro bono: charity doesn't have to begin at home'. This session will review the different areas of opportunity for international pro bono work (including human rights protection, legal education and advisory work, and promotion of the rule of law) and illustrate the roles played by the leading non-governmental organisations, clearing houses, bar associations, private practitioners and others in locating, evaluating and addressing needs, as well as identifying emerging trends and the benefits to be gained from participation. For those of you unable to join us, the session will, once again, be videoed and subsequently available on our [www.internationalprobono.com](http://www.internationalprobono.com) website.

During the proceedings we shall also be taking the opportunity to present the 2015 IBA Pro Bono Award. The panel of judges has concluded its deliberations, but their decision remains a closely guarded secret until the Award ceremony. I can, however, let you know that we received a large number of very impressive nominations, from which it was an extremely difficult task to produce a shortlist of ten. Brief descriptions of those short-listed appear in this edition of the newsletter and on the IBA website. The final selection was no easier, as all would be worthy winners and all nominees demonstrated outstanding commitment to the practice of pro bono work, in a range of different ways, in achieving a real difference within and, in many cases, outside their respective communities and jurisdictions.

On other fronts, we continue to work to improve the content and presentation of our website and related communications vehicles and I would like to recognise here all the efforts of our Communications Officer, Pam Kovacs, in this regard.

We are continuing to pull together the information received through our African survey, which produced a sizeable number of responses across a wide range of jurisdictions: we shall endeavour to produce some initial conclusions from this material in time for our next newsletter, together with some proposals as to the future direction for our planned African Working Group. In the meantime, I would like to thank all those who contributed to this exercise. At the same time, work continues in establishing a similar group in Latin America, led by Flavia Regina de Souza Oliveira and Carlos del Rio.

We have also recently been approached by the Bar Issues Commission to help with an initiative they are undertaking to investigate the approaches adopted in different jurisdictions to taxation of the nominal value of pro bono services, especially the application of VAT. If anyone has information to share from their own jurisdiction on this topic, please do let us know.

This is *your* newsletter and I hope you find it of interest. Please do let us know if you have any comments or questions on any of the content or suggestions for other areas of work we might consider and, above all, inform us of the work you are doing so that we can ensure we share best practice as widely as we can.

**Pamela Kovacs**

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Development  
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# Welcome to our third newsletter!

**T**he release of our third Committee newsletter reflects our Committee's ongoing commitment to helping legal professionals deliver pro bono legal services more effectively, efficiently and within the ethos of doing public good. Articles in this newsletter will touch on support for the peaceful resolution of inter-governmental disputes in the South Pacific, pursuit of judicial remedy for victims in Kenya, and the removal of a key barrier to provision of pro bono legal services in Brazil.

By featuring global pro bono stories and developments, we hope to actively encourage and support further pro bono legal services, which are uniquely within the sphere of legal professionals. In future issues, we will report on progress regarding current initiatives and continued efforts to foster a pro bono culture.

In this issue, we feature a look ahead to the IBA Annual Conference in Vienna, the impressive short-listed nominees from the 2015 Pro Bono Award, and our usual assortment of stories from global pro bono programming. In particular, we learn of very interesting matters being handled on a pro bono basis in international dispute resolution and international criminal law and the importance of bar associations in the pursuit of favourable regulatory environments for expanding a pro bono culture. Finally, in the 'Meet the Officer' feature, we introduce you to a long-standing member of our Committee, Patricia Blair, who reflects on the importance of pro bono and career opportunities.

Our Committee remains committed to actively encouraging lawyers, judges, law firms, bar associations, law schools, and governmental and non-governmental organisations to participate in pro bono legal services. As noted, this newsletter also includes information on nominations for our annual award, which helps to raise awareness of the importance of pro bono work and its positive impacts.

Between newsletters, you can stay current on pro bono topics via our Twitter and newsfeeds, linking to other helpful resources and networks. And a general reminder that the IBA Pro Bono Declaration,<sup>1</sup> approved by the IBA Council in October 2008, defined pro bono legal service as '... work by a lawyer of a quality equal to that afforded to paying clients, without remuneration or expectation of remuneration, and principally to benefit poor, underprivileged or marginalised persons or communities or the organizations that assist them.' As noted in the IBA Pro Bono Declaration, pro bono legal services may extend to:

- advice to or representation of persons, communities or organisations who otherwise could not exercise or assert their rights or obtain access to justice;
- activities supporting the administration of justice, institution building or strengthening;
- assisting bar associations and civic, cultural, educational and other non-governmental institutions serving the public interest that otherwise cannot obtain effective advice or representation;
- assisting with the drafting of legislation or participating in trial observations, election monitoring, and similar processes where public confidence in legislative, judicial and electoral systems may be at risk;
- providing legal training and support through mentoring, project management and exchanging information resources; and
- other similar activities to preserve the rule of law.

As always, please get in touch if you share our passion for pro bono or would like to contribute an article or item of interest related to pro bono projects, opportunities or challenges.

**Note**

1 See: [www.internationalprobono.com/declarations/](http://www.internationalprobono.com/declarations/).

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# Vienna 4-9 October 2015

## ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION



### Pro Bono Committee sessions

#### Monday 0930 – 1230

##### **International pro bono: charity doesn't have to begin at home**

*Presented by the Pro Bono Committee and the Poverty, Empowerment and the Rule of Law Working Group*

*Session Co-Chairs*

**Professor Neil Gold** *University of Windsor, Windsor, Ontario, Canada; Senior Vice Chair, Poverty, Empowerment and the Rule of Law Working Group*

**Peter King** *Weil Gotshal & Manges, London, England; Secretary, Pro Bono Committee*

In many jurisdictions, pro bono provision is, understandably, focused on domestic need, especially given the inability of legal aid services to satisfy demand. However, there is a growing community of pro bono lawyers who concentrate their efforts internationally. This session will review the different areas of opportunity for this work (including human rights protection, legal education and advisory work and promotion of the rule of law) and illustrate the roles played by the leading non-governmental organisations, clearing houses, bar associations, private practitioners and others in locating and addressing needs as well as identifying emerging trends and the benefits to be gained from participation.

The 2015 IBA Pro Bono Award will be presented at this session.

*Award sponsored by*  LexisNexis®

*Speakers*

**Peter Braun** *Orrick Herrington & Sutcliffe, Pro Bono Deutschland, Frankfurt/Main, Germany*

**S Todd Crider** *Simpson Thacher & Bartlett, New York, USA*

**Janet Fuhrer** *Canadian Bar Association, Ottawa, Ontario, Canada*

**Susan Hazeldine** *International Senior Lawyers Project, London, England*

ROOM -2.31

#### Monday 1230 – 1330

##### **Open committee business meeting**

*Presented by the Pro Bono Committee*

An open meeting of the Pro Bono Committee will be held to discuss matters of interest and future activities.

ROOM -2.31

#### Wednesday 0930 – 1230

##### **The role of lawyers in advancing development and the rule of law: working with social entrepreneurs**

*Presented by the Poverty, Empowerment and the Rule of Law Working Group, the Human Rights Law Working Group and the Pro Bono Committee*

*Session Chair*

**Professor Neil Gold** *University of Windsor, Windsor, Ontario, Canada; Senior Vice Chair, Poverty, Empowerment and the Rule of Law Working Group*

*Introductory Speaker*

**Norman Clark** *Walker Clark, Fort Myers, Florida, USA; Chair, Poverty, Empowerment and the Rule of Law Working Group*

Social entrepreneurs represent a new way of doing business with a clear double focus: to grow a business by helping people or the environment. Social entrepreneurs benefit society as a whole and the poor particularly, by developing innovative product or service solutions to compelling social and environmental problems. The legal profession's support is critical for empowering social entrepreneurs to achieve their goals.

The session will be organised in a very interactive format whereby all attendees will engage and participate in the discussion.

This session will explain the nature of social entrepreneurship, a hybrid figure between non-profit and for-profit entities. Also the range of opportunities for lawyers and law firms to collaborate internationally to facilitate the work of social entrepreneurs will be explored, clearly portraying their most urgent needs.

Additionally, aspirational legal needs will be addressed, with the hope to come up with a proposal of an ideal global legal framework for social entrepreneurs, new players in the global market. A convenient legal vehicle to reflect the singularities of the business structure; taxation and social security incentives to pursue the companies' goals; legal formalities relating to fundraising and agreements with investors and social impact funds; pursuing law and social reform, etc.

*Speakers*

**Eoghan Mackie** *Challenges Worldwide, Edinburgh, Scotland*

**Ian McDougall** *LexisNexis, New York, USA*

**Professor Luz Nagle** *Stetson University College of Law, Gulfport, Florida, USA; Member, IBAHRI Council*

**Kurt Peleman** *European Venture Philanthropy Association, Brussels, Belgium*

ROOM 2.15

# A look ahead: IBA Annual Conference 2015

## Committee sessions and meeting

The Pro Bono Committee – in collaboration with the Poverty, Empowerment and the Rule of Law Working Group and the Human Rights Law Working Group – once again has a great slate of sessions planned for the IBA Annual Conference that will provide insight from leading professionals on key issues regarding delivery of pro bono legal services. All are also welcome to attend the Open Committee Meeting, scheduled immediately following our main Committee session:

### Monday 5 October, 0930–1230

#### International pro bono: charity doesn't have to begin at home<sup>1</sup>

In many jurisdictions, pro bono provision is, understandably, focused on domestic need, especially given the inability of legal aid services to satisfy demand. However, there is a growing community of pro bono lawyers who concentrate their efforts internationally. This session will review the different areas of opportunity for this work and illustrate the roles played by the leading non-governmental organisations, clearing houses, bar associations, private practitioners and others in locating and addressing needs as well as identifying emerging trends and the benefits to be gained from participation.

The 2015 IBA Pro Bono Award, sponsored by Lexis Nexis, will also be presented at this session. Details on the ten nominees short-listed can be found below.

### Monday 5 October, 1230–1330

#### Open Committee Business Meeting<sup>2</sup>

This will be an open meeting of the Pro Bono Committee to discuss matters of interest and future activities for the Pro Bono Committee. All are welcome to join.

### Wednesday 7 October, 0930–1230

#### The role of lawyers in advancing development and the rule of law: working with social entrepreneurs<sup>3</sup>

This session will explain the nature of social entrepreneurship, a hybrid figure between non-profit and for profit entities. Also the range of opportunities for lawyers and law firms to collaborate internationally to facilitate the work of social entrepreneurs will be explored, clearly portraying their most urgent needs.

#### Notes

- 1 See: [www.int-bar.org/Conferences/conf637/ProgrammeSearch/Results/Index.cfm?Search=ListSessionsByCommittee&CommitteeGuid=CBD3C5B4-1397-4E80-9665-9F06DA63FF1B](http://www.int-bar.org/Conferences/conf637/ProgrammeSearch/Results/Index.cfm?Search=ListSessionsByCommittee&CommitteeGuid=CBD3C5B4-1397-4E80-9665-9F06DA63FF1B).
- 2 See: [www.int-bar.org/Conferences/conf637/ProgrammeSearch/Results/Index.cfm?Search=ListSessionsByCommittee&CommitteeGuid=CBD3C5B4-1397-4E80-9665-9F06DA63FF1B](http://www.int-bar.org/Conferences/conf637/ProgrammeSearch/Results/Index.cfm?Search=ListSessionsByCommittee&CommitteeGuid=CBD3C5B4-1397-4E80-9665-9F06DA63FF1B).
- 3 See: [www.int-bar.org/Conferences/conf637/ProgrammeSearch/Results/Index.cfm?Search=ListSessionsByCommittee&CommitteeGuid=CBD3C5B4-1397-4E80-9665-9F06DA63FF1B](http://www.int-bar.org/Conferences/conf637/ProgrammeSearch/Results/Index.cfm?Search=ListSessionsByCommittee&CommitteeGuid=CBD3C5B4-1397-4E80-9665-9F06DA63FF1B).

# IBA Pro Bono 2015 Award nominees

The Pro Bono Award, presented annually by the IBA Pro Bono Committee and sponsored by LexisNexis, recognises lawyers who are leading the legal profession in building a pro bono culture. Nominees are reviewed based on the following criteria:

- *Dedication* – The Committee seeks to recognise pro bono work that exhibits an exceptional level of commitment and dedication to the provision of free legal services and access to justice;
- *Innovation* – The Committee seeks to recognise efforts and pro bono work that have been designed or carried out in an innovative fashion and might serve as a model for others in that jurisdiction and other jurisdictions; and
- *Impact* – The Committee seeks to recognise work, including legislative reform, litigation, and transactional representation, that has brought about a significant impact to an individual, community, group, or country, or to the provision of pro bono services generally.

The 2015 award will be presented at the IBA Annual Conference in Vienna, on Monday 5 October. Here are the ten shortlisted nominees with brief summaries of the work for which they have been nominated.

**Daniel Urbas**, Partner at Borden Ladner Gervais, has been nominated for his outstanding contribution to a very high profile case in Canada with unparalleled support of the victim's family. Urbas and his team devoted thousands of hours to this family alongside their busy litigation practices and continue to work with them although the perpetrator has been sentenced. Other examples of Mr Urbas's pro bono contributions include establishing a constructive trust to protect the possessions of homeless individuals, representing a taxi driver fined for having religious symbols in his vehicle, and assisting Canadian war veterans to challenge being denied pension benefits. His nominator states that:

'Mr Urbas' pro bono efforts share a common denominator: they are the result of a selfless lawyer observing a problem and searching for a creative solution'.

**David Gutierrez**, Co-Founding Partner at BLP, the largest law firm in Costa Rica, has launched a new project, entitled FundaciónBLP, to assist those in need of but unable to afford legal services. It has offered pro bono services in the areas of education, youth, community, environment and entrepreneurship to over 160 non-profit organisations nationally and internationally. As pro bono work was prohibited by the Costa Rican Bar Association, Gutierrez took initiative to coordinate, together with the presidency of the Costa Rican Bar Association, the necessary changes in the Code of Ethics so that pro bono work would be allowed and not considered unfair competition. His nominator highlights:

'I can confirm that David's interests and concerns make the difference in the Costa Rica social area, not only in the legal profession but also in motivating the rest of professionals and companies, making them aware of the importance of helping others.'

**Enrique Felices**, Partner and Head of Pro Bono at Miranda & Amando Abogados in Lima, also serves as President of Alianza Pro Bono, which is a clearing house formed by 17 leading Peruvian law firms. It liaises between its members, people in need and the organisations that support them. Peruvian firms traditionally viewed assisting people in need solely as charity, but Alianza Pro Bono promotes such work as an extension of professional responsibility. Felices was awarded the *Latin Lawyer* magazine 'Latin American Pro Bono Lawyer of the Year' in 2014. His nominator notes that:

'Over the past decade, Enrique has been one of the most prominent advocates of pro bono in the region, and a driving force in the efforts to create a pro bono culture among Peru's leading law firms.'

**Gavin Davies**, Partner at Herbert Smith Freehills in London, pioneered HSF's 'Fair Deal Sierra Leone' programme, which aims to free legal support to Sierra Leone so that it can protect its interests as it enters into complex agreements with international investors. This is the first pro bono facility offered by a law firm on this scale in support of one country's development efforts. To

date, the 'Fair Deal' programme has delivered over £1.5m of support to the Government of Sierra Leone to help build its capacity to manage inward investment. His nominator remarks on the success of the 'Fair Deal' programme:

'None of this would be possible without Gavin's dedication, enthusiasm and foresight.'

**Kirsty Brimelow**, Chair of the Human Rights Committee at Doughty Street Chambers in London, is involved in a vast array of pro bono contributions, including recent work in Nigeria providing training programmes and long distance case support on children's rights. She has also facilitated dialogue between Colombia's San José de Apartadó comunidad de paz. She has led training of the National Human Rights Commission with 300 participants comprising lawyers, judges, police, social workers and NGOs together with employees of the National Human Rights Commission. Her nominator explains that Kirsty was nominated:

'in recognition of her unrelenting and longstanding commitment to pro bono international human rights work over her career as a barrister.'

**Marcos Fuchs**, Founder and Executive Director of Instituto Pro Bono in Brazil, has been monitoring prison conditions for ten years and tirelessly advocating for those who lack access to justice based on their geographic, social, economic or racial backgrounds. As pro bono work has been up until very recently prohibited in Brazil, Mr Fuchs has worked to establish the legality of the pro bono practice for individuals. His nominator praises that Fuchs:

'continues to actively engage several Brazil state bar associations in dialogue about the importance of regulating pro bono practice and expanding access to justice in Brazil.'

**Mercedes Pando**, of Estudio Beccar Varela in Buenos Aires, is also co-founder, volunteer, mentor and board member of Fundacion Microjusticia Argentina (MJA), an organisation which provides legal access to disenfranchised communities. The MJA trains volunteers from law schools and law firms who carry out six-month programmes and partner with grassroots NGOs and microfinance institutions already working in the slums. The volunteers provide legal counsel and services in the areas of civil documentation, family law, disabilities and immigration status. Her nominator highlights that:

'Mercedes has been an invaluable asset in the development of Microjusticia Argentina,

participating in different ad honorem capacities throughout the years and promoting the foundation's growth.'

**Pooja Dela**, of Webber Wentzel in Johannesburg, has been nominated for her commitment to improving the lives of fellow South Africans through legal intervention with a view to upholding the values of the Constitution. Dela's greatest achievements are in the sphere of protecting and enhancing the rule of law and independence of critical state institutions, including the National Prosecuting Authority, the judiciary and the South African Police Service. Her nominator states:

'Pooja has made a monumental contribution to South African jurisprudence and safeguarding of fundamental constitutional values and institutions.'

**Richard Dyton**, Partner (Head of Projects and voluntary Pro Bono Partner) at Simmons and Simmons, has been nominated for his contribution to pro bono culture in the United Kingdom and internationally over the past 20 years. Under his leadership, voluntary pro bono hours at Simmons and Simmons have increased from 3,920 in 2009 to 14,957 in 2014. He supervises a team working with local lawyers in Tanzania in their support of the Maasai in asserting their rights to access and utilise traditional lands. He is also leading a team working on matters involving land rights in Colombia to support the application of international human rights principles in governmental and court decision-making processes. His nominator notes that:

'Richard has made a significant contribution to vulnerable people as a solicitor through his own direct involvement in pro bono service as a lawyer.'

**Scott Anderson**, Managing Partner at Sidley Austin in Geneva, has been nominated for his tireless development of a groundbreaking initiative, the singular aim of which is to enhance the income of the poorest farmers throughout Africa and Asia. He is a key partner for The One Acre Fund, which addresses the poverty of smallholder farmers in East Africa by providing the tools and knowledge to increase farm productivity. He also represents the interests of MicroEnergy Credits, a social enterprise dedicated to empowering low income families and rural populations in Africa and Asia. His nominator highlights that Anderson's

'dedication to furthering the cause of African and Asian agricultural businesses has made a widespread difference to people's lives.'

**Sarah Grimmer**

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**Nicola Peart**

Permanent Court  
of Arbitration  
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## SNAPSHOTS: PRO BONO IN PRACTICE

## Pro bono in international proceedings at the Permanent Court of Arbitration\*

In 2013, the Permanent Court of Arbitration (PCA), the oldest intergovernmental institution for dispute resolution, provided its services on a pro bono basis in a proceeding concerning one of the world's youngest intergovernmental organisations, the South Pacific Regional Fisheries Management Organisation (SPRFMO). The dispute, involving multiple state parties and other actors, raised issues concerning sustainable fishing practices in the South Pacific Ocean. The process involved several unique procedural challenges.

The PCA was established by the 1899 Convention for the Pacific Settlement of International Disputes, revised in 1907, to facilitate arbitration and other modes of dispute resolution.<sup>1</sup> The PCA has a growing membership, currently numbering 117 states. While headquartered in the Peace Palace in The Hague, it facilitates proceedings around the world. In recent years, the PCA has seen an exponential growth in its case load.

The SPRFMO was established in November 2009 under the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (Convention).<sup>2</sup> Amongst other tasks, it governs the conservation of fisheries in areas of the South Pacific Ocean beyond national jurisdiction. It consists of a Commission (comprised of states and other interested entities) that decides on specific conservation measures, as well as various subcommittees and a Secretariat.

In one of its first decisions, the Commission, concerned by the low levels of Chilean jack mackerel in the South Pacific Ocean, allocated limits on the amount of mackerel that could be caught in 2013. The allocations were based on the amount of mackerel that had been caught in previous years when there were no

catch limits in place. Vessels belonging to the Russian Federation had been operating in the area for a number of years but, according to the SPRFMO, were used for processing fish rather than fishing, and therefore could not be classified as fishing vessels for the purposes of calculating allowable catch. Consequently, the Commission allocated no fish catch to Russia for 2013.

Under the Convention, a member state may lodge an objection to a decision of the Commission on the grounds that it is discriminatory or inconsistent with the Convention or international law. When doing so, the objecting state is obliged to adopt alternative measures that have an effect equivalent to the Commission's decision. On 19 April 2013, Russia objected to the Commission's decision on all of the above grounds and calculated the catch allocation to which it considered itself entitled. In doing so, Russia triggered, for the first time, the Convention's review panel proceedings – a non-binding process by which the Commission's decision is reviewed by three independent experts with the participation of, potentially, all Commission members.

Shortly after Russia lodged its objection, the Commission requested the PCA's assistance in administering the proceedings. The PCA provided full administrative support to the Review Panel and participants on a pro bono basis and offered its hearing and meeting rooms in the Peace Palace at no charge.

The review panel proceedings posed a number of challenges, not least of which was the fact that they had never before been conducted. Under the Convention, the proceedings are to be completed within a tight timeframe to avoid detriment to fish stocks. A review panel must hold a hearing within 30 days of its constitution and issue its

findings and recommendations within 45 days of its constitution. Within that time period, the Convention provides that all Commission members – of which there are now 14, including China and the EU – have the right to be heard.<sup>3</sup>

On 21 May 2013, the Review Panel was composed of Professor Bernard Oxman (US) (Chair), Professor Kamil Bekyashev (Russia), and Ms Valeria Carvajal (Chile). With the assistance of the PCA, it adopted rules of procedure, issued a procedural directive, and considered written submissions from Chile, New Zealand, the European Union Delegation to the SPRFMO, Chinese Taipei, Russia, and the SPRFMO. The PCA acted as a channel for communications and provided a central registry for documentation by way of a secured website. Given the nationalities of the panel members and participants in the case, the PCA administered the proceedings in Russian and English, and when necessary, Spanish. A hearing was held at the Peace Palace on 1 July 2013, attended by Chile, Chinese Taipei, Russia, the SPRFMO, and the Commission.

On 5 July 2013, the Review Panel transmitted its Findings and Recommendations, including the Separate Opinion of Sra Valeria Carvajal, in timely fashion, and just five days after the hearing.<sup>4</sup> It found that no convincing argument had been made to justify the failure to allocate any catch to Russia, and that doing so resulted in an unjustifiable discrimination against Russia.<sup>5</sup> The Panel also found that Russia had not adopted alternative measures equivalent in effect to the Commission's decision and therefore recommended alternative equivalent measures. Those alternative measures maintained the original 2013 total allowable catch for all members of 360,000

tonnes of mackerel but required that this total be allocated in a way that reflected Russia's share.<sup>6</sup> The solution recommended by the Review Panel thus achieved two important ends: it allowed Russia a share of the catch whilst ensuring that the total allowable catch did not exceed the level needed to sustain Chilean jack mackerel stocks.

An entry on the SPRFMO's website dated 7 August 2013 indicates that Russia confirmed its commitment to follow the Review Panel's recommendations.<sup>7</sup>

A full record of the proceedings, including the Hearing and the Review Panel's Findings and Recommendations, is available on the PCA's website at: [http://pca-cpa.org/showpagedf5a.html?pag\\_id=1520](http://pca-cpa.org/showpagedf5a.html?pag_id=1520).

#### Notes

- \* The views expressed herein reflect the personal views of the authors and are not attributable to or binding upon the Permanent Court of Arbitration.
- 1 The PCA's website is [www.pca-cpa.org](http://www.pca-cpa.org). Annual Reports can be found at: [http://pca-cpa.org/showpagea5b0.html?pag\\_id=1069](http://pca-cpa.org/showpagea5b0.html?pag_id=1069).
- 2 2009 Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, Auckland, New Zealand, 14 November 2009, entered into force 24 August 2012. For further information, see: [www.sprfmo.int/](http://www.sprfmo.int/).
- 3 Commission members include Australia, Belize, Republic of Chile, Cook Islands, Republic of Cuba, European Union, Kingdom of Denmark in respect of the Faroe Islands, Republic of Korea, New Zealand, the Russian Federation, and Chinese Taipei. The Republic of Ecuador, Republic of China and Republic of Vanuatu joined the Commission subsequent to the proceedings in question.
- 4 See SPRFMO Proceedings, Review Panel Findings and Recommendations, 5 July 2013, available at: [http://pca-cpa.org/showpagedf5a.html?pag\\_id=1520](http://pca-cpa.org/showpagedf5a.html?pag_id=1520).
- 5 *Ibid*, paras 93, 100.
- 6 *Ibid*, para 100.
- 7 See: [www.southpacificrfmo.org/russian-federation-accepts-recommendations](http://www.southpacificrfmo.org/russian-federation-accepts-recommendations), accessed on 16 July 2015.

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## ARTICLES

# Pro bono pursuit of judicial review for Kenyan victims at the International Criminal Court

## Strengthening the voice of Kenyan victims at the International Criminal Court: judicial review of the prosecutor's decision to cease active investigation in the case against President Kenyatta

On 3 August 2015, lawyers representing approximately 20,000 Kenyan victims filed an application – the first of its kind – at the International Criminal Court (ICC) challenging the decision by the Office of the Prosecutor (the OTP or 'Prosecutor') to cease active investigation in the case against high-ranking Kenyan officials, including President Uhuru Kenyatta. The OTP withdrew charges of crimes against humanity against President Kenyatta late last year following a systematic campaign against the ICC by the Kenyan Government. Kenyatta had been charged with participation in murder, rape, forcible transfer and other crimes committed against thousands of Kenyans during the ethnic violence that engulfed Kenya in the wake of the 2007 general election.

The ICC's constitutive instrument, the Rome Statute, makes victims active participants in and beneficiaries of the ICC justice process. Kenyan victims of the post-election violence claim that without the ability to seek judicial review of the Prosecutor's unilateral decision to cease investigating and prosecuting the crimes committed against them, this statutory objective is frustrated. By granting judicial review, the ICC will uphold the victims' fundamental rights to truth, justice and reparation and further the ICC's goal of ending impunity.

The authors' law firm, Bryan Cave, is assisting Fergal Gaynor, the legal representative of the victims (the 'LRV'), in making this unprecedented application.<sup>1</sup>

## Judicial review of prosecutorial discretion under the Rome Statute

Judicial review of a decision by the OTP not to investigate or prosecute crimes within the ICC's jurisdiction – genocide, crimes against humanity, war crimes and aggression – is governed by Article 53 of the Rome Statute. Article 53 permits judicial review at the request of a state party to the Rome Statute that has referred crimes to the ICC or at the request of the UN Security Council in cases where it has made such a referral. Additionally, the ICC's Pre-Trial Chamber is empowered to initiate a review where the statutory criteria for jurisdiction and admissibility are met and the OTP's decision not to proceed is made solely 'in the interests of justice'.

These provisions were successfully invoked for the first time earlier this year by the island nation of Comoros, which referred the *Mavi Marmara* case to the ICC. In May 2010, the *Mavi Marmara*, a ship bearing the Comoros flag, was bound for Gaza along with five other civilian ships carrying humanitarian aid when it was boarded by the Israel Defence Forces. Ten activists were killed and many others injured. Having conducted a preliminary examination of the flotilla raid, the OTP determined that although it had a reasonable basis to believe that war crimes were committed on board the *Mavi Marmara*, it would not proceed with an investigation as the crimes did not satisfy the threshold of gravity required by the Rome Statute. The OTP specifically noted that the Rome Statute permitted Comoros as the referring state to seek judicial review of the OTP's decision not to continue the case.

Comoros, along with Greece and Cambodia as other flag states of ships in the flotilla, applied for judicial review of the OTP's

decision. On 16 July 2015, the Pre-Trial Chamber issued its decision and articulated a requirement of ‘rigorous’ review of prosecutorial discretion under Article 53. The Pre-Trial Chamber found that the OTP made material errors in evaluating the gravity of the crimes committed in the flotilla raid and required it to reconsider the decision not to initiate an investigation. In this landmark ruling, the Chamber affirmed the need for thorough checks on the OTP’s decision-making.<sup>2</sup>

### Extending the right to seek judicial review to victims

One key issue now faced by the Pre-Trial Chamber is whether the right to seek review of a decision by the OTP not to investigate or prosecute should extend beyond states and the Security Council to victims.

The Kenyan victims have endured a difficult and emotional five-year journey that has left them with little hope of accountability for the crimes committed during the post-election violence. Following an unsuccessful domestic and international effort to encourage prosecutions in Kenya, the victims welcomed referral of the matter to the ICC in 2009. In January 2012, the ICC confirmed charges of crimes against humanity against William Ruto and Joshua Arap Sang (a radio DJ) in one case (*Kenya I*), and against Francis Muthaura (former Head of Civil Service and Secretary to the Cabinet) and Uhuru Kenyatta in another (*Kenya II*). Kenyatta and Ruto were elected President and Deputy President of Kenya respectively in March 2013.

However, as *Kenya I* proceeded against Ruto and Sang, the prosecutions of Muthaura and Kenyatta in *Kenya II* began to disintegrate. In March 2013, the OTP dropped charges against Muthaura, citing state obstruction of access to evidence and bribery of a key witness. In August 2013, the OTP made detailed allegations of efforts to intimidate key witnesses due to testify against President Kenyatta, after their identities were provided to the defence. In December 2014, the OTP dropped charges against President Kenyatta, following a change in the evidence of a key witness, after a year of litigation focused on the refusal of President Kenyatta’s government to deliver key evidence relevant to the charges against him. The total collapse of *Kenya II* left victims and their families devastated.

The OTP’s termination of *Kenya II* is

troubling given the obstruction of the investigation and prosecution perpetrated by the Kenyan government, helmed by President Kenyatta. Specific instances of obstruction included the failure to produce Kenyatta’s financial and telephone records, the disregard of an ICC order to freeze Kenyatta’s assets and the refusal to grant access to crucial witnesses. The OTP issued a despairing criticism of Kenya’s flagrant non-cooperation, stating that ‘[t]he individual and cumulative effect of [Kenya’s] actions has been to undermine the investigation in these cases and limit the body of evidence available to the Chamber at trial.’ Even more alarming is the evidence of rampant witness intimidation. The OTP itself described a ‘climate of fear’ which ‘chilled the willingness of individuals with information relevant to the case to come forward.’

Although the OTP came up against exasperating efforts to forestall its investigation and prosecution of *Kenya II*, the OTP is not without remedies for such behaviour. The Rome Statute empowers the Prosecutor to prosecute individual obstruction of justice through Article 70 and to report state obstructionism to the UN Security Council or the ICC’s Assembly of States Parties through Article 87(7). The OTP decided to cease its investigation following the collapse of the prosecutions against all accused in *Kenya II*, having made only one Article 87(7) request in respect of one element of Kenya’s non-cooperation. It has publicly released no charges for obstruction of justice by any individual.

The OTP’s decision is distressing for the victims who are the most aggrieved by the withdrawal of all charges. More than 1,100 Kenyans were killed and tens of thousands maimed, raped and expelled from their homes in attacks taking place over just a few weeks in early 2008. Given that Kenyan authorities refuse to prosecute the crimes domestically, victims are left with little prospect of accountability, no formal declaration of truth and no reparations.

### The Kenyan victims’ application for judicial review

As yet, there is no established manner for victims to challenge a decision of the Prosecutor to discontinue investigating or prosecuting a case, despite their central role in the ICC justice process. Assisted by Bryan Cave’s International Pro Bono Program,

the LRV has asked the Pre-Trial Chamber to correct this apparent gap in ICC procedure with his recent request on behalf of Kenyan victims for review of the OTP's decision to cease investigating and prosecuting crimes committed during the post-election violence. The LRV claims that the OTP failed to ensure an effective investigation and prosecution as required by Article 54(1) and requests that the ICC direct the OTP to take all appropriate measures to comply with its investigative and prosecutorial obligations under that provision.

The application makes four key arguments to support the conclusion that the victims have a right to seek judicial review of the Prosecutor's decision to terminate the Kenyatta prosecution and cease further active investigation of the crimes charged.

First, a review is necessary because the OTP violated its positive obligations under Article 54(1) by failing to undertake an effective investigation and prosecution of the crimes charged in *Kenya II*, including through the neglect of its explicit duty to 'respect the interests and personal circumstances of victims.' Although fulfilling these obligations was made more difficult by the Kenyan government's ongoing obstruction of justice, these obligations continue to bind the OTP.

Second, the victims have a right to an effective remedy for prosecutorial error. This right is consistent with the Rome Statute, including Article 68(3) which requires the ICC to permit victims' views and concerns to be presented and mandates that they be considered. It is also grounded in international law, which is applicable under Article 21. Where, as here, there is an apparent gap in the Rome Statute, the ICC must derive a general principle of law from national legal systems under Article 21(1)(c) and confirm that any such principle is consistent with internationally recognised human rights under Article 21(3). The application drew from legal research into the national law of nearly 70 countries and the jurisprudence of regional human rights courts in arguing that Kenyan victims are entitled to challenge the OTP's decision not to continue with the case.

Third, the ICC may independently review the OTP's decision not to investigate or prosecute under Article 53(3)(b), much like it did in the *Mavi Marmara* case. The Rome Statute makes clear that the only basis on which the OTP may cease investigating and prosecuting a jurisdictionally sound and admissible case is where such an outcome would serve the 'interests of justice'. The

reason offered by the OTP to cease active investigation appears to be based on the absence of genuine cooperation by the Kenyan government. Given that a decision to cease investigation on this basis is not foreseen by the Rome Statute, the victims invite the ICC to find that this is a de facto decision to discontinue the case in the interests of justice and to review it of its own initiative, including by assessing whether the OTP should have done more to challenge the obstructionism that led to the collapse of the case.

Lastly, several other factors demand a review of the OTP's decision, including the role that President Kenyatta's position of power as Head of State and Head of Government had on Kenya's response to requests from the ICC in connection with the case, and the Rome Statute's directive to vigorously pursue investigations and prosecutions of sexual and gender-based crimes, which were a key component of the post-election violence.

## Conclusion

Through the commitment of resources by a large international law firm, Bryan Cave's International Pro Bono Program has supported and continues to support the LRV's work to give victims their day in court and strengthen their voices in challenging the Prosecutor's cessation of its investigation against President Kenyatta and other high-ranking Kenyan officials. Our firm's assistance to the LRV has encompassed legal research and drafting as well as consultation on litigation strategy. Particular contributions that 'big law' has been well placed to provide have included an analysis of prosecutorial discretion under the national laws of nearly 70 countries worldwide and a review of two decades of international human rights jurisprudence on judicial review for failures to investigate and prosecute serious crimes.

We hope that the ICC will uphold the victims' right to seek judicial review of the OTP's decision to cease investigation and prosecution of crimes committed during the post-election violence so that ordinary Kenyans may see justice done. Thousands of victims of crimes against humanity were led to believe in a justice process at the ICC for over five years, to endure three failed prosecutions without a single day of trial, and then to face the further anguish of learning that the OTP has decided not to proceed with further investigation or prosecution of the crimes committed against them – a decision driven by the obstructionism of the Kenyan government and allegations

of witness interference implicating President Kenyatta himself. In keeping with the ICC's goal of ending impunity for the most serious crimes of concern to the international community, the case should not end here.

#### Notes

- 1 In addition to the authors, the Bryan Cave pro bono team includes Bieta Andemariam and Daniel Lewkowicz.
- 2 On 27 July 2015, the OTP filed an appeal of the Pre-Trial Chamber's decision before the ICC's Appeals Chamber.

## A major step forward for pro bono in Brazil

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**O**n 14 June 2014, there was a landmark decision by the Brazilian Bar Association (OAB) Federal Council regarding the regulation of pro bono work in Brazil. The Federal Council approved an amendment to the Brazilian Bar Association Code of Ethics to permit lawyers in private practice to provide pro bono services to individuals and non-profit organisations that cannot afford legal services.

The Research Center of Law Firms (CESA) and the Instituto Pro Bono proposed new language regulating pro bono work in Brazil, which was approved by the Brazilian Bar Association:

- Article 30 – During the provision of pro bono legal work, the attorney, appointed by the judge or by the Brazilian Bar Association, will conduct the case with the

utmost diligence and will assist his/her clients with integrity and legally support them in their claims.

- Section 1 – Pro bono legal work is the provision of legal services undertaken voluntarily and without payment in favour of non-profit organisations and individuals assisted by these organisations who cannot afford legal services.
- Section 2 – Pro bono legal work also includes individuals who are not associated with non-profit organisations and are not able to afford legal services.
- Section 3 – Pro bono legal work shall not be used to assist political parties or as an election tool. It shall not likewise benefit institutions engaged in such political or electoral activities. Finally, it shall not be used as a device to attract paying clients.

## MEET THE OFFICER

## Patricia Blair

Each issue, we introduce an officer of the Pro Bono Committee. This time we feature Patricia Blair, pro bono attorney with Connecticut Legal Services, Inc, which is a non-profit organisation that provides legal services to the impoverished. Patricia is a former Chair of the Pro Bono Committee and remains involved as an Advisory Board Member. She reflects on the changing legal landscape and opportunities that have shaped her career.

### How did you get into your area of practice?

As a woman, in 1965, my recently acquired Bachelor of Science degree in business opened almost no doors to a managerial position so I decided to apply to law school. The study of law proved to be my passion and I have marvelled over the years at how lucky I was in choosing the perfect profession for me. I went on to get my LLM and, as a part of the programme, taught legal writing which then amazingly opened the door to a professor of law position and, ultimately, the position of assistant dean at a national law school. However, I discovered that teaching, combined with administrative responsibilities, was not 'my cup of tea'. I really longed to try practicing law. And, this time, my being a female was a plus. The US Department of Justice in Washington, DC was seeking a commercial litigation lawyer and had no women in the litigation unit. Not only was I hired, but I received excellent, on the job training on being a litigator – I loved it. Years later, I became a litigation partner in a private firm and then a specialist in mediation. When I approached my 60th birthday, it occurred to me that it was time to move in a new direction and so I joined a legal service organisation where, for the last ten years, I have specialised in the practice of elder law for the impoverished. None of my prior legal work has ever been so rewarding.

### What advice would you give to someone new to your area of practice?

For a young lawyer today (which was so many years ago for me), I would tell them that they

should follow their passion in the law. If an area of practice does not feel rewarding or right for them, then investigate other areas. Paying the bills is certainly important, but it is often possible to do that and still be proud of, and truly enjoy, your legal work.

### What are the current challenges facing your area of practice?

As a legal aid lawyer, I believe the biggest challenge to the legal aid profession is the lack of adequate funding in virtually every state in the United States. How to overcome that challenge is constantly being investigated but, unfortunately, not resolved. While the pro bono activities of lawyers can never replace the need for a structured system of legal aid, such pro bono activities are often the only way an impoverished person can receive any legal help in our society. Of course, that is why I believe so firmly in the work of our Pro Bono Committee.

### What has been the biggest challenge of your career? And how did you overcome it?

With regard to my own challenges, I think a major one was coming to terms with my perception that, as a woman in the 1970s and '80s, particularly in litigation, I had to constantly 'prove myself' in a then male dominated culture. Frankly, it seemed to me that women simply had to outperform their male counterparts to be considered equal back then. But I discovered that hard work and devotion to your clients' causes did, in fact, pay off. The more important lesson to be learned was that, whatever the challenge, hard work and devotion generally do result in a successful outcome, over time.

### What do you do in your free time and how do you relax?

I do have a life outside the law which includes a love of travelling, attending the theatre, spending time with dear friends (many of who are of the furry variety), and swimming on a daily basis.



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