

# ACADEMIC AND PROFESSIONAL DEVELOPMENT

INTERNATIONAL BAR ASSOCIATION PUBLIC AND PROFESSIONAL INTEREST DIVISION



the global voice of the legal profession

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## FROM THE CO-CHAIRS

### Message from the Co-Chairs

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The Academic and Professional Development Committee (APDC) was formed in 2007 following the friendly merger of the Academics Forum and the Legal Education and Professional Development Committee. Broadly speaking our committee represents the interests of law teachers (academic and professional, permanent and casual) as well as professional developers. Our aim is to provide an opportunity for law teachers, trainers and researchers to share common concerns and join together to support the development of the academic lawyer. By combining these activities the committee will cover all areas of lawyer education - from pre-admission legal studies and training to post-admission continuing legal education and professional development.

In relation to legal education generally, the APDC is interested in legal curricula, law teaching and teaching methods, the scholarship surrounding law, and public policy development in relation to the role of law, a society's main means through which justice is sought to be accomplished. The committee is also interested in the professional development of academics, practising professionals and judges.

While the APDC primarily focuses on the organisation and presentation of seminars and sessions within the Annual and Regional Conferences of the IBA, it is planning to expand its activities. In particular, the APDC is

*Continued overleaf*

**Contributions** to the newsletter are always welcome and should be sent to the Newsletter Editor at the address below:

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keen to work with other committees, particularly in areas of law firm management, including in-house professional education, and finding academic lawyers who might be suitable as speakers etc for the Annual Conference. As an example, the APDC recently gave advice to the Bar Issues Committee on a proposed survey of members in relation to various educational matters.

Our committee ran four successful legal education/professional development sessions at the 2007 Annual Conference in Singapore and we are planning a further four sessions for the next Annual Conference in Buenos Aires. This year's sessions will cover the following:

1. Ensuring the future success of your firm: choosing and training your partners: this session will look at the path to partnership and preparing candidates for promotion. It will also consider creating management development training curricula for partners at different stages in their careers.
2. Cost-effective ways to train and develop your lawyers: this session will examine how small law firms can ensure that their junior lawyers are receiving the training, development opportunities and guidance they need to become effective, responsible and profitable legal practitioners. Two specific topics will be featured - cost-effective training techniques for small firms and turning business development training into revenue.
3. Greenrush or goldrush? What is the role of lawyers in achieving 'success' in environmental law matters? In cases where the ensuing environmental degradation is likely to threaten humankind's very existence should the duties of lawyers go beyond the mere interests of their clients? In this joint session with the Environment, Health and Safety Law Committee, the speakers will consider the ethical and legal issues arising and the ways lawyers can achieve 'success' in environmental law matters.
4. Part-time law – implications for legal practice and education? This session examines the phenomenon of part-time law and the implications of part-time practice, study and teaching. Areas and issues to be addressed will include disjunctions between law school programming and student profiles and work practices; discrimination and reduced hours' practice; psychological well-being and balance between work and leisure; alternatives to traditional

study and career paths; maintaining quality and collegiality in a casual workplace; and the representation of the legal profession within the law school curriculum.

We are also joining with the Professional Ethics Committee to deliver a session on 'Plagiarism: a threat to global law firm integrity'.

In addition to these conference sessions, the APDC will be holding a breakfast meeting for delegates to discuss matters of concern and interest in the academic and professional development field. Last year's meeting was very well attended and productive in forming this year's conference programme.

One major concern for the APDC is that it remains difficult to increase our membership (in particular from the ranks of legal educators) so long as the membership and conference costs remain as high as they are. Despite the good will and major efforts of the PPID and IBA the cost for an academic far exceeds the annual daily allowance for memberships, travel and conferences. The APDC will continue its discussion within PPID and beyond to fashion an arrangement with the Association's many committees and initiatives that would provide a place for academics with at least some financial support. Many members of the APDC are part-time teachers of law and the Committee needs to identify specific means to support this group that labours for small compensation filling a critical role in the preparation of new lawyers and training generally.

Another problem area that has been identified is the reality that academic lawyers are increasingly looking to present papers at 'refereed conferences' to fulfil their domestic research obligations. The APDC believes that if we could promote a viable system of refereeing conference papers for subsequent publication by the Association, we may increase interest in both membership and registration for future conferences.

If you are not already a member of the APDC and this is an area of interest, you can join by visiting:

<http://www.ibanet.org/jointheiba/joiniba1.cfm>.

As we both 'retire' as Co-Chairs at the end of 2008, we wish all the best to our committee, our membership and the PPID in the years ahead. We have both enjoyed and appreciated being the foundation co-chairs for the APDC.

#### Terms and Conditions for submission of articles

1. Articles for inclusion in the newsletter should be sent to the newsletter editor.
2. The article must be the original work of the author, must not have been previously published, and must not currently be under consideration by another journal. If it contains material which is someone else's copyright, the unrestricted permission of the copyright owner must be obtained and evidence of this submitted with the article and the material should be clearly identified and acknowledged within the text. The article shall not, to the best of the author's knowledge, contain anything which is libellous, illegal, or infringes anyone's copyright or other rights.
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4. The rights of the author will be respected, the name of the author will always be clearly associated with the article and, except for necessary editorial changes, no substantial alteration to the article will be made without consulting the author.

# Amalgamation of Committees

Frances Burton

*Newsletter Editor, Academic and Professional Development Committee;  
Chambers of Leolin Price QC, Lincolns Inn, London  
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This is the second edition of our joint newsletter since the amalgamation of the former Academics and Professional Development entities, and once again I have attempted to find articles of interest to both constituencies and to achieve some sort of global spread. Tony King (United Kingdom) and Ida Abbott (United States) 'trail' the professional development sessions they will present at the Annual Conference in Buenos Aires and Professor Judith Willis (United Kingdom) offers a perspective on a teaching and learning method which straddles both academic and vocational, including professional development, courses. Also from the United States, Adjunct Professor Ethan Burger offers a topical article on international humanitarian law. From both sides of the Pacific Co-Chairs Associate Professor Geoff Monahan (Australia) and Dick Carter (United States) update us on the current mission and projected programme of the committee. A further timely article in memory of the late Lyndal Taylor, a former Chair and Vice-Chair of predecessors of APDC (the old Academics Forum and the Legal Education and Professional Development Committee – Committee 8) has been provided by Phillip Tahmindjis (IBA Human Rights Institute) and Mary Fran Edwards who has found time away from her important work on the US Aid Administration of Justice Support programme in Cairo, North Africa, to contribute for us. Finally an account of the recent annual European Women Lawyers

Conference in London records the European women lawyers' perspective on addressing the overlapping interests of academics and practitioners and discloses the gender balance which has now developed in lawyers' lifestyle aspirations.

Unfortunately this year no one was able to send us an article from Asia – a pity as we aim to achieve a global as well as an academic and vocational spread. This is your newsletter and articles can be sent for consideration. We are also particularly interested in receiving articles which involve topics and methodologies which resonate with both academics' scholarly interests and practitioners' professional development issues, as these two branches of the legal profession move ever closer together, particularly in the context of the patterns of part time and flexible lawyering which encourage this cross-fertilization. This is also a particularly topical APDC theme at this year's Annual Conference in Buenos Aires, where a speaker in our session on Part time law – implications for legal practice and education (Dr Marilyn Freeman of London Metropolitan University in the UK) will be explaining the concept of a new Centre for Family Law and Practice which she and I will shortly be setting up. This will explore how these two distinct sectors can each enrich the other in the context of Family Law and perhaps provide a useful model for other areas of law. Please let me have your articles or suggestions on [frb@frburton.com](mailto:frb@frburton.com) at any time.

## IN MEMORIAM

### Lyndal Taylor

Thanks for the memories...

On Friday 11 April 2008, in Sydney, Australia, Lyndal Taylor lost her long battle with cancer. The IBA lost one of its most valuable members and many IBA members lost a dear friend. Students at the University of Technology in Sydney lost a wonderful teacher and the faculty lost an esteemed colleague. Worse, Jason Holt and his children Emma and Riley lost a beloved wife and mother. She leaves us all with precious memories.

Lyndal had extensive academic qualifications: BA; LLB (University of Queensland); LLM (Bond University); Graduate Certificate in Higher Education (University of NSW); and she was admitted as a solicitor in both the Supreme Court of Queensland and the High Court of Australia. She practised in commercial and property law for some years and was then a lecturer in commercial law, torts, insurance law and gender law at the Queensland University of Technology, James Cook University, Sydney

University and the University of Technology Sydney. A superb teacher, she was a leading light in the Australasian Law Teachers' Association, edited journals devoted to teaching law and wrote textbooks on taxation law and superannuation. She was a member of the Consumer, Trader and Tenancy Tribunal of New South Wales and a fellow of the Taxation Institute of Australia.

Lyndal was a zealous member of the IBA from the moment she joined in the early 1990s until her illness forced her to cut back on volunteer activities in 2005. Even after her diagnosis in late 2003, Lyndal attended the 2004 IBA Annual Conference in Auckland with almost her old energy level. She was active in the former Section on Business Law and the Section on Legal Practice, serving as Vice-Chair and Chair of both the Academics' Forum and the Committee on Legal Education and Professional Development (Committee 8), now merged together into

## IN MEMORIAM

PPID constituent Academic and Professional Development Committee. On gender integration in the IBA, she led by example and was a change agent through her own speaking and committee work. She was also a driving force in, and an officer of, the Discrimination and Gender Equality Committee (Committee 11) and later participated in the Women's Interest Group. She also assisted, without an official position, the work of the Publications Committee.

Her multiple IBA professional accomplishments were a tapestry of creative projects, diligent scholarship, dynamic speaking and facile use of audio-visual aids and technology. She was a brilliant speaker. Robert Trevisani, past Chair of the Section on Legal Practice, said that Lyndal was 'a natural born teacher'. In addition to her own numerous presentations at IBA conferences, she organised programmes, wrote newsletter articles, lobbied for academic discounts and solicited donations of left-over law books from IBA exhibitors for the benefit of law schools in developing countries. She was a constant helper to other members. Marc Cornblatt, past Chair of Committee 8, remembers: 'She stood with me and propped me up to keep my first IBA programme from disintegrating in Vancouver ten years ago and was a shining light and constant ray of sun every time I saw her thereafter.' It was Lyndal who encouraged Phillip T ahmindjis (then a Professor of Law and now the Deputy Director of the IBA's Human Rights Institute) to join the IBA in 1993. She was his right-hand person on Committee 11 and together they drafted the IBA's 1998 Resolution on Non-Discrimination in Legal Practice as well as conducting a world survey on

women in judicial posts. Always having an eye to publication and the sharing of knowledge, and with a total lack of self pity, Lyndal's last published article was for The Inside Story, the journal of the Australian Breast Cancer Association. It was about how women with cancer could obtain medical care for less cost.

Our memories of her personally are more like a crazy quilt of raucous laughter, excellent meals and great conversation in cities like New Orleans, Amsterdam, Barcelona, Berlin, London, Vancouver, Durban and Auckland. Mary Fran's most vivid memory will always be Lyndal's rapid fire laugh. During the Berlin conference in 1996, she laughed so loudly that our group (which also included Jane Garvie, Andrew Primrose, Milton Seligson, New South Wales DPP Nicholas Cowdery QC and Lord Abernathy) was disciplined by the waiter in a dour Berlin pizzeria! He ran across the room and said to her, 'Madame, you must not! It is not proper.' We picked up our brief cases and left a split second before he threw us out. We found refuge in a traditional German beer hall that encouraged laughter.

Thank you, Lyndal. The IBA will always remember your enthusiasm, your smile and your laughter, as well as your many professional accomplishments.

*Phillip Tahmindjis*  
*Human Rights Institute*

*Mary Frances Edwards*  
*Vice-President for Grant Administration*  
*IBA Foundation, Inc*

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# Buenos Aires

12-17 October  
International Bar Association Conference 2008

## Academic and Professional Development Committee

*Council Liaison Officer*

**Neil Gold** University of Windsor, Windsor, Ontario, Canada

*Co-Chairs*

**Richard Eitel Carter** ALI-ABA, Philadelphia, Pennsylvania, USA

**Geoff Monahan** Faculty of Law, University of Technology, Sydney, New South Wales, Australia

### Ensuring the future success of your firm: choosing and training your partners

*Session Chair*

**Richard Eitel Carter**

Partners in modern law firms need to be experts in their chosen field of practice AND to be effective business managers. Therefore, choosing the associates with the right skills to become partners, preparing them for partnership, and then, after promotion, continuing to train them to manage the business effectively are all essential steps for ensuring the firm's future success.

The existing partners need to plan ahead with these objectives in mind. The current associates need to understand what is expected of them so they can position themselves to maximise their chances of promotion.

In this session, we will look at:

- the path to partnership – selecting partners (identifying criteria, choosing candidates and determining decision-making processes) and preparing candidates for promotion (looking at training programmes, mentoring structures and leadership development); and
- training for partners – creating management development training curricula for partners at different stages in their careers, integrating laterally-hired partners and training newly-appointed partners in client management.

*Speakers*

**Maximo Bomchil** M & M Bomchil, Buenos Aires, Argentina;  
Communications Officer, Law Firm Management Committee  
**Ann Dalsin** Gilliss Valla & Dalsin LLP, Lafayette, California, USA  
**Thomas Weimann** Clifford Chance, Düsseldorf, Germany

**MONDAY 1000 – 1300**

**Tirso De Molina B, Melia Buenos Aires Hotel**

### Cost-effective ways to train and develop your lawyers

*Session Chair*

**Ida Abbott** Ida Abbott Consulting, Oakland, California, USA; Vice-Chair, Academic and Professional Development Committee

This programme will examine how small law firms can ensure that their junior lawyers are receiving the training, development opportunities and guidance they need to become effective, responsible and profitable legal practitioners. Two topics will be featured:

- cost-effective training techniques for small firms: creating training programmes on a shoestring budget; organising professional development consortia among local firms; finding low-cost CLE providers; on-the-job training, mentoring, and coaching; and
- turning business development training into revenue: IBA participation will be used as a case study. Establishing yourself and your firm as capable, dependable, and trustworthy; developing ongoing relationships with potential referral sources; becoming a preferred provider to whom larger/foreign firms regularly send

business; learning the customs and norms that affect lawyer-client communications and relationships across borders and cultures.

*Speakers*

**Shelley Dunstone** Legal Circles, Adelaide, South Australia, Australia  
**Sebastian Iribarne** Marval O'Farrell & Mairal, Buenos Aires, Argentina

**TUESDAY 1000 – 1300**

**Poncho, 2nd Floor**

### Greenrush or goldrush? What is the role of lawyers in achieving 'success' in environmental law matters?

*Joint session with the Environment, Health and Safety Law Committee.*

*Session Co-Chairs*

**David McQuoid-Mason** Commonwealth Legal Education Association, Durban, South Africa; Vice-Chair, Academic and Professional Development Committee

**Ian Rose** *Salans, London, England; Chair, Environment, Health & Safety Law Committee*

South America, in particular the Amazon in Brazil, is the largest repository of oxygen-producing vegetation on the planet. Yet this precious resource is being depleted through illegal and legal activities that destroy the forests, such as illegal logging, agriculture and other developments. Legal activities that contribute to the degradation of the environment are facilitated by lawyers who assist clients in negotiations, contractual arrangements and litigation.

In cases where the ensuing environmental degradation is likely to threaten humankind's very existence should the duties of lawyers go beyond their clients?

What is the role of lawyers in achieving 'success' in environmental law matters? How do we 'win' environmental disputes? Do we only 'win' for our clients or do we also try to 'win' for society? What are the civic obligations of lawyers in environmental issues? Do lawyers have a civic duty outside of their duty to their clients? If so, what is it? What are the most appropriate dispute management strategies in environmental matters? Is it always possible to resolve environmental disputes on a win-win basis? Do we need to advise clients about dispute mechanisms beyond the traditional alternative/ appropriate dispute resolution models?

The session will explore the role of lawyers when representing clients in situations that can cause environmental degradation using a mixture of formal presentations and interactive small group discussions of some of the ethical and legal issues involved.

*Speakers*

**Frank Astill** University of Sydney, Sydney, New South Wales, Australia; Secretary, Academic and Professional Development Committee  
**David Estrin** Gowling Lafleur Henderson LLP, Toronto, Ontario, Canada  
**Steve Pete** Faculty of Law, University of KwaZulu-Natal, Durban, South Africa

**WEDNESDAY 1000 – 1300**

**Poncho, 2nd Floor**

### Plagiarism: a threat to global law firm integrity

*Joint session with the Professional Ethics Committee*

*Session Chair*

**David McQuoid-Mason** Commonwealth Legal Education Association, Durban, South Africa; Vice-Chair, Academic and Professional Development Committee

Plagiarism takes many forms but can be summarised as appropriating the written expression of another person's intellect and passing that expression off as your own. It is a form of theft that undermines the

integrity of lawyers and law firms who participate in it. This session will explore the challenges presented to global lawyering by plagiarism.

*Keynote Speaker*  
Professor Duncan Webb

**WEDNESDAY 1700 – 1800**  
**San Telmo, Ground Floor**

**A BREAKFAST meeting will be held to discuss matters of concern and interest in the academic and professional development field.**

**THURSDAY 0830 – 1000**  
**Dorado, The Marriott Plaza Hotel**

**Part-time law – implications for legal practice and education**

*Session Chair*  
Frank Astill

This session examines the phenomenon of part-time law and the implications of part-time practice, study and teaching. Law students typically combine work and study. Acting judges and part-time tribunal

members have increased dramatically. Academic lawyers often have several professional roles. Retired practitioners and judges are retained as consultants, special investigators and dispute resolvers. Many senior lawyers curtail their working week. Others, including those with children and in similar firms, explore alternatives. What does this pervasive part-time culture mean for the practice and study of law?

Areas and issues to be addressed will include disjunctions between law school programming and student profiles and work practices; discrimination and reduced hours' practice; psychological well-being and balance between work and leisure; alternatives to traditional study and career paths; maintaining quality and collegiality in a casual workplace; and the representation of the legal profession within the law school curriculum.

*Speakers*

Ida Abbott

Marilyn Freeman London Metropolitan University, London, England

Kay Maxwell University of Wollongong, Wollongong, New South Wales, Australia

**THURSDAY 1000 – 1300**  
**Río de la Plata, 2nd Floor**

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# Continuing professional development for partners

**Tony King**

*Vice-Chair, Academic & Professional Development Committee;*

*Clifford Chance LLP, London*

*tony.king@cliffordchance.com*

When I was a newly-qualified lawyer, I worked with a partner whom I regarded as the fount of all knowledge in his particular area of expertise. There seemed to be no question I or indeed his other colleagues or clients could raise which he could not answer. He appeared to acquire the knowledge without effort; he just seemed to know everything.

Therefore, in my naïveté it came as a surprise to me to hear him say at his retirement party that he continued to learn and develop as a lawyer right up to the day he stopped practising.

The reality was that he was proof that continuing professional development has always been necessary for a successful lawyer and that continues to be the case in our current, highly-competitive times.

In this article, I have set out some ideas for the continuing professional development of partners but as a full examination of that topic would require a book, first some carve-outs and a caveat.

## **The carve-outs**

- 1) The bar associations or law societies of many jurisdictions have introduced some form of compulsory 'continuing professional development' as part of their regulatory processes. The purpose of this article is not to look at all those rules and regulations and identify ways of complying with the local requirements. Instead, it looks at some of the topics for continuing development which any conscientious professional could work on whether or not they needed to meet some regulatory requirement.
- 2) Whatever the jurisdiction and whatever the area of practice, law and practice does not remain static forever. Therefore, keeping up to date is an inevitable requirement of the daily job of being a lawyer. In some jurisdictions, this obligation is a burden which the individual lawyer must shoulder him or herself. In others, there is a wealth of continuing professional development support available in the form of courses (online in some jurisdictions as well as face-to-face), journals, books and so on. 'Pure' legal-technical professional development (that is, learning about new laws and/or new approaches to some aspect of legal practice) is a huge and important topic but difficult

to cover appropriately in a general article such as this. Therefore, this article looks at business management topics for continuing development, rather than legal ones.

- 3) The focus of this article is on the continuing development of partners but clearly the foundations of a partner's professional development must be laid while he or she is an associate. It is safe to assume the foundations of the future partner's legal-technical expertise will have been laid in the years leading up to the promotion to partner but that may not necessarily be the case with the business management skills which are essential for the future health of the partner's business. While I have not dwelt on the management skills development of associates, I have touched on this topic.

## **Now, the caveat**

The readers of this article will represent the whole spectrum of law firms around the world. They may work in large, multi-office international firms, major national firms or local firms; the firms may offer services in a range of areas or be niche firms specialising in one area of work; however many business services or support staff they may work with, the readers will work in organisations with hundreds of lawyers, or with tens of lawyers or as sole practitioners. Taking into account that wide range of organisations and environments, I recognise that the points I have made below will not be relevant to everyone. Nevertheless, I have tried to identify topics which would at least be recognisable as potentially relevant to partners in most law firms, whatever their location, specialisation or size.

That said, what might be good topics for a partner's continuing professional development?

A partner in a law firm is a perfect illustration of the 'producer manager' in professional service firms identified by Harvard Business School. That means that, in addition to being an effective fee earner (a 'producer'), he or she also needs to manage (some portion of) his or her firm's:

- business,
- clients, and
- people.

That general role description probably applies to all partners, irrespective of the size of firm, the nature of the practice and the seniority of the individual partner. However, the detailed descriptions of their tasks will differ depending on the stage they have reached in their careers and the nature of their management responsibilities.

To my mind, partners can potentially go through three 'stages':

- 1) entry (that is, when they first become partners);
- 2) practice managers (that is, when they have responsibility for managing their own practices, a stage in which many partners remain throughout their practising careers); and
- 3) firm managers (that is, when they take on responsibility for the internal management of some part of their firm which could be a practice group or area, an office in a multi-office firm or of the whole firm itself).

While some of the topics which I have suggested could be covered at these three stages are discrete (in the sense that only partners entering the relevant stage need training on the particular topic), most should be progressions from previous training. Given that, it is surprising how often in firms around the world associates are trained to be excellent legal practitioners and yet are expected to be able to perform these very different management tasks on promotion to partner with little or no training. Lawyers are fast learners but many potentially expensive mistakes can be made in the (possibly short) period between promotion and these new partners developing their managerial skills to an appropriate level. How that might be done merits a separate article.

Looking at the three separate 'stages', on what topics could partners entering those stages receive some form of training?

### Entry

The development of partners at this level probably is best divided into two segments – the training/information/guidance they need immediately after their promotion and more specific training they need as they 'bed down' in their role.

The immediately post-promotion training is often delivered in bigger firms on some form of 'new partners programme' though one-on-one briefings from senior colleagues is just as beneficial.

What could this training cover? Using the headings from the generic description of a partner's management responsibilities but not claiming to be intending to produce a comprehensive list:

#### *Business management*

- 1) An understanding of the firm's business strategy and their role in achieving it.

- 2) An explanation of the firm's finances looking at:
  - what they are expected to bring in (so billing targets)
  - how they are expected to manage the finances (so guidance on the firm's key performance indicators such as managing work in progress, utilisation, debt collection, fee arrangements including any discounts they can offer and so on)
  - what they will take out net (so profit-sharing arrangements, capital contributions, tax payments etc).
- 3) An understanding of their roles and responsibilities as partners (including managing risk/conflicts and the terms of the partnership agreement).

#### *Client management*

- 1) An understanding of the firm's client development strategy and, therefore, of the clients they should be targeting in their business development activities.
- 2) Guidance on business development approaches (including how to build networks both inside and outside the firm) and, to the extent it is different, 'client relationship management' covering a range of topics including:
  - how to pitch for work
  - how to ensure deals/cases/matters are run smoothly (looking at work management, client communications etc)
  - how to maintain client relationships between cases (so ways of keeping in touch with clients when no instructions are forthcoming).

#### *People management*

- 1) An understanding of the firm's people management strategy so covering the firm's approach to recruiting, developing, retaining and motivating the people (whatever their role) working within it.
- 2) Following on from that, a review of the firm's performance management approach (looking at appraisals/reviews, management of good and bad performers, learning and development approaches etc).
- 3) An explanation of the development opportunities available to the partners (training programmes, mentoring schemes, executive coaching etc).
- 4) An explanation of the way the performances of the partners themselves will be reviewed (so the partner appraisal/review system, upward feedback approaches etc).
- 5) Finally, these post-promotion events often include sessions with junior partners who give guidance on managing the transition from associate to partner. After the 'new partners programme' (whatever form it may take), more in-depth training could be offered

to address the particular developmental needs of new partners. These will build on the topics in the 'new partners programme' and will reflect the key (but not only) role of a new partner – to build a profitable practice. Therefore, the topics may be:

- financial management
- practice development techniques
- pitching and client communication skills
- people and team leadership.

The majority of partners falling within this category will have been associates at the firm but the increasing mobility of partners between firms means some firms organise a version of a 'new partners programme' for laterally-hired partners. What it will cover will depend on the experience of the partner involved but one element will be to familiarise the partner with his or her new firm's culture, people and processes.

### Practice managers

The second stage of partner training is for those partners who have established themselves as successful partners (perhaps after two or three years in that role) and who would benefit from broader management skills training to help them consolidate their practices.

The topics for this training may be more advanced versions of the 'Entry' level training as well as new topics depending on the development needs of the partners at this level. The topics could be:

- business planning (such as manpower planning, financial budgeting, client development planning etc)
- 'advanced' client management (looking at issues such as managing legal/commercial conflicts, handling difficult discussions with clients such as over fees etc)
- project management
- advanced financial skills (looking at topics such as pricing and profitability, in-depth understanding of key performance indicators and ways to manage the firm's finances profitably)
- advanced people management skills (looking at handling more difficult situations such as dealing with under-performers, work allocation methods, large team management etc).

In some firms, partners will take on specific management responsibilities – to be the finance partner, the personnel partner or whatever. For that individual, more tailored training suitable to that role may be necessary.

### Firm managers

Perhaps only a minority of partners will fall into this category as it covers those partners with internal management responsibilities – that is, a managing partner role (whatever the portion of the firm the

individual will manage).

This group will benefit from advanced training on managing the firm's business, clients and people so topics could include:

- strategic decision making and risk analysis
- financial and business management looking at investment appraisal and risk, statistics and reporting, cost analysis frameworks, profitability analyses, operational and technology management etc
- leadership skills focusing (though not exclusively) on managing fellow partners, change management etc
- marketing/promoting the firm generally.

It is not the purpose of this article to go into detail on how such training could be delivered or by whom as that will depend on the development needs of individual partners and the availability of suitable trainers in the particular firm or jurisdiction. Nevertheless, at the 'Entry' stage, much of the training could be provided by people from inside the firm – the managing or senior partner could explain the firm's strategy, the finance partner/director (if there is such a person in the firm) could explain the firm's finances and so on. At the two other stages, internal 'trainers' may be less suitable. In many (but not all jurisdictions), there are external trainers at universities, in management consultancies, and executive coaches who can provide some or all of this training, plus there is a wealth of literature on all these topics.

I do not mean to ignore 'learning by doing'. That can be very effective but if it is done without any guidance, it carries with it the risk of learning from one's mistakes which could be costly.

Last but not least, there are often sessions at the IBA annual conference which will address some of these issues. The Academic and Professional Development Committee has organised the following sessions at the Buenos Aires Conference (the first of which is particularly relevant to the subject matter of this article):

- 'Ensuring the future success of your firm : choosing and training your partners'
- 'Cost-effective ways to train and develop your lawyers'
- 'Part-time law – implications for legal practice and education'
- 'Greenrush or goldrush? What is the role of lawyers in achieving "success" in environmental law matters?'
- 'Plagiarism : a threat to global law firm integrity'.

In this article, I have aimed to identify suitable topics for the continuing professional development of partners. I recognise that not everything I have suggested will be relevant for all partners in all firms but I trust I have at least provided helpful food for thought.

Be that as it may, the main topics I have listed are vital to the continuing success of any law firm and ignoring them runs the risk of limiting the firm's success.

# The 8th European Women Lawyers Conference, London: 'Being heard in the future of Europe'

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The European Women Lawyers Association ('EWLA'), founded only a decade ago, has now become established on the wider European scene (ie, in the European Union and the EEA and countries having neither membership of nor affiliation to either) and amongst women's organisations in the legal professions. EWLA has established an annual conference, which rotates amongst the countries from which its successive presidents are drawn and has encouraged membership amongst both practitioners (including politicians) and academics. The current General-Secretary is English and a Professor of Legal Practice, and the Vice-President and incoming President is Icelandic, Professor dr juris Herdis Thorgeirsdottir of Bifrost University, Iceland. Next year's conference will therefore be in Iceland.

It is interesting to see how EWLA has managed to meld the academic and practitioner interests. The catalyst appears to be the common commitment to achieving legislative reform on agendas of feminist and family interest, in respect of which EWLA has a powerful lobbying track record. This may be because the early years had the benefit of significant Brussels support or because of EWLA's habit of drawing written resolutions from each of their conferences, which are proposed and debated at the AGM which closes each conference.

A significant influence might be the EU support which has been extended to this organisation. In 2005 the Palais des Droits Humains in Strasbourg was made available for that year's conference and there was an afternoon visit to the European Court of Human Rights. Another influence might be the emphasis on European employment law, a topic which resonates equally with academic researchers and writers and with the practitioner at the coalface. Empirical research generally, and its presentation in a practical context, has played a prominent part in past conferences, most recently in the present year in the session on the 'Glass Cliff' research conducted by Michelle Ryan and Alex Haslam at the University of Exeter which, with the assistance of a panel of experts, explored the concept of this slippery successor to the 'glass ceiling'.

The idea was to look at the numbers of women leaders in boardrooms of FTSE companies and leading law firms and also the nature of the pathways which

delivered them there – or hindered their arrival via the career ladder and perhaps explained their under-representation at the top and relatively low retention rates in comparison with men in their respective chosen careers. The cautious conclusion was that there are many complex reasons why women leave in mid-career, sometimes for social reasons but in some cases because they were set up for failure as men had a sixth sense for risky projects, avoided them, colluded in offering such posts to women and thereby directly or indirectly caused them to fail. Women, it seems, have been identified in many contexts as crisis managers but when, not unpredictably, they fail do not have the support networks which men enjoy. The practical conclusion, gripping both academics and practitioners from different perspectives, and underpinned by empirical research which appealed to both, was that true equal opportunity was about the *nature* of leadership positions as much as their number and that if organisations were committed to offering genuinely comparable opportunities and experiences it seems highly likely that women would show as much commitment and effort to retain their leadership.

This was not the only original session at the conference. Another, presented by Lucy Daniels, consultant, researcher and writer on the subject of work-life balance, flexible working and childcare, founding Director of Parents at Work, and Associate Director of the Work Life Research Centre, looked at changing attitudes to work in the legal sector. She highlighted the 'Can Do' attitude of such top City firms as Wilde Sapte, who looked for flexibility on both sides, and White & Case, who were willing to try out new options open to all, with the emphasis on business benefits and on the take-up not hampering long-term career to partnership level. She commented that a new development appears to be the fact that international and City clients buying legal services are now looking for law firms to mirror their own diversity, often explicitly asking firms for their diversity statistics! So, while globalisation has produced a 24/7 culture, firms were also looking for a SMART interpretation of flexible working: specific, measureable, achievable, realistic and time bound. Moreover there was a realisation that SMART working delivers for men (who also now increasingly desire a

work-life balance) as well as for women, and that staff retention might be the result since nowadays work-life balance is less about childcare (which has improved considerably in the past two decades) than about committed workers of both sexes 'getting a life' in

order to have time for their own interests.

Thus has the influence of EU employment law metamorphosed from a feminist to a human resources perspective and intertwined the academics' research and the practitioners' practical evidence-based interests.

## Ten cost-effective ways to promote lawyers' learning and development in small firms

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Being a professional requires constantly improving one's skills, staying up to date on legal and practice developments, and adapting to rapidly changing markets, technologies, and client needs. While large firms can supply a wide range of personnel and resources to support lawyers in this effort, smaller offices cannot. Nonetheless, smaller firms can do a great deal to support lawyers' learning and growth.

Because there is more frequent interaction between partners and associates in smaller firms, there are greater opportunities for direct teaching and mentoring. The very fact of being small obviates the need for most of the infrastructure, personnel and formal programmes that large organisations require. Nonetheless, to ensure that associates engage in the learning and growth necessary to acquire needed skills, perform at high levels, serve the firm's existing clients and bring in their own clients, even small firms need to organise and supervise professional development activities. Here are ten cost-effective ways for firms with limited human and financial resources to promote their associates' learning and professional development.

### Train supervisors to develop talent

If you have only limited resources to spend on training, spend your training dollars on educating lawyers to become effective supervisors and mentors. Most associate learning occurs on the job. Conscientious supervising partners who pay careful attention to associates' work experience and development are the most influential individuals in this learning process. The richness of associates' learning is determined by the way their supervisors interact with them – how

willing they are to explain, teach, counsel, and include associates in the inner workings of client matters. Recognise and reward supervising lawyers who do these things well. Collect and circulate information about what they do and how they do it. Use this data to create your firm's own 'best practices' and use these best practices as examples in your training programmes.

### Provide feedback and coaching

Associates need to appreciate what the firm expects of them, how they measure up to those expectations and, if they don't, what they need to do to improve. Partners who give them frequent, constructive feedback and regular, precise performance evaluations promote their development. Feedback is best when coupled with coaching. Coaching involves clarifying performance expectations, setting performance or development goals, a plan for achieving those goals, and ongoing support during the process. Use performance reviews to conduct forward-looking discussions of associates' development needs and goals. Expect reviewing partners to assist associates in creating development plans to address those needs and achieve those goals, then support them as they implement their plans. This takes time, but it is highly valuable for development and requires little financial expenditure.

### Allocate work assignments systematically

Associates' learning and advancement is directly tied to their work experience. To be sure that associates receive work of appropriate quantity and quality, designate certain partners to be responsible for making work assignments and monitoring work experience.

Factors to consider in assigning work to an associate include the associate's workload, breadth and depth of work experience, exposure to multiple partners and clients, and professional development needs. Expect assignment partners to meet at least twice a year with the associates they are monitoring, and also whenever they perceive any potential work-related problems. By systematically allocating and monitoring work experience, the firm not only promotes associate development, it also ensures better utilisation of associates' time and expertise, which translates into higher economic efficiency.

### **Learn from your own cases and deals**

An important part of learning occurs when lawyers analyse their own work. Have supervising partners meet with the associate who worked on the matter, or if there was a larger team call the entire team together, at the conclusion of every client matter to review what the team did well and what could have been done better. This simple activity educates everyone on the team in how to repeat successful tactics and strategies and how to avoid repeating mistakes. It enhances lawyers' development and leads to continuous improvements in client service.

### **Have current leaders prepare their successors**

To continue thriving as a business, firms need to have leaders in the pipeline. There are countless leadership training courses, and all are expensive. Sometimes it is important for a firm to invest in such programmes. At the very least, however, firms can identify potential leaders and help prepare them in-house for leadership roles. Current firm leaders can teach rising leaders about law firm management and structure, client relations, practice development, and law firm economics. Firm leaders can serve as mentors and role models, providing guidance about what it means to be a leader in the firm. They can also work with rising leaders on actual firm problems or strategic planning. As they work together, the senior partners can transmit their wisdom while observing and advising the more junior lawyers in leadership techniques.

### **Share learning internally**

The most inexpensive way to transfer learning throughout the firm is to encourage all lawyers in the firm to teach each other. Ask lawyers who write articles or make conference presentations to use their materials as the basis for an in-house presentation. Similarly, ask lawyers who attend outside continuing legal education (CLE) programmes to present what they learned to their colleagues. Hold informal 'lunch and learn' sessions to discuss topics of shared

professional interest eg, substantive legal points, recent court decisions, legislative actions, case developments, or firm clients. Rotate responsibility among lawyers for selecting the topic and leading the discussion. This method promotes teaching habits and helps lawyers improve their presentation skills, demonstrate their substantive knowledge, and hone their leadership abilities.

### **Make your formal training programmes cost effective**

Sometimes the specific needs of associates and partners are best addressed by formal training programmes. If that is the case, set priorities and hold training sessions on the most important topics. Use your own lawyers as faculty whenever they have suitable expertise and teaching ability. In addition, look for free or inexpensive training resources to facilitate in-house course development, such as videos or DVDs of programmes sponsored by bar organisations or law schools. If you need to use outside training providers, search for options that are not too costly, such as online CLE offerings and programmes sponsored by bar associations and CLE vendors. Even if you choose to bring in a trainer, there may be inexpensive alternatives. Your clients or suppliers may offer training at little or no cost. For example, liability insurers often teach ethics and risk management programmes.

### **Combine resources with other firms**

Although it may seem counterintuitive to teach your competitors, you can collaborate with other small firms to develop a joint training course, or to present programmes for each other on subjects where the firms' practices are complementary. For example, have your associates practise courtroom arguments against associates from another office. Both firms can jointly develop a training exercise and teach their own associates the basics. When the arguments are presented, have partners from both firms critique and advise the participating associates.

### **Look for secondment and loan opportunities**

Secondment involves temporarily assigning a lawyer from your firm to work in a client's office. Seconded lawyers learn a great deal about the client's operations, industry, and perspective on legal matters. When they return to the firm, they bring that knowledge with them, along with deeper connections to the client. Similarly, lawyers can be 'loaned' for a period of time to public agencies or public interest organisations. They serve the organisation and its clients, while gaining experience that may be hard to get in the firm, such as first-chair trial experience.

### Use community resources

For maximum professional development, lawyers must expand their sources of learning beyond the firm and the legal profession. Clients, community leaders, and prominent business guests can offer valuable insights and information about client management, current civic issues, or industry developments that affect the firm's practice. Many of these individuals will welcome the chance to talk with your lawyers, and most will do so at no charge. Your lawyers will benefit both from what the individuals have to say and from the networking opportunities presented for new business and for teaching lawyers the art of business development.

As these suggestions demonstrate, being a small firm does not have to limit associates' professional development. With a little creativity and resourcefulness, firms of any size can ensure that their associates acquire the learning they need to become outstanding lawyers.

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## Assessing work-based learning: what's in it for practitioners?

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Work-based learning (WBL), unlike some other educational terms, is easy for us to understand. Essentially, it is learning that takes place at work; for lawyers that is most likely to be an office, for those in medicine it may be within a hospital or clinic, for hospitality students it could be hotels or resorts.

### Why use it?

'Learning by doing' has long been known by educators as one of the most effective ways to learn. Other professions and occupations use WBL as one conduit for it extensively; sandwich courses are common within many commercial study areas. The Council of the Bars and Law Societies of the European Union (CCBE, [www.ccbe.org](http://www.ccbe.org)) plans that every qualified lawyer in Europe should have undertaken a period of WBL before qualifying. The current focus on enhancing ethical and professional standards and behaviour amongst legal practitioners favours WBL or a simulation of professional practice (which can be created to some extent by IT programmes such as the excellent SIMPLE project on [www.ukcle.ac.uk/research/projects/tle/html](http://www.ukcle.ac.uk/research/projects/tle/html)) as an effective way forward.

The potential of WBL is attractive. We all learned more after starting 'real work' than we did in law school, didn't we? The challenge is to eliminate

learning bad habits and ensure all new lawyers have reached the same, high standards.

### How can it be used?

Clinical legal education includes learning by doing. As the term suggests, much of the potentially transferable expertise in educating professionals has been built up in the world of medical education. However, clinical legal education is not found everywhere and the likelihood is that, in the foreseeable future, its enhancement may be limited for cost reasons. It is clearly more expensive for tutors to supervise student practitioners effectively (both from a learning and practising perspective) than it is to sit them in vast rooms containing 100 or more students and lecture to them.

So, if we want more learning by doing in our training of the future legal profession and at present the formal education stage (university, law school etc) shows limited capacity to provide it, WBL will need alternative venues. One fairly obvious way of increasing capacity is to increase the involvement of legal practitioners, as is done in medicine. Work-based learning actually happening in the workplace – it has a certain elegance as a solution, doesn't it? Some practitioners may also be seduced by the opportunity to pass on their skills and wisdom to the next generation.

### What problems are there?

But we are lawyers and there have to be catches. Traditionally, WBL for lawyers has taken place after law school, when potential entrants and their employers believe they have left formal education for good. If there is no link to professional educators, the burden is likely to fall on practitioners throughout the WBL process, unless arrangements can be negotiated. Loss of billable hours may be the first catch that comes to mind and we cannot ever underestimate how dominant that issue is. Putting it to one side though, for the sake of argument, we ought to consider also the other issues facing practitioners who might be persuaded into involvement in WBL and the principal amongst these then becomes assessment.

The argument goes like this:

- We plan to use WBL to enhance learning.
- The learning is not simply to increase the sum of human wisdom; it has the clear purpose of producing competent, professional legal practitioners.
- To allow the product of the process into practice we must be able to tell what has been learned and know that agreed standards have been met by students.

The process needs assessing, in other words.

(For a full wish-list, we might also aim at creating lifelong learners who function well not just after qualification but throughout their careers; particularly useful in today's fast-moving, global legal world.)

Any assessment of learning must aim to be valid, reliable and robust. Those who pass must all demonstrably have met the same standards and learned the same things even if they did so in different ways, as is highly likely via WBL.

### What solutions are there?

Let us explore suitable mechanisms for assessment. Space is limited, so consider one tool, very often used by those professions who have had WBL for some time – portfolio assessment. Portfolios are thought to be better in assessing fitness to practise than examinations (Davis et al. 2001; Woolf 1998). Portfolio assessment is not to be confused with the art student lugging a large, flat case almost as large as they are into school. Professionals' portfolios are far more complex. Portfolios can explore *how* someone approaches tasks and exercises skills, also identifying bad habits for elimination. They can cause the compiler to reflect on their learning, where the narrative within them becomes as valuable as the evidence base on which it rests. This exploration via students' own narratives is also a powerful weapon against plagiarism and the buying of material off the internet. If the aim is to produce reflective practitioners and lifelong learners, certain types of portfolio are ideal, although there are dangers in expecting portfolios to do everything. Smith and Tilemma's view was 'the same portfolio cannot

be used for assessment and personal development purposes' (2003, 646).

Where it is a gate-keeping stage before entry into practice, WBL must be assessed reliably. Whilst no method of assessment is perfect and although it is widely used with WBL, reliability is arguably the portfolio's Achilles' heel. Experts suggest some ways to improve this.

The first is tight rules and controls on assessors. Arguably, where guidelines, descriptions, written standards or suchlike are clear and detailed enough, this solution, coupled with assessors who follow those guidelines etc accurately, will ensure reliability (Johnston 2004). If only it were that simple, but the evidence suggests the exercise is more like herding cats; there can be difficulties in assessors understanding and/or agreeing with the criteria they are asked to work with (Baume and Yorke 2004) and even experienced assessors have a tendency to generate some of their own criteria to add to those they are asked to use – what has been described as 'emergent criteria'. (Lawyers from common law backgrounds will recognise an analogy here.) There is evidence to show that reliability is increased where the decision is a simple pass/fail one rather than a question of grades, but law students are often dissatisfied with such simplicity, demanding to know how well they did, where they sit in the hierarchy of achievement.

We might look instead at the rules for the portfolios instead of the assessors. 'Shaping' these, by being specific on content, standards etc, seems attractive to many (Baume and Yorke 2002, Pitts et al. 2001) but it has not been shown that this increases reliability and arguably risks losing the flexibility and individuality that are a portfolio's strengths (Pitts et al. 2002).

Woolf, who has considerable experience in this area, would disagree that it is at all possible to reach these definitions with sufficient detail and accuracy to guarantee reliability (Woolf 1998). Appealing as an ideal, it may not be possible in practice. Even for lawyers (to many of whom it presents a tempting drafting challenge if nothing else), increasing regulation may not be the solution.

If practitioners became expert assessors, would this help to provide the confidence in this assessment method necessary to allow students into practice?

Good assessor training is not of course a requirement merely of the portfolio method, but many in the field attest to its particular importance in increasing reliability (Baume and Yorke 2002; Hill and Irvine 2003; Johnston 2004). Unsurprisingly, the evidence suggests that rational, consistent application of scoring rubrics can be helped by using a small number of well-trained assessors who have discussed and developed their own rubric over time, though complete consistency is not reached by this or any other method (Baume and York's 2002 work showed that the best methods only reached 60 per cent agreement between

assessors). In fact, the best recorded method of increasing consistency seems to be simply to eliminate rogue assessors, though this is perhaps only the tyranny of the majority (Johnston 2004).

Or there is a more 'consensus' approach (Baume and Yorke 2002; Johnston 2004; Pitts et al. 2001). Assessors discuss portfolios in groups, or mark in pairs (sometimes then having their work reviewed by a third assessor). Discussion commonly takes place after marking a selection of portfolios in common; assessors are then sent off to mark the rest without further comment. This appears to increase inter-rater reliability. Bringing assessors together *after* marking, to discuss again and possibly revise their thoughts, increases reliability still further (Johnston 2004), but is rarely used for reasons of cost. The aim is to eliminate as far as possible the idiosyncrasies and personal agendas within assessor groups that increased regulation appears powerless to do (Baume and Yorke 2004).

### Costs, benefits and risks

It will be clear to any reader, though, what virtually all commentators in this area agree on – *assessing portfolios properly is always costly*. Seen alone, these costs might appear prohibitive. Seen in the context of legal professions battling to maintain standards, reputations and a degree of self-regulation in an increasingly hostile environment, the costs may seem more reasonable.

If cost weren't enough, here's another catch. Within other fields using WBL there is an assessor's phenomenon that can be described as the 'strength to fail'. It is hard, after working with someone and getting to know and like them, to tell them they are not good enough to do what you do. It is easier to pass them. In the United Kingdom, legal educators have been observing for some time another phenomenon. This is that those who don't pass, appeal. Unsuccessful appellants sue. If failing a student risks your defending a court action the stakes are higher than mere guilt feelings. Imagine the insurance premiums.

It might be tempting (and is anecdotally not unknown) to pass poor students and let them become someone else's problem. But there is a potential catch here too. Knowing about practitioners' inherent lack of the 'strength to fail', those within the nursing world in the United Kingdom plan to introduce something new. Should a new nurse make a serious, significant error during their first year in practice, the person who assessed their WBL can be held to account. That does not mean they will be held responsible, simply that they may need to explain on what grounds they passed this nurse into unsupervised practice.

By analogy we then have an emerging picture for legal practitioners as follows. Practitioners who fail a student doing WBL with them *may* get sued. If they opt

to pass them, to avoid that risk, what are the chances that they get sued by the future client who suffers through faulty legal work done by the 'newbie'? If the client doesn't sue, the bleak view is that their insurance company may.

### Who can help?

Nevertheless, there are multiple reasons why WBL is worthy of our notice and why legal educators advocate increasing its use as a way to produce effective, ethical, professional legal practitioners. But there are undeniable perils and pitfalls for inexperienced, vulnerable practitioners who embark on WBL and its assessment, unprepared and unsupported. It is not for dabblers. There is however help available to assist in creating expertise for practitioners and/or share the burden (and risk) of assessing. This comes from education practitioners, upon whose knowledge, skills and values legal practitioners may draw. But then I would say that, wouldn't I?

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# **The duty to investigate possible war crimes: has an unfortunate determination by the International Criminal Tribunal for the Former Yugoslavia been overtaken by subsequent developments in international humanitarian law?**

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## **Introduction**

In July 2003, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTFY) handed down a decision in connection with a jurisdictional challenge in the form of an interlocutory appeal in *The Prosecutor v Hadzhihasnovic et al* Case No IT-01-47-AR72. There were two issues for the Appeals Chamber to examine, namely whether:

- (i) customary international humanitarian law with respect to the concept of ‘command responsibility’ for war crimes applied to an internal conflict, and
- (ii) a commanding officer who has assumed responsibility for a particular territory can be held liable for crimes that have been committed by a subordinate at a point in time before said commander assumed responsibility for the relevant territory in which the alleged war crime occurred.

While on the first issue, the ICTFY Appeals Chamber’s five members were in unanimous agreement – the norms of international humanitarian law also governed an internal armed conflict,<sup>1</sup> it split 3-2 on the second issue. The majority reasoned that officers with command responsibility for an area where war crimes occurred cannot be charged pursuant to Article 7 of the ICTFY Statute, which concerns individual criminal responsibility for war crimes.<sup>2</sup>

The language of concern can be found in Article 7(3):

The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.<sup>3</sup>

The allegations in the underlying case were not

in dispute and relate to the lack of efforts to punish the perpetrators of certain war crimes apparently committed by individuals serving in the Bosnian armed forces. There is no evidence that the Bosnian officers present in the area at the time made efforts to prevent the alleged war crimes or punish those who carried them out.

Subsequently, units under the command of Amir Kubura and other officers of the

Bosnian Army’s 7th Muslim Mountain Brigade of its 3rd Corps, moved into the area where alleged war crimes were committed. While there are no facts to suggest that Mr Kubura and his officers personally engaged in any of the crimes or were in the immediate area at the time they were alleged to have occurred, they failed to undertake appropriate actions to identify and punish those responsible. Mr Kubura and his colleagues did not investigate allegations that war crimes were committed in territory now occupied by the Bosnian armed forces.

In its November 2002 decision, the Trial Chamber held that Mr Kubura and his officers by failing to investigate the alleged war crimes were liable under the doctrine of command responsibility. It held that even within the context of an internal armed conflict, a commander under the afore-mentioned doctrine could be held liable for acts committed even before he had assumed command of forces active in the area – at least as of 1991 pursuant to customary international law and Article 7(3) of the ICTFY Statute, which represents a declaration of customary international law. A majority of the Appeals Chamber’s judges disagreed finding that the ICTFY lacked jurisdiction over the matter.

## **The Appeals Chamber’s reasoning**

There appears to be a tendency in the area of international humanitarian law for tribunals to

be conservative in finding that certain actions or inactions are prohibited by customary international law. As the number of international agreements on this topic increases, there is a natural tendency for an international war crimes tribunal to be reluctant to find the existence of a norm in the absence of a written document on the issue.

Such tribunals seem unwilling to 'push the envelope' since they recognise that their ability to ensure the enforcement of their rulings is limited – hence only in cases when there is no reasonable doubt will an international criminal tribunal find the existence of a norm prohibiting certain conduct.

According to Theodore Meron, the Appeals Chamber's Presiding Judge, the Trial Chamber failed to find either evidence of state practice or written decisions to support its view that at the time the crimes were alleged to have occurred that customary law was consistent with the principle that a 'commander could be held responsible for crimes committed by a subordinate prior to the commander's assumption of command over the subordinate'.<sup>4</sup> Furthermore, the Appeals Chamber's 3-2 majority viewed that the principle authority on this issue ran contrary to the Trial Chamber's conclusion. The Appeals Chamber found the Trial Chamber misunderstood the principles established in Article 28 of the Rome Statute of the International Criminal Court, Article 86(2) of the Additional Protocol I to the Geneva Conventions<sup>5</sup> and the Nuremberg Military Tribunal's *Kuntze* case.<sup>6</sup>

The Appeals Chamber majority found fault with the Trial Chamber's effort to construe the Statute's Article 7(3) as a basis for finding a subsequent commander could be charged with criminal responsibility. The Appeals Chamber explained that the proper approach to take to the case was to determine the applicable law at the time of the offence. Furthermore, the Appeals Chamber evinced the desire to protect the accused's human rights.

Two judges dissented from the majority's opinion on the second issue. While they concurred with the Appeals Chamber's majority that there was no equivalent case that addressed the question posed, they approached the situation as if it were appropriate to follow an international 'common law', as opposed to the concept of *nullum crimen sine lege* – this is something akin to a statutory or civil law approach.

The dissenting judges seemed troubled that the majority's decision could provide military commanders with an incentive to follow ostrich-like behaviour in situations where there was a possibility that war crimes had been committed. The dissenting judges believed that the failure to recognise that a new commanding officer inherited the responsibilities of his predecessor was not only at odds with the purposes of Protocol I – it would motivate senior commanders to move military units or officers around to avoid the risk of being charged with potential liability for war crimes.

While there could be legitimate debate whether the Appeals Chamber's majority was legally correct, it is much more difficult to contend in good conscience that it furthered the cause of justice as it relates to the alleged victims of war crimes. International humanitarian law is at best a flawed instrument. It largely concerns situations where man has committed human atrocities. Ultimately, an overly-legalistic approach is likely to prove to be unsatisfactory to those victimised by war crimes and those concerned about them.

### **Declaring new norms or clarifying the state of customary law?**

The Appeals Chamber's minority was not alone in their view that there ought to be a duty to investigate potential violation of human rights and humanitarian law. For example, this appears to be the position of at least one of the United Nations Special Rapporteurs on Extrajudicial, Summary or Arbitrary Executions.<sup>7</sup>

Human Rights Watch has identified various reasons why military commanders should have an obligation to investigate alleged violations of human rights and humanitarian law.

At the most basic level, armies investigate allegations of wrongdoing by their soldiers for reasons of self-interest. Members of the armed forces must remain accountable to their superiors in order to maintain operational efficiency, enforce discipline, and maintain respect for principles of international humanitarian law (IHL). In almost all armies, the procedures for military investigations and disciplinary or judicial proceedings were originally based on the need to punish service-related offences such as desertion, insubordination, theft, or mutiny. The more frequent the military operations, the more important it becomes that patterns of unlawful or negligent behaviour are detected and stopped.

A further reason to investigate is to uphold the integrity of the armed forces, ensuring that ill-disciplined or unlawful acts by soldiers do not discredit the army or the country they defend and represent. The accountability of individuals entrusted with the use of lethal force is an essential part of any functioning democracy. Functioning democracies require that the military be accountable to the civilian authorities. The greater the role the military plays in the daily life of a country, the more important this accountability becomes.

Investigations are required to ensure respect for the laws that govern the use of force in armed conflict: IHL. The advantages of such respect are obvious. It minimises the suffering caused by armed conflict. It encourages higher morale and a sense of professionalism within the armed forces, and prevents the commission of war crimes. It increases the likelihood of reciprocal behaviour by

other government or quasi-governmental parties, minimising the possibility of a downward spiral in which each party attempts to inflict the most pain, cruelty, and suffering. Respect for IHL also helps ease post-conflict transition, by lessening the trauma and bitterness that develop when war crimes or crimes against humanity are committed. Lastly, efficient and impartial investigations can forestall pressures for international tribunals to take up serious violations of IHL on the grounds that the responsible government had failed to do so.<sup>8</sup>

In November 2005, the United Nations General Assembly 'adopted and proclaimed' Resolution 60/147 – Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.<sup>9</sup> The Resolution's Preamble arguably sidesteps whether customary international law and existing treaties required UN Member States to investigate instances of possible violations of international human rights and humanitarian law.

The General Assembly took the position that there was already such an obligation under customary international law, or if there were not, it was declaring that henceforth such an obligation existed based on a combination of: (i) treaties to which states are parties, (ii) customary international law; and (iii) states' domestic law.

The Resolution's Section II sets out UN Member States' obligations in this regard. Significantly, Article 3 concerns the obligation to respect and ensure the observance of international human rights and humanitarian law. It requires that UN Member States:

- a) take appropriate legislative and administrative and other appropriate measures to prevent violations;
- b) investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;
- c) provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and
- d) provide effective remedies to victims, including reparation, as described below.<sup>10</sup>

For the reasons discussed below, this approach recognises that it is morally unsatisfactory to deal with crimes against humanity, genocide, and war crimes in general in a manner that operates like ordinary criminal law.

### **Grappling with the need to apply morally appropriate punishments**

In his recent work, *Atrocity, Punishment and International Law*, Washington & Lee Law Professor Mark A Drumbl

notes the general lack of proportionality between the actions committed by perpetrators of crimes against humanity, genocide, and war crimes and the punishments imposed in cases of international criminality.<sup>11</sup> He is notably disturbed by an apparent obsession with the protection of the due process rights of the accused.<sup>12</sup> To find that there was no command responsibility to investigate possible atrocities would make worse an already unsatisfactory situation.

Whereas it is understandable to attach great importance to the upholding of the alleged perpetrator's civil rights with respect to common crimes, the extraordinary nature of the international crimes that led to the establishment of international criminal tribunals are such that perhaps greater concern should be paid to the needs of the victims than is apparently the case. This objective would be achieved by holding that there was in fact an obligation of subsequent responsible commanders to investigate alleged war crimes committed in the territory where their forces were currently active.

Many individuals may feel uncomfortable with the idea that punishments of ordinary crimes should emphasise retribution, restitution, revenge, vengeance and the imposition of huge awards of punitive damages. This is less likely to be true with respect to the punishment of individuals who committed acts constituting criminal violations of human rights and humanitarian law since it is impossible to make the victims 'whole' in any sense of the word. From a humanitarian standpoint, increasing the likelihood that perpetrators of atrocities would be identified and punished would be a desirable development.

Professor Drumbl examined the sentences imposed by the International Criminal Tribunals on Rwanda and Yugoslavia through May 2006 as well as the Special Tribunal on East Timor. The lack of proportionality between the heinousness of the crimes committed and the punishments imposed is striking.<sup>13</sup> Furthermore, the lightness of the sentences imposed by national courts and tribunals is often more troubling.<sup>14</sup> Thus, any step that could lead to an increase in the prosecution of atrocities would be a net positive in not only punishing wrongdoers, but possibly also deterring potential perpetrators.

Perhaps it is unrealistic if not impossible to create an international human rights and humanitarian law system that is capable of producing legal outcomes that contain a higher level of justice. International criminal courts or tribunals lack the ability to produce *status quo ante* situations, and even if they were so capable they are unlikely to have the power to ensure that their constructs would survive – one only need think of the instability engendered by the Treaty of Versailles at the conclusion of World War I – its provisions almost made unavoidable World War II.

### Taking one step at a time

At the conclusion of World War II, British Prime Minister Winston Churchill thought that the enormity of the Nazis' crimes was self-evident and thus there was no need for a formal legal process to resolve the guilt of the leading Nazis, so summary executions would be adequate. Soviet General Secretary Joseph Stalin largely agreed with his British counterpart, but believed there would be some benefit from holding show trials. At the behest of Henry Stimson, US President Harry Truman wanted a process having the semblance of law – the US position won out. Perhaps this has proven to be unfortunate – war crimes tribunals that are overly-legalistic processes that produce slow, unsatisfactory results.<sup>15</sup>

Indeed, it would seem that an overly-legalistic approach to the punishment of violations of human rights and humanitarian law has little deterrent effect on wrongdoers. That is not to suggest that we should ignore or give up on the potential for international law, but we need to be more realistic as to how it is applied. International criminal courts and tribunals should be permitted to follow a more common law approach – criminal acts should not be permitted to fall through the cracks merely since the offences are not well-established principles of customary international law or that treaty law has not reached a broad consensus on an issue.

Some issues simply do not lend themselves to regulation by treaty. The UN Convention Against Corruption probably would never have been concluded if the parties had to generate an agreed definition of 'corruption'.<sup>16</sup> A concept such as corruption tends to be fact specific and the world's population does not possess uniform views on what constitutes corruption. For example, 'lobbying' legislators might be considered to be illegal in some countries.

In contrast, a duty to investigate a war crime on the basis of assumed command responsibility would seem to be an obligation that should be universal to ensure the prevention and punishment of war crimes, thought its application might be fact specific. The failure to give teeth to international human rights and humanitarian law will increase the likelihood that it will be breached. This would be an indefensible and undesirable outcome.

### Notes

- 1 This result may have been made easier to reach since there were international aspects of the conflict that ensued upon Yugoslavia's break-up into separate states. The Appeals Chamber's determination is consistent with what appears to be a gradual evolution towards acceptance of the principle that international humanitarian law applied equally to refugees who have fled to a foreign country as well as those who relocated to a region within the same country. See Patrick L. Schmidt, 'The Process and Prospects for the U.N. Guiding Principles on Internal Displacement to Become Customary International Law: A Preliminary Assessment' (2004) 35 *Geo J Int'l L* 483, 484 (noting that despite the fact that the 1998 UN Commission on Human Rights' Guiding Principles on Internal Displacement are based on existing international human rights law and international humanitarian law, they themselves did not constitute a 'binding instrument').
- 2 Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc S/25704 at 36, annex (1993) and S/25704/Add1 (1993), adopted by Security Council on 25 May 1993, UN Doc S/RES/827 (1993), available at <http://www1.umn.edu/humanrts/icty/statute.html> (last accessed 2 July 2007).
- 3 Articles 2-5 are titled, respectively, Grave breaches of the Geneva Conventions of 1949, Violations of the laws or customs of war, Genocide, and Crimes against humanity.
- 4 Theodore Meron, 'The Humanization of International Law' (2006) 409.
- 5 The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), available at [www.unhcr.ch/html/menu3/b/93.htm](http://www.unhcr.ch/html/menu3/b/93.htm) (last accessed 2 July 2007).
- 6 The underlying facts and the majority and minority opinions in the *Hadzhihasanovic* case are set out in some detail in Theodore Meron, 'Editorial Comment: Revival of Customary Humanitarian Law' (2005) 99 *AJIL* 817, 823-26 (in this article, Judge Meron praised a study conducted by the International Committee of the Red Cross for producing a report that follows a conservative approach when identifying principles of international humanitarian law that can properly be deemed to be customary law).
- 7 See Phillip Alston, Report of the Special Rapporteur, Civil and Political Rights, Including the Question of Disappearances and Summary Executions, Commission on Human Rights, Economic and Social Council, E/CN4/20006/53, 8 March 2006), available at [www.extrajudicialexecutions.org/reports/E\\_CN\\_4\\_2006\\_53.pdf](http://www.extrajudicialexecutions.org/reports/E_CN_4_2006_53.pdf) (last accessed 2 July 2007).
- 8 Human Rights Watch, 'Promoting Impunity: The Israeli Military's Failure to Investigate Wrongdoing', available at [http://hrw.org/reports/2005/iopt0605/4.htm#\\_ftn26](http://hrw.org/reports/2005/iopt0605/4.htm#_ftn26) (last accessed 2 July 2007).
- 9 Available at <http://www.ohchr.org/english/law/remedy.htm> (last accessed 2 July 2007).
- 10 *Ibid* (emphasis added).
- 11 Mark A Drumbl, *Atrocity, Punishment and International Law* (2006).
- 12 *Ibid* at 7.
- 13 *Ibid* at 46-67.
- 14 *Ibid* at 68-122.
- 15 In fact, George Kennan opposed this legalistic approach since it did not take into account the critical developments influencing post-war international politics. That is, law in a sense was operating in a political vacuum. *Ibid* at 10. To what does this refer?
- 16 The text of the Convention and related materials are available at [www.unodc.org/unodc/crime\\_convention\\_corruption.html](http://www.unodc.org/unodc/crime_convention_corruption.html) (last accessed 3 July 2007).

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