

# Ethics Principles for the Global Lawyer\*

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## APPENDIX

### Guideline: Ethics Principles

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## **1. Introduction**

Lawyers advising global businesses constantly encounter myriad legal, cultural and ethical challenges. Today's global lawyer must continuously learn new lessons on how to do business in foreign countries, keep clients happy and, at the same time, deal with difficult ethical dilemmas presented by the sometimes contradictory demands in international business.

International ethical challenges are never straightforward. These tough ethical dilemmas tend to arise in the opaque parts of the international business world:

The real problem... is the choice *to be made in doubtful decisions when there is no clear certainty as to the ethical choice to be made...* The ethical principle may be straightforward: do what is right and avoid the wrong. The real question is to determine what is right and what is wrong in doubtful situations. Doubtful situations in the context of ethical conduct pose the most serious dilemmas to the international lawyer and representatives of commercial and other organizations.<sup>1</sup>

## **2. Framework for the International Lawyer**

Lawyers act within a legal and ethical framework determined by the society and culture where they live and practice law. By their very nature, ethical issues are difficult to address in any society or legal jurisdiction. But when they straddle a number of countries and jurisdictions, they become exponentially difficult. In such situations, the various cultural norms, legal systems and ethical standards must be taken into account in reaching a decision. However, they should not be considered as totally distinct issues when determining what is ethical. They need to be viewed in their totality. As stated by Professor Hall, "...[l]egal culture is the matrix of values, attitudes, and assumptions that have shaped both the operation and perception of the law." It "...is a manifestation of ideology... [and] has evolved in response to individual and group interests."<sup>2</sup> It is therefore necessary to understand and consider the cultural context in applying ethical standards in international business.

This decision-making framework is never stagnant. Quite the opposite, the relationship amongst cultural, ethical, and legal issues is dynamic and constantly

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<sup>1</sup> Alfred J. Boulos, "Ethical Considerations for Lawyers with an International Oil and Gas Practice," *The Energy Law Institute for Attorneys and Landmen* (August 5-6, 1999), O-4.

<sup>2</sup> Kermit L. Hall, *The Magic Mirror* 6 (1989).

evolving.<sup>3</sup> As stated by one international lawyer: "...standards evolve and must be in response to the concerns of society at any given time, as well as the pragmatic considerations of assisting clients in radically different settings."<sup>4</sup>

## **2.1 Cultural Framework**

**Culture:** *The distinctive customs, achievements, products, outlook, etc., of a society or group; the way of life of a society or group.*<sup>5</sup>

The challenge for the international lawyer is that he must be able to assess and advise on difficult issues when the cultural and ethical values in a foreign country can be quite different from those in his own country, background and training. In order to properly assess the situation, he needs to answer the kinds of questions posed by Al Boulos, a leading international energy advisor: "Are values relative to the people who espouse them? Are there universal values which apply to all? How do you resolve conflicts of values between cultures, social practices, individuals and organizations or between individuals?"<sup>6</sup>

There are common values that appear in all cultures, societies and countries. They are not always exactly the same and there are subtle differences between even relatively similar cultures. And the more different cultures are, the greater the difference in the perception and application of these common values. For instance, all cultures share a common belief in the values of honesty and integrity. But, depending on the circumstances, different cultures can elicit different behaviors from a person considered to be honest or one acting with integrity. However, to therefore take the position that all values are relative to each culture and therefore one can ignore one's own ethical standards is dangerous. A lawyer needs a solid moral compass when navigating international waters. Without one, you risk making bad decisions and running your client's ship aground on treacherous reefs.

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<sup>3</sup> Mary C. Daly, "The Cultural, Ethical and Legal Challenges in Lawyering for a Global Organization: The Role of General Counsel," 46 *Emory L.J.* (1997), 1057.

<sup>4</sup> Roger J. Goebel, "Professional Responsibility Issues In International Law Practice," 29 *The American Journal of Comparative Law* (1981), 58.

<sup>5</sup> William R. Trumble and Angus Stevenson, eds., *Shorter Oxford English Dictionary*, 5<sup>th</sup> ed. Vol. 1 (New York: Oxford University Press, 2002).

<sup>6</sup> Boulos, *supra*, at O-14.

The challenge is to do the right thing and, at the same time, be culturally sensitive. The international lawyer therefore needs to be flexible and open-minded, explain the client's position in a culturally sensitive way and still obtain a proper legal and ethical result. Is this easy to do? Of course not, as stated by one legal commentator: "One should not expect an easy solution of the cultural relativity of ethical values."<sup>7</sup> And when those values are applied, they must be considered in the light of the specific facts and circumstances to arrive at a sound decision. Most people can agree on certain moral principles and ethical values, but the problem arises when the circumstances and the different cultural perspectives place doubt on one's judgment. A decision in such situations will always be difficult.<sup>8</sup>

Foreign business and government people often view ethical issues quite differently from the international lawyer who is expected to respond positively to their expectations. What is the best thing to do in such a situation? Should we do "what we personally believe is proper on the basis of our own standards or are we to test our standards by the morals of the country in which the behavior occurs, or the transaction will be executed, so that our clients will not be disadvantaged by us as their lawyers"<sup>9</sup> or, if at all possible, should we apply the standards of both countries?

As an example, a perception in other countries is that North American businesses and their lawyers are result-oriented, resulting in some foreign companies and their advisors thinking that all that North Americans want are fast, conclusive results without regard to ethical behavior. In order to overcome this cultural divide, "...expectations must be communicated to the [foreign] lawyer at the beginning of the engagement to the effect that results may be highly desirable, but that ethical shortcuts will not be tolerated."<sup>10</sup> In other situations, a European or North American lawyer may want to enamour his foreign hosts or he may want to get the deal no matter what the cost. His decision may therefore be to abandon the ethical standards of his home jurisdiction. Neither approach is acceptable. Good ethical conduct is always necessary in international transactions.

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<sup>7</sup> F. Northrop, *The Complexity of Legal and Ethical Experience* (Little Brown, 1959), 259.

<sup>8</sup> T. Higgins, *Man as Man - The Science and Art of Ethics* (Bruce Publ., 1958) 139-141.

<sup>9</sup> John Skogland, "Does Your Client Need Foreign Counsel?: Ethical Considerations for U.S. Lawyers Acting Abroad," 24 A.B.A. Int'l News (Fall 1995), 6-7.

<sup>10</sup> Rona R. Mears, "Ethics and Due Diligence: A Lawyer's Perspective on Doing Business With Mexico," 22 St. Mary's L.J. 605 (1991), 647. See also Jim Gibson, "In Japan Lawyers Are Elite Professionals," Nat'l L.J., (Mar. 16, 1992), 16.

The reality is that different societies and cultures have different standards of ethical conduct and respect for the law. That does not necessarily mean that one society's values are better than another, but it does mean that a lawyer must be fully aware of these differences in providing multi-jurisdictional advice:

The lawyer certainly may and should have a pragmatic awareness of such different standards in foreign countries and not attempt to gauge his American or his foreign client's conduct by standards which reflect those of the American community under all circumstances. Sometimes the American international lawyer will deem that the local standards are justified in light of the socio-cultural environment; and sometimes he may conclude that the local standards are evolving or immature and, consequently, those of the United States are appropriately to be applied because ultimately they are to be pursued anywhere in the world.<sup>11</sup>

This is the "cultural quagmire" that an international lawyer can easily find himself in. Rather than confuse the client however, the lawyer must bridge the cultural gap between societies and provide solutions which are both pragmatic and ethical. Or put another way, "The lawyer must be sensitive to the different ways of doing business in different countries and assist the client in adjusting to these different operational factors."<sup>12</sup> Some commentators even argue that it is "... the ethical duty of the international lawyer to help the client negotiate the divergent cultural and social factors underlying the legal transaction, in addition to providing the legal advice for which all lawyers are responsible -- a difficult task if the lawyer does not know it is required of him or does not know how to do so."<sup>13</sup> In support of this view, Rule 2.1 of the ABA Model Rules of Professional Conduct states that "...[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant to the client's situation."<sup>14</sup>

It is not always easy to provide such advice, but a good international lawyer is one that is able to assess cultural differences, understand the various applicable laws and then successfully apply relevant ethical values to the particular circumstances. Is there a single international ethical standard to provide guidance to lawyers, or "...by analogy to

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<sup>11</sup> Goebel, *supra*, at 50.

<sup>12</sup> Goebel, *supra*, at 20.

<sup>13</sup> Lauren R. Frank, "Ethical Responsibilities and the International Lawyer: Mind the Gaps," *University of Illinois Law Review* (Vol. 2000, No. 3), 965. See also Goebel, *supra*, at 47.

<sup>14</sup> ABA Model Rules of Professional Conduct, Rule 2.1 (2002).

international conflicts of law, is there a ‘proper ethical standard’ for an international contract or transaction, just as there may be a ‘proper law’?”<sup>15</sup>

## **2.2 Ethical Framework**

**Ethics:** *The moral principles or system of a particular leader or school of thought; the moral principles by which any particular person is guided; the rules of conduct recognized in a particular profession or area of human life.*<sup>16</sup>

Ethics are a set of moral principles, which establish rules of correct behavior and conduct.<sup>17</sup> They deal with concepts such as right and wrong, good and evil, fairness and justice.<sup>18</sup> Even though ethics are not meant to be laws, they have a significant impact on how lawyers practice law.

Laws and the lawyers that work in any legal system need to do so within an ethical framework. Failure to do so results in a legal system that is neither credible nor sustainable. If people do not believe that their legal system is fair and just, they will simply not pay any attention to it, resulting in no rule of law. That is why the legal profession pays a lot of attention to legal ethics and professional rules of conduct. As a result, they have become highly developed in Western countries where they have gained wide acceptance.<sup>19</sup>

That is not true in every country. As one international commentator has stated, “There are many jurisdictions where the rules of professional conduct are handed down from generation to generation as some kind of ‘oral law,’ uncodified and restricted to prohibitions of the most obvious conflicts of interest.”<sup>20</sup> In many countries in Africa, Asia and Latin America, there are no formal, enforceable professional codes that govern the conduct of their lawyers. As an example, the Mexican Bar Association has adopted a code of professional ethics. However, it only governs the conduct of lawyers who voluntarily join the organization and it does not have the force of law.<sup>21</sup>

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<sup>15</sup> Goebel, *supra*, at 17.

<sup>16</sup> *Shorter Oxford English Dictionary*, *supra*.

<sup>17</sup> J. D Mabbott, *An Introduction to Ethics* (London: Hutchinson Library, 1966).

<sup>18</sup> L. Pojman, *Ethics: Discovering Right and Wrong* (Wadsworth Pub., 1990).

<sup>19</sup> Daly, *supra*, at 1067.

<sup>20</sup> Ivo Caytas, *Transnational Legal Practice: Conflicts In Professional Responsibility* (New York: Commonwealth Press, 1992), 19.

<sup>21</sup> Mears, *supra*, at 611.

Even between the United States and Europe, there are significant differences in how professional and ethical standards are set. As Professor Terry noted on the conflicts provisions of the Code of Conduct for Lawyers in the European Community (CCBE Code), differences in approach most likely reflect different institutional concerns:

[T]he CCBE Code simply does not have the plethora of rules which tell the lawyer how to behave when faced with situations which may tempt the lawyer . . . . [T]he silence of the CCBE Code reflects more trust in the judgment of the lawyer and the lawyer's ability to resist temptation. In contrast to the ABA's concerns, the conflicts that the CCBE Code worries about are not the specific temptations a lawyer may face, but situations that compromise the lawyer's independence and distance from the client.<sup>22</sup>

International lawyers therefore have to make decisions and provide advice while having to apply ethical standards with subtle and sometimes significant differences between countries. Lawyers need to take these differences into account in all of their international dealings. But what standards should they apply? An international lawyer resident and practicing law in a foreign country with some recognized status in that country should at a minimum set his standard of conduct as high as that set by the rules of professional conduct for local lawyers.<sup>23</sup> But that may not be sufficient in many circumstances, especially when acting on behalf of a multinational corporation on a multi-jurisdictional basis.

Unfortunately, international lawyers generally have little ethical guidance on a global basis. There are a number of reasons for this situation:

First, many legal organizations and the public at large are concerned more with disciplining lawyers working domestically than those practicing overseas. Second, the legal bars and other international practice constituencies have expressed little urgency in expressly addressing these issues, preferring to work within a somewhat less ordered system. Third, and perhaps most importantly, because existing U.S. ethical standards are geared toward litigation and not transactional work (which comprises the majority of international practice), American lawyers working internationally have few tenets to draw upon as a base.<sup>24</sup>

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<sup>22</sup> Laurel S. Terry, "An Introduction to the European Community's Legal Ethics Code Part I: An Analysis of the CCBE Code of Conduct," 7 *Geo. J. Legal Ethics* 1 (1993), 55.

<sup>23</sup> Goebel, *supra*, at 50.

<sup>24</sup> Frank, *supra*, at 961. See also Robert E. Lutz "Ethics and International Practice: A Guide to the Professional Responsibilities of Practitioners," 16:53 *Fordham International Law Journal* (1992 - 1993), 53.

There have been some efforts to co-ordinate and harmonize professional codes of conduct and the legal profession across countries, such as that undertaken by the Council of the Bars and Law Societies of the European Community (CCBE).<sup>25</sup> According to the CCBE, despite the diversity in different countries, which make their professional rules “...inherently incapable” of “[general] application,” they “...nevertheless are based on the same values and in most cases demonstrate a common foundation.”<sup>26</sup> Similar values can be seen in U.S. codes, despite differences in the details of the rules.<sup>27</sup>

Even though there are many common values in legal ethical standards around the world, the differences in the detailed application of various codes of conduct often make them incompatible and therefore difficult, if not impossible, to apply simultaneously. The result is that international lawyers invariably tend to fall back on the professional codes and ethical standards of their home jurisdiction and try to make them work on a pragmatic basis in the foreign country where they do business.

### **2.3 Legal Framework**

**Law:** *The body of rules, whether formally enacted or customary, which a particular State or community recognizes as governing the actions of its subjects or members and which it may enforce by imposing penalties.... The profession which is concerned with the exposition of the law, with pleading in the courts, and with the transaction of business requiring skilled knowledge of law; the profession of a lawyer.*<sup>28</sup>

All countries have some sort of legal system in place with some being more sophisticated or complex than others. To provide proper advice, an international lawyer must first of all be competent in the laws of the country where he is doing business. If not, he should at least retain the advice of a qualified lawyer in the foreign law in question.<sup>29</sup> Assuming that he has such competence, he must then be prepared to deal with the ethical problems that arise in foreign contexts. Ethical dilemmas for an international lawyer concerning

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<sup>25</sup> Christopher J. Whelan, “Ethics Beyond the Horizon: Why Regulate the Global Practice of Law?” Vol. 34:931 Vanderbilt Journal of Transnational Law (2001), 934-935.

<sup>26</sup> The Union Internationale des Avocats. See CCBE Code of Conduct for Lawyers in the European Union, (1998) at 1.2.2, available at <http://www.ccbe.org>.

<sup>27</sup> Terry, *supra*, at 45-59.

<sup>28</sup> *Shorter Oxford English Dictionary, supra*.

<sup>29</sup> M. W. Janis, “The Lawyer’s Responsibility for Foreign Law and Foreign Lawyers,” 16 Int’l Law, 693 (1982), 703.

foreign law often arise when there are conflicts between the laws of different jurisdictions.

Sometimes laws are vague, inconsistent and even contradictory. That is especially so in a multi-jurisdictional situation. It is often difficult to provide clear-cut advice. Nevertheless, clients want and need guidance in making decisions under these types of circumstances. How does an international lawyer weigh the various options against the sometimes conflicting demands of different applicable laws? He invariably starts with the familiar, i.e. his home jurisdiction, and views everything from that perspective. Or he may determine that the laws of one of the jurisdictions has the most significant impact on the transaction or long term business interests of his client and therefore should take precedence over other contradictory laws. Hopefully, there is alignment amongst all these laws. But where there is variance, choices have to be made. Whatever those choices; they should be made with high ethical standards and proper conflict of law principles.

### **3. Conflicting Demands on the International Lawyer**

Aside from conflicting laws, there are a number of other conflicts that international lawyers encounter when providing legal advice. These usually arise from the sometimes differing demands of clients on their lawyers and those of society on the legal profession. As an example, both the ABA Model Rules and the CCBE Code acknowledge that a lawyer's core duties to client, court, profession, and public, can conflict.<sup>30</sup> For instance, the preamble to the ABA Model Rules states that: "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice," and that "...[v]irtually all difficult ethical problems arise from conflict" between these three responsibilities. "Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules."<sup>31</sup>

#### **3.1 Clients' Expectations**

The demands upon a lawyer first start with the client. Since the client is ultimately paying for the service, the client naturally expects that his needs are met above all others. Those expectations are quite often expressed as follows:

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<sup>30</sup> Whelan, *supra*, at 941.

<sup>31</sup> ABA Model Rules of Professional Conduct, Preamble 1 and 9 (2002).

The business world is vastly more complicated than it was five years ago. And in defining what is quality legal service what corporations do not want is an attorney who views a particular situation or proposal and says ‘you cannot do that because it is illegal, period.’ We want attorneys that start by saying ‘Maybe,’ followed by, ‘have you looked at a different approach?’ The attorney who works with you and suggest alternatives so you can still get your end result is the one who is providing quality legal services.<sup>32</sup>

North American lawyers, in particular in-house counsel, have responded to those needs and have made themselves more integrated into the business management team. The result is that they have become proactive in providing business solutions and do not limit their role to counseling clients on purely legal matters. This approach focuses on problem-solving and mixes business and legal counseling with little concern for the boundaries between them. This proactive model of lawyering stands in sharp contrast to other legal systems where it is often non-existent.<sup>33</sup>

The active participation of lawyers in business decisions can be a good thing because it results in decisions that are both workable and enforceable. But there is a potential downside in that where there are gray areas and ethical dilemmas, this “can do” attitude can sometimes cut corners and put the lawyer and his client in compromising situations. International transactions tend to have more gray areas and therefore, ethical dilemmas can easily increase in size and frequency.

Along with their companies, in-house lawyers see their organizations as global citizens. Does this result in the concept of the “global lawyer” who has no allegiance to any particular country? While it may be valid from a business perspective, the concept carries with it the danger of professional statelessness, a condition in which lawyers over time become disassociated from the legal profession’s fundamental values, such as lawyer independence. As Professor Terrell has observed, “...the lawyer’s special pledge is that he or she will help the legal system remain the centerpiece of our fragile sense of community, help it continue to function within our culture as the crucial mechanism for social cohesion and stability.”<sup>34</sup> The result may be that “...lawyering for a global

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<sup>32</sup> “Management Wants Alternatives from Its Attorneys,” *Corporate Legal Times*, July 1992, 23.

<sup>33</sup> Daly, *supra*, at 1062.

<sup>34</sup> Timothy P. Terrell & James H. Wildman, “Rethinking Professionalism,” 41 *Emory L.J.* 403 (1992), 423.

organization runs the risk of creating a new legal elite whose commitment to this understanding is, at best, tenuous and, at worst, nonexistent.”<sup>35</sup>

The pressure to meet the demand of clients can be very intense for even large global law firms. As one commentator has put it: “...[c]ompetition puts loyalty to clients at a premium. It would be professional suicide for a global firm lawyer to exercise independent professional judgment at the expense of the client’s perceived best interests.”<sup>36</sup>

There is sometimes a fine line between providing the client with what he wants and suggesting that a client disregard certain laws. As explained by one practitioner, “...while lawyers are advising their clients to obey the law, they are often finding ways to ‘wink at’ or avoid complying with local practice rules which may be unreasonable or arbitrary.”<sup>37</sup> This is maybe what the client wants to hear, but it is not the kind of advice society expects of its lawyers. The challenge for international lawyers is to meet the needs of their clients while at the same time addressing rising demands in an increasingly globalized world.

### **3.2 Society’s Expectations**

While the demands of clients on their lawyers has increased, the pressure from civil society on international companies and their advisors has also increased in intensity. International Governmental Organizations (IGO’s) and Non-Governmental Organizations (NGO’s) are requiring increased transparency and accountability from companies with regards to their investments in developing countries. To meet those expectations, corporations have begun to look at the measurement of social and cultural performance in order to demonstrate to the world at large that they are acting responsibly.

There are presently no common standardized indicators currently accepted by the business community and the majority of international companies do not at this time report on their performance in these areas.<sup>38</sup> To address this perceived shortcoming,

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<sup>35</sup> Daly, *supra*, at 1076.

<sup>36</sup> Whelan, *supra*, at 945.

<sup>37</sup> Bernard L. Greer, Jr., "Professional Regulation and Globalization: Toward a Better Balance," in *Global Law in Practice* (J. Ross Harper ed., 1997), 181.

<sup>38</sup> Alexandra S. Wawryk, "Adoption of International Environmental Standards by Transnational Oil Companies: Reducing the Impact of Oil Operations in Emerging Economies," *Journal of Energy & Natural Resources Law* (Vol. 20 No. 4, 2002), 402.

some major international oil & gas companies are starting to collaborate on the development of indicators of social performance to reflect their contribution to sustainable development, with performance measured in a number of areas, including: ethics, human rights, bribery & corruption, gender, cultural & racial diversity and political activities.<sup>39</sup>

Social reporting, which is the process of accounting, preparing and publishing information on social and cultural impacts and performance, lags well behind financial and environmental reporting. IGO's and NGO's are beginning to demand more information from companies on such issues as: corporate security arrangements involving paramilitary or government armed forces; human rights abuses; distribution of costs and benefits; environmental management in local communities; land rights of indigenous communities; discrimination in the workforce; occupational health and safety; and bribery and corruption.<sup>40</sup> Such information is presently not widely available. The World Business Council for Sustainable Development states that systems for monitoring, measuring and reporting corporate social responsibility performance through generally-accepted indicators are just being developed but will increasingly be required.<sup>41</sup>

The corporate social responsibility movement will likely gain momentum into the future and become a minimum standard rather than a voluntary undertaking. With performance in the social area being more difficult to quantify than financial performance, development of social performance and impact indicators is being championed by a number of bodies such as, the Institute of Social and Ethical Accountability (ISEA), the World Business Council on Sustainable Development and the Coalition for Environmental Economies (CERES). The Global Reporting Initiative (including the UN and the Association of Chartered Certified Accountants) are collaborating with ISEA to develop indicators and reporting standards for sustainable development, which includes social performance measures.<sup>42</sup>

The development and use of voluntary standards for best social practices, drafted by IGO's, sometimes in cooperation with international business associations, have the

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<sup>39</sup> Wawryk, *supra*, at 419.

<sup>40</sup> SustainAbility Ltd/UNEP, *The Oil Sector Report: A Review of Environmental Disclosure in the Oil Industry* (London: The Beacon Press, 1999), p 43.

<sup>41</sup> World Business Council for Sustainable Development (WBCSD), *Meeting Changing Expectations: Corporate Social Responsibility* (1998), <http://www.wbcd.ch/publications/csrepub.htm>.

<sup>42</sup> Wawryk, *supra*, at 426.

potential to ‘harden’ from ‘soft law’ into ‘binding law’. Over time, soft law can provide the foundation for binding international law, either through its incorporation into treaties, or if those standards or codes are viewed as legally authoritative by a sufficient number of countries over a period of time.<sup>43</sup>

How does this growing trend of global social responsibility impact the lawyers that advise international companies? The impact is quite simple. Ethical standards for both lawyers and their international clients are being raised. Lawyers who ignore those rising standards do so at their peril. Going forward, international lawyers will need to consider and take these rising social and ethical standards into account when advising their clients. Otherwise, they run the risk of exposing their clients and themselves to potential future liabilities.

#### **4. International Ethical Dilemmas**

Given the global nature of their practice, international lawyers tend to see the full gamut of ethical dilemmas. They run from the expected to the unexpected, from the obvious to the hidden, and from the clear cut to the often perplexing ethical dilemmas presented by an increasingly complex and globalized world. Here are a few examples:

##### **4.1 Corruption**

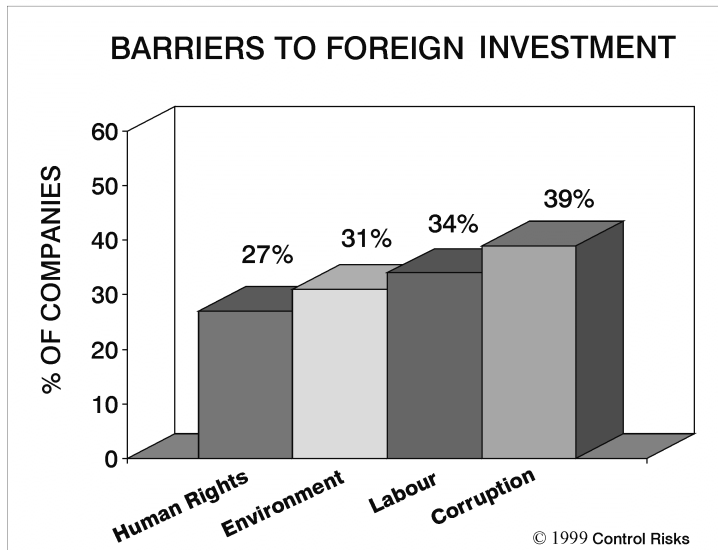
The ethical issue that consistently is at the top of international companies’ list is corruption. It has been with us since time immemorial. And in response, there is a lengthy history of laws that have dealt with it.<sup>44</sup> Unfortunately, it continues to be widespread and pervasive throughout many parts of the world. Companies encounter it on a frequent, if not daily basis. It covers the full range of business transactions. The money involved can be miniscule “petty bribes” worth a few dollars to the “grand bribery” of millions of dollars. Bribery is the most significant obstacle for multinationals in their investments in developing countries as illustrated in a survey of 50 US and 71 European multinational companies conducted by Industrial Research Bureau on behalf of

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<sup>43</sup> C. Chinkin, "The Challenge of Soft Law and Change in International Law," 38 Intl and Comp LQ (1989), 850.

<sup>44</sup> For a more complete history of corruption in both business and government, see J. Noonan, Jr., *Bribes* (New York: Macmillan, 1984); A. Timothy Martin, "Corruption and Improper Payments: Global Trends and Applicable Laws" Vol. 36, No. 2, Alberta Law Review (April 1998), 416; A. Timothy Martin, "The Development of International Bribery Law" Vol. 14, Issue 2, Natural Resources & Environment, ABA (Fall 1999), 95; Michael Levi & Monty Raphael, "Anti-Corruption – a signpost for transactional lawyers" Issue 1, Business Law International, IBA (1999) 80.

Control Risks in 1999. This survey clearly indicated that corruption is considered the most significant obstacle to investing overseas by major corporations of the world.



There has been a tremendous change in attitude throughout the world about corruption and its devastating effect on developing economies since the enactment of the U.S. Foreign Corrupt Practices Act (FCPA) in 1977. Over the last several years, a number of international anti-bribery conventions have been ratified including: the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention); the Organization of American States' Inter-American Convention Against Corruption (OAS Convention); the Council of Europe's Criminal Law Convention on Corruption and its Civil Law Convention on Corruption. The most significant of these conventions has been the OECD Convention. The result of all these anti-bribery conventions is that more than sixty countries have similar laws to the FCPA which prohibit the payment of bribes to foreign public officials.<sup>45</sup>

More work is being done on other conventions such as the Organization of African Unity Convention on Combating Corruption that could encompass another fifty countries. Finally, the United Nations Convention Against Corruption will be completed by the end of 2003. This convention will cover the entire UN membership and include such "indicative elements" as: preventive measures; preventing and combating the

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<sup>45</sup> Lucinda Low and Michael Burton, "The OECD, OAS and Council of Europe Antibribery Conventions: New International Standards and their Implications" ABA *Third Annual Symposium on the Implementation of the OECD Convention*, Bruges, Belgium (September, 2000).

transfer of funds of illicit origin derived from acts of corruption, including the laundering of funds and returning such funds; criminalization; confiscation and seizure; promoting and strengthening international cooperation; and mechanisms for monitoring implementation.

The U.S. government has been aggressively prosecuting foreign bribery cases since the adoption of the FCPA. Other international enforcement actions have begun to occur in other jurisdictions, such as Canada and Germany. The World Bank has also debarred a number of companies for violations of its Procurement and Consultant Guidelines. The result is that the potential liability to international companies continues to increase in this area.

As a result of the ratification of these conventions and the enactment of many new anti-bribery laws, there is no longer any argument that the payment of a bribe is considered an illegal and unethical act throughout the world. However, the discussion has now moved to a more detailed and subtle level of how these laws are to be implemented and enforced. Given the plethora of these anti-bribery laws, which do not always say the same thing, the ethical dilemmas have become more complex and perplexing as illustrated by the following issues.

### ***Facilitating Payments***

Since 1988, the FCPA has not applied “...to any facilitating or expediting payment to a foreign official . . . the purpose of which is to expedite or to secure the performance of a routine governmental action by [that] official,”<sup>46</sup> which would otherwise be performed in the normal course of business. The term “routine governmental action” is narrowly limited to actions ordinarily and commonly performed by a foreign official in:

- (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
- (ii) processing governmental papers, such as visas and work orders;
- (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
- (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

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<sup>46</sup> 15 U.S.C. §§ 78dd-1(b), 78dd-2(b).

(v) actions of a similar nature.<sup>47</sup>

The OECD Convention did not explicitly provide for or require facilitating payments in the implementing legislation of the signatory countries. The Commentaries of the OECD Convention stated that small facilitating or facilitation payments did not constitute payments made to obtain or retain business or other improper advantage and are therefore not an offence. However, neither the OECD Convention nor its Commentaries provided any explanation or definition of what constituted facilitating payments. The result is that different signatory countries to the OECD Convention have treated the issue of facilitating payments quite differently.

Some countries such as Canada followed the example of the United States and clearly allowed for facilitating payments. Section 3(4) of the Canadian Corruption of Foreign Public Officials Act<sup>48</sup> provides that facilitation payments do not qualify as a bribe and lays out in detail “acts of a routine nature” that would be considered facilitation payments. The categories and even the language in this section are very similar to that used in the FCPA.<sup>49</sup>

Other countries such as England, France and Italy did not provide for facilitating payments in their foreign anti-bribery legislation. As an example, the United Kingdom enacted the Anti-terrorism, Crime and Security Act 2001<sup>50</sup>, which updated the previously existing English law (the Public Bodies Corrupt Act 1889 and the Prevention of Corruption Act 1906) to conform with the OECD Convention. When considering what to address in the drafting of this new law, the UK Parliamentary Select Committee on International Development considered the use of facilitation payments by international companies. Corporate witnesses to the Select Committee agreed that grand corruption was completely unacceptable, however, they argued that facilitation payments were an unfortunate but necessary evil in doing business in foreign countries. The report of the Select Committee did not take the same view. The committee regarded facilitation payments to public officials as corrupt and could not see any distinction, except in the

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<sup>47</sup> *Id.* §§ 78dd-1(f)(3)(A), 78dd-2(h)(4)(A).

<sup>48</sup> Corruption of Foreign Public Officials Act, S.C. c.34 (1998)(Can.).

<sup>49</sup> A. Timothy Martin, “Canadian Law on Corruption of Foreign Public Officials,” *National Journal of Constitutional Law*, Vol. 10, No. 2 (June, 1999), 189.

<sup>50</sup> The Anti-Terrorism, Crime and Security Act 2001 (c.24, Part 12) (U.K.).

size of the sums involved, between these and payments of large secret “commissions” to government servants or politicians for the purpose of gaining new business.<sup>51</sup>

This opinion is reflected in the official position of the United Kingdom as stated in one of their government’s websites:

Why doesn’t the UK law exclude facilitation payments?

- We do not think it desirable for UK law to apply differently overseas to the way it applies in the UK. That admits a double standard: we do not tolerate ‘facilitation payments’ to UK officials and clearly we should outlaw such payments in all equivalent countries. The realities of life in different countries vary, but we see no formal way of distinguishing one country from another.
- Blanket exemptions are always liable to misuse, and we do not think it appropriate to make an exemption for ‘facilitation payments’. However, we do not envisage any circumstances in which the making of a small ‘facilitation’ payment, extorted by a foreign official in countries where this is normal practice, would of itself give rise to a prosecution in the UK. The making of such payments may well, however, be illegal under the law of the country concerned.<sup>52</sup>

Whatever the reasoning behind the UK Government’s position on this issue, legal practitioners are faced with a clear dilemma when providing advice on facilitation payments if a government has in effect said: “We have intentionally decided to not make facilitation payments legal but we also have no intention of prosecuting anyone for making such a facilitation payment.” A number of ethical problems arise from this situation.

As an example, a U.S. or Canadian company has an improper payment policy which explicitly allows for facilitating payments as defined in their home jurisdiction law (U.S. or Canada). The company runs its overseas businesses through a number of foreign subsidiaries for financial and tax reasons, some of which are incorporated in England or in protectorates of the United Kingdom (such as the Channel Islands, Bermuda or the Bahamas). These companies are subject to English law. The company also has a number of British expatriates employed as senior managers by their UK subsidiaries in foreign countries with high levels of corruption. Has the company broken English law by allowing facilitating payments in its corporate policies throughout its corporate structure (including the UK subsidiaries) and its business practices in foreign countries? Are the British employees at personal risk if they follow the corporate policy and participate in

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<sup>51</sup> John Sissons, “Corruption: Bribery Overseas Now a Crime in the UK” *Energy Exchange* (Winter 2002), 3.

<sup>52</sup> [http://www.tradepartners.gov.uk/corruption\\_overseas](http://www.tradepartners.gov.uk/corruption_overseas).

making facilitating payments? And is the company liable for allowing its British employees to engage in such practices? And finally, all of the company's international joint venture and service agreements provide for the exception of facilitating payments in their anti-bribery clauses and invariably have English law as the substantive law of the contract. Are these contracts valid and enforceable if facilitating payments, which may be in breach of English law, are made under such contracts?

A straightforward solution to all of these questions is for the company to simply eliminate the exception of facilitating payments from its corporate policy and require that all of its employees worldwide do not make any payments of value to any government official, at any time, anywhere. Some corporations have adopted this kind of policy for a number of reasons such as: facilitating payments are difficult to define and control, concern about memorializing their breach of foreign laws in their codes of conduct and books of account, possible violation of the laws of the country where their subsidiaries are based, and widespread facilitating payments set a permissive tone which invites more and greater demands.<sup>53</sup> However, there are some disadvantages to this approach. Firstly, it does not reflect the reality of how even the smallest things get done in developing countries. Secondly, it forces many employees with performance targets to hide these activities or pay for them out of their own pocket. Thirdly, it drives the problem down the supply chain. Major international companies may be able to say no. However, their suppliers, especially the small local ones, may not be so fortunate. When that happens, you lose control of the problem. And finally, there are significant policy reasons to question this approach: people's time and resources should be focused on the "grand bribery" which is only now being addressed on a multilateral basis. It is not realistic to expect that authorities will spend the necessary millions of dollars to investigate and prosecute a facilitating payment. In effect, it becomes a law that will not be enforced and potentially not taken seriously.

Therefore, some companies prefer to take a more pragmatic approach and have decided to continue to allow facilitating payments. How do they then address these ethical questions? They continue to have a consistent policy throughout their corporate structure, because to administer different policies is unworkable and would undermine the legitimacy of allowing facilitating payments in the non-UK parts of the organization. The company then advises its British employees that they should not make facilitating

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<sup>53</sup> See Alexandra Addison Wrage, *The High Cost of Small Bribes*, (TRACE International Inc., 2003).

payments if they are uncomfortable with them and if that prevents them from doing their job effectively, the company will provide them job opportunities in other areas that do not have corruption risks. And finally, the company contracts? They simply need to be drafted without reference to facilitating payments. The Association of International Petroleum Negotiators' (AIPN) Model Service Contracts provide some good examples and explanations of how to properly draft such clauses.<sup>54</sup>

### ***Agents***

One of the most difficult areas to deal with in international business is the retention of foreign agents or business representatives. It is fraught with risk through the concept of vicarious liability.<sup>55</sup> A good corporate compliance program would ensure that prior to retaining a foreign agent, the company conducts a thorough due diligence prior to retaining the agent.<sup>56</sup> Given that it consists of researching character references in opaque societies, it often turns into a frustrating exercise. That is especially true when serious allegations of misconduct are made from questionable sources. What is the lawyer supposed to do with this kind of information? He cannot ignore it but, at the same time, he may not be able to directly confront the potential agent with the information since it could put the source of information at risk and, in any event, the agent will likely deny the allegation which is probably unprovable. Given the questionable nature of the information, are there grounds to recommend against retaining the agent and proceeding with the transaction? The determination of whether the business deal is legal and ethical depends upon the facts, the parties involved, how the transaction is structured and the level of risk the client is prepared to tolerate. These are never easy decisions. The lack of transparency in many developing countries and the questionable quality and accuracy of personal information will always make this due diligence process an exercise in assessing risk.

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<sup>54</sup> <http://www.aipn.org/> See Guidance Notes for International Model Service Contracts, pp. 54-56 and Article 21.5 in both the Model Well Services Contract and the Model Seismic Acquisition Contract.

<sup>55</sup> H. Lowell Brown, "Parent-Subsidiary Liability Under the Foreign Corrupt Practices Act," *Baylor Law Review*, Vol. 50:1 (1998).

<sup>56</sup> For a good due diligence process, see generally Alexandra Addison Wrage, *The TRACE Standard: Doing Business with Intermediaries Internationally*, (TRACE International Inc., 2002).

### ***Litigation Risks***

There are a number of disputed cases where companies have retained agents and entered into contracts with them which provided for the payment of large bonuses upon the company successfully winning business. Problems then occurred when the companies discovered or suspected that the bonuses were going to be used to pay a bribe to the government official involved. Interestingly, the companies seemed to come to that realization after they had won the government contract but prior to paying the agent's bonus. The companies then stopped payment on the grounds that it was an illegal act and, naturally, the agent demanded payment of the bonus and sued for breach of contract.

There is a published U.S. case<sup>57</sup> that has dealt with this issue. United Technology signed agent agreements with several Argentine citizens for work on a project in Argentina. When United Technology discovered that the Argentines had engaged in violations of the FCPA, United Technology terminated the relationship and refused to pay commissions under the contracts. The terminated agents sued for breach of contract and other claims. Although the plaintiffs were ultimately unsuccessful on their common law claims, and received only nominal damages in their claim under a state statute relating to unfair trade practices, substantial punitive damages were awarded along with attorneys fees after United Technology endured a five-week jury trial.

There are a number of international arbitration cases dealing with the same issues that have had varying results.<sup>58</sup> There have been approximately 20 reported international arbitration cases dealing with corruption over the last forty years. These cases revolve around the same kinds of issues as elaborated in the *Fabri* case, i.e., the company who retained the agent refused to pay the fee on the grounds that the payment of a bribe was against international public order resulting in the contract being invalid and unenforceable. The agent would then initiate an international arbitration as provided in the dispute resolution clause of their contract demanding payment of the fee. These disputed contracts primarily had a European law as the substantive law of the contract. There was wide variation in the arbitration decisions, often with the same kind of facts.

These decisions invariably turned on the evidence or lack of it. The arbitral tribunals had problems getting the facts when both parties were allegedly participating in

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<sup>57</sup> *Fabri v. United Tech. Int'l, Inc.*, 193 F.Supp. 2d 480 (D. Conn. 2002).

<sup>58</sup> A. Timothy Martin, "International Arbitration and Corruption: An Evolving Standard," *International Energy and Minerals Arbitration*, Paper No. 12 (Rocky Mt. Min. L. Fdn. 2002).

the corrupt activity. Certainly in all of these cases, bribery was difficult, if not impossible, to prove. The arbitral tribunals were therefore forced to rely on circumstantial evidence and clues, if they wished to pursue the issue. Some of the arbitral tribunals decided not to pursue the issue on their own. They felt it was strictly the responsibility of the alleging party, who in the end was not able to provide sufficient evidence and overcome their burden of proof.

These arbitrations illustrate the risk of using a claim of bribery as a defence against an agent looking for his bonus or fee under the contract. Firstly, the defendant company is potentially exposing itself to future criminal prosecution if its defence in the civil action (or arbitration) is successful. Secondly, if the arbitral tribunal dismisses the defence and finds the contract valid, they have potentially validated an illicit activity. This is always possible given the difficulty in proving or disproving such allegations. Thirdly, there is a certain amount of inequity in the tribunal finding in favor of the defendant company since the company was successful in winning the contract from the government but the agent did not get paid for doing what the company asked him to do.

When faced with such a situation, what is the best ethical advice that an international lawyer should provide his client? Once again, it depends on the specific facts and circumstances and the evolving ethical standards expected of companies on a global basis.

Another kind of litigation risk in the area of foreign bribery is when ex-employees claim they were fired because they refused to participate in a bribe or they were put at risk because the company did not pay a bribe. In a recent civil action against Baker Hughes, a former Colombian employee of Western Atlas, which was acquired by Baker Hughes in 1998, alleged that the company put him and his family in danger by failing to honor its commitment to pay bribes to one of the guerrilla groups in Colombia. The former employee claimed that the company paid at least \$0.5 to \$1 million in protection money to the guerrilla groups. The suit further alleged that after the takeover, Baker Hughes initially condoned the payments until its accountants' objected. Guerrilla groups are not considered "foreign officials" under the FCPA even though the plaintiff characterized the payments as "illegal."<sup>59</sup> What is the ethical thing to do: ensure the safety of employees or succumb to extortion and bribes? The answer is simply not that

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<sup>59</sup> Lisa M. Landmeir, et al, "Anti-Corruption International Legal Developments," Volume 36, No. 2, The International Lawyer (Summer, 2002), 599.

straightforward. These dilemmas are best handled by having a well thought out game plan in place rather than reacting to an impossible situation, as illustrated in the next section on Human Rights dealing with *guerrilla* groups in Colombia. Good legal advice should be pragmatic, flexible and anticipatory, while ensuring that ethical standards are met.

## **4.2 Human Rights**

The area of human rights is fraught with many risks, including ethical ones, for the international lawyer. Over the years, multinational corporations have worked in countries with poor human rights records; more recent ones of note include the Sudan, Angola, Nigeria, Indonesia, Myanmar and Colombia. Human rights have been violated in a number of countries by both government security forces and rebel groups with innocent civilians caught between the crossfire. Under increasing pressure, oil & gas companies have been forced out of some of these countries. In the Sudan, Chevron left nearly twenty years ago after making two major discoveries and then decided that the security and human rights risks were simply too great.<sup>60</sup> Recently, Talisman was forced to divest its interest in the Greater Nile Production Operating Company in Sudan under intense pressure from various NGO's.<sup>61</sup>

Sometimes the decisions around this issue are quite simple. Is your company or client prepared to work in a zone of conflict or with a regime known for its abuse of people? Sometimes the situation is more complex. Even though there are conflicts and people are being injured or killed, your client sees it is as manageable and is prepared to deal with the risk. Having made that decision, the reality is that the safety of a company's employees and the security of its infrastructure and assets are now exposed. And quite often the only organization it can deal with to manage those risks is the government, through its military or police forces, the very same organization that opposition groups or NGO's will likely criticize for being the actual perpetrators of the violence. What is the ethical thing to do and how does a lawyer advise on dealing with foreign governments on such matters? Especially since the government is usually the only legal entity that the client can deal with in the country.

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<sup>60</sup> "Chevron Corporation of the US Appears to be Preparing to Abandon All its Operations in Sudan," The Guardian (July 23, 1984), 16.

<sup>61</sup> Edward Alden, "Canadian Oil Group Asked Sudan Army to Remove Villagers," Financial Times (March 22, 2002), 12.

Companies operating in such areas first need to be aware of international human rights standards<sup>62</sup> and should incorporate best practices concerning security into their operating practices and agreements with the government.<sup>63</sup> The international business community is beginning to work with the UN and other IGO's to establish templates for how to manage risk in conflict zones, such as the Global Compact project.<sup>64</sup> The security, legal and ethical risk for these kinds of projects can be managed properly by using these tools. Otherwise, bad decisions can be made that would not only be viewed as unethical but bad for the long term business interests of the client.

Human rights organizations have tried to show that international companies exercise control over the military forces in countries where they operate and should be held accountable for the human rights violations committed by such security forces by suing under the U.S. Alien Tort Claims Act (ATCA).<sup>65</sup> Recent well known cases include Unocal in Myanmar,<sup>66</sup> Shell in Nigeria<sup>67</sup> and ExxonMobil in Indonesia.<sup>68</sup> The Unocal

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<sup>62</sup> International standards on human rights are found in the Universal Declaration of Human Rights and in six international human rights treaties: International Conventions on Economic, Social and Cultural Rights/Civil and Political Rights/ Elimination of All Forms of Racial Discrimination/Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment/Elimination of All Forms of Discrimination against Women/Rights of the Child. Further information can be found on the website of the Office of the United Nations High Commissioner for Human Rights <http://www.unhcr.ch/html/intlinst.htm>.

<sup>63</sup> Special attention should be given to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Rome Statute of the International Criminal Court; the U.N. Principles on the Use of Force and Firearms; and the U.N. Code of Conduct for Law Enforcement Officer. For further information, see US-UK voluntary principles on security and human rights [www.iblf.org/humanrights](http://www.iblf.org/humanrights) and [www.bsr.org](http://www.bsr.org); see also UN Draft Fundamental Human Rights Principles for Business Enterprises [www.umn.edu/humanrts/links/principles11-18-1001.htm](http://www.umn.edu/humanrts/links/principles11-18-1001.htm)

<sup>64</sup> Details on the Global Compact can be found at [www.unglobalcompact.org](http://www.unglobalcompact.org). For further information see "The Business of Peace: the private sector as a partner in conflict prevention and resolution", International Alert, Council on Economic Priorities and the Prince of Wales Business Leaders Forum, 2000 [www.international-alert.org](http://www.international-alert.org) and "Beyond Voluntarism: Human rights and the developing international legal obligations of companies", International Council on Human Rights Policy, 2002, [www.ichrp.org/107/1.pdf](http://www.ichrp.org/107/1.pdf)

<sup>65</sup> Demian Betz, "Holding Multinational Corporations Responsible for Human Rights Abuses Committed by Security Forces in Conflict Ridden Nations: An Argument Against Exporting Federal Jurisdiction for the Purpose of Regulating Corporate Behavior Abroad," Vol. 14, DePaul Business Law Journal (Fall 2001), 163

<sup>66</sup> Doe v. Unocal, 963 F. Supp. 880 (C.D. Ca. 1997). Doe v. Unocal, 110 F. Supp. 2d 1294 (C.D. Ca. 2000), *aff'd*, Doe V. Unocal Corp., 248 F. 3d 915 (9<sup>th</sup> Cir. 2001).

case was the first time a U.S. court recognized that a corporation could be held liable for torts committed in violation of the “law of nations.” Unocal and its partner, Total, a French company, entered into agreements with the Myanmar military to provide security for its gas pipeline project in the country. The action was initiated on behalf of Burmese farmers in the project area who alleged that Unocal was liable for human rights abuses, including forced labor, committed by the military under the joint venture with the Myanmar government; even though Unocal did not directly participate in the alleged abuses. In the Shell case, Royal Dutch Shell was accused of actively participating in the execution of Ken Saro-Wiwa, a Nigerian human rights activist and author, and other human rights abuses in the Ogoni region of Nigeria. The plaintiffs alleged that Shell Nigeria directed Nigerian security forces to attack local villages and put down the opposition led by Mr. Saro-Wiwa to Shell’s operations. The ExxonMobil case centered on their massive Arun liquefied natural gas (LNG) project in Indonesia’s Aceh province in northern Sumatra. The plaintiffs alleged that ExxonMobil conditioned its payments to the Indonesian government under their Production Sharing Contract on the Indonesian military providing security services to the project and that ExxonMobil controlled and directed the activities of these military units which committed human rights abuses. The plaintiffs argued that ExxonMobil was jointly and severally liable for all of the abuses committed by the Indonesian security forces on the Arun project.

Human rights organizations have sued these U.S. energy companies under ATCA for several reasons: these companies automatically fall under U.S. jurisdiction, they have deep pockets, and the actual perpetrators of the alleged abuses, the foreign government’s security forces, are unreachable. The essence of these ATCA lawsuits is that U.S. courts are being used to force companies to “either control the behavior of their military security forces or cease entering into such ventures altogether.”<sup>69</sup> These cases are essentially misguided since they are attempting to impose U.S. law on foreign countries while claiming to apply international law, they are trying to hold American companies accountable for the actions of their host government’s security forces while under international law the security of sovereign nations is the exclusive domain of the host government, and finally, the individuals who supposedly commit such atrocities, the

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<sup>67</sup> *Wiwa v. Royal Dutch Petroleum Co.*, 226 F. 3d 88 (2d Cir. 2000), *cert. denied*, 121 S. Ct.1402 (2001).

<sup>68</sup> *Doe v. ExxonMobil Corp.*, Case No. 01-CV-1357 (filed 06/19/01) (D.C. Civ.).

<sup>69</sup> *Betz*, *supra*, at 188.

security forces themselves, go unpunished.<sup>70</sup> In effect, these ATCA cases do not address the underlying problem and prevent human rights violations. Indeed, they discourage many responsible multinational companies from investing in such countries resulting in these countries losing out on the opportunity to raise their economic standards and improve governance and transparency.

To look at this problem from another perspective; instead of working with government security forces that are ineffective in *guerrilla* country in Colombia, as an example, should a multinational corporation deal with organizations such as the FARC or the ELN that actually control the country side? There are a number of risks in doing this even though it is an easy thing to fall into. Firstly, it is illegal under Colombian law to collaborate with and fund *guerilla* groups. Secondly, you get on a perpetual treadmill of extortion. Thirdly, even though technically this would not likely be a breach of the FCPA or other anti-bribery laws, the company is potentially exposing itself to the type of corruption allegations and litigation illustrated in the Baker Hughes case above. The best advice is for the client to work from the beginning with the local community rather than the *guerrillas* who cannot operate without the support of that community. The company also needs to work closely with the government's military and police forces to ensure that human rights are respected within the company's "sphere of influence." This is not easy to do in some countries; however, the time and effort must be made to educate legitimate security forces on human rights standards and the proper use of force. The international lawyer needs to consider the cultural differences, provide pragmatic advice and foresight on how to implement such arrangements and ensure that the ethical decision is made.

#### **4.3 Sanctions and Export Controls**

Sanctions and export controls are political and economic tools used by certain countries to advance their foreign policy and national interests. They are occasionally used by multilateral organizations, such as the UN, when a broad consensus forms in the international community to punish rogue states. Sanctions tend to be directed at particular countries or groups, and export controls apply to a broad range of transactions based on the nature of the products or technology being transferred.

The U.S. government has been the most aggressive government to use such economic tools. At any one time, it may have nearly a dozen countries targeted in its sanctions programs, such as Afghanistan, Angola, Burma, Cuba, Iran, Iraq, Libya, North

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<sup>70</sup> Betz, *supra*, at 202, 192 and 193.

Korea, Sudan, Syria and Yugoslavia, along with non-government entities, such as terrorist organizations and individuals and narcotics traffickers.<sup>71</sup> European countries and other nations have imposed sanctions on similar countries, but usually as a result of UN security resolutions, such as those imposed on Iraq and Libya.

But sanction regimes are not universally accepted, especially when they are unilaterally imposed. In response, the concept of “blocking laws” has been developed. The United States first pioneered blocking measures in 1977 in response to the Arab boycott of Israel. The U.S. antiboycott statute, incorporated into the Export Administration Act of 1979, effectively blocks the application of the Arab boycott against U.S. firms doing business with Israel by prohibiting U.S. persons from complying with such requirements.<sup>72</sup>

On a number of occasions, other foreign governments have reacted very negatively to the extra-territorial nature of U.S. sanctions programs and have either protested vigorously or put in place their own blocking measures using the U.S. anti-boycott template to counteract U.S. policy goals and limit interference with their own nationals’ trade and investment. For example, the prohibition on third-country trade with China by U.S.-controlled foreign companies was litigated in France and resulted in major disputes with Canada and European countries until that prohibition was ended in 1971. Later in 1982, the U.S. government barred foreign subsidiaries and licensees of U.S. companies from providing foreign-made equipment to a gas pipeline project from the Former Soviet Union (FSU) to Western Europe. European allies protested so much that it potentially undermined the NATO alliance. Within a few months the U.S. withdrew the pipeline sanctions. However prior to this withdrawal, the government of the United Kingdom issued blocking orders under the Protection of Trading Interests Act of 1980, the first such actions to nullify U.S. foreign sanctions and the model for later actions in Canada, Mexico and the European Union.

Similar conflicts have arisen with Canada, several Latin America countries and some European countries as a result of the Cuban Assets Control Regulations of 1963 and the Cuban Democracy Act of 1992. The latter law prompted widespread foreign protest

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<sup>71</sup> Edward J. Krauland and Del Renigar, “U.S. Economic Sanctions: An Overview of Legal Requirements and Compliance Issues,” *Economic Sanctions*, ABA Center for Continuing Legal Education (2001), B-43.

<sup>72</sup> See Recommendation on U.S. Extraterritorial Foreign Trade Controls Proposed by the Council of the Section of International Law and Practice of the American Bar Association (August 4, 1998).

and led to the adoption of blocking measures in both Canada and the United Kingdom. Those blocking measures prohibited British and Canadian companies respectively, notwithstanding their ownership by U.S. persons, from complying with the U.S. embargo of Cuba, thereby placing such companies at risk of violating either U.S. law or the law of the country of their nationality. The Canadian government significantly strengthened their blocking order after the passage of the Helms-Burton Act under their Foreign Extraterritorial Measures Act<sup>73</sup> which blocked foreign judgments, provided for “claw-back” recovery of Helms-Burton litigation judgments and expenses, and increased penalties for violations of blocking orders. Despite the posturing, there has been little actual conflict between the two governments. As stated by one commentator: “Canadian-American policy differences over Cuba remain unresolved. However, the impasse is one our respective governments and international business communities have managed to live with, notwithstanding clearly conflicting laws between our two jurisdictions and equally antithetical positions on their appropriate reach.”<sup>74</sup>

Similarly, Mexico enacted a broad blocking measure in 1995, targeting not only the Helms-Burton Act, but all similar foreign extraterritorial measures characterized as being in contravention of international law. It incorporated similar principles as the Canadian legislation. Finally, the Council of Ministers of the European Union approved legislation in 1996 that prevented nationals of member states from complying with specified foreign extraterritorial foreign trade control measures, including the U.S. embargo of Cuba, the Helms-Burton Act and the Iran and Libya Sanctions Act. It permitted “claw back” recovery in the courts of member states of economic losses sustained by the application of such extraterritorial measures.

Inevitably, such sanctions and counter-measures create conflicting legal obligations which can create ethical dilemmas for international lawyers. What laws should you advise your client to comply with? If you are a U.S. lawyer advising a U.S. company, the answer is quite simple: comply with U.S. law. But in a multi-jurisdictional transaction with parties from many different countries, the situation becomes more complex. The type of advice will likely revolve around such factors as the citizenship, residency and nationality of the client. But is it ethical for a U.S. lawyer to advise a non-

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<sup>73</sup> Foreign Extraterritorial Measures Act, R.S.C., c. F-29 (1984) (Can.) (as amended).

<sup>74</sup> H. Scott Fairley, “Relating to and Doing Business with Cuba: A Canadian Perspective,” Vol. 36, No. 4, *The International Lawyer* (Winter 2002), 1118.

U.S. client on how not to comply with U.S. sanctions law? Indeed, it may be considered a form of illegal facilitation that is subject to criminal and civil sanctions under U.S. law. And would it be unethical or illegal for a Canadian lawyer to advise his client to comply with Canadian law but not U.S. law, or vice versa? These dilemmas become especially acute when companies want to “push the envelope” to gain competitive advantage. The appropriate advice will depend on the particular facts and circumstances. No matter how you look at the situation, this area is a legal minefield and one therefore needs to proceed with caution and a good compass. Thankfully, given the rarity of cases prosecuted in this area and the unwillingness of most governments to directly confront each other on such blocking laws, the actual dilemmas have been limited and international lawyers have been spared, for the most part, from choosing sides.

#### **4.4 Environment**

Emerging environmental standards have begun to present ethical dilemmas to global lawyers and their clients. This is especially true in developing countries where regulatory standards are unclear or non-existent. Companies can sometimes be uncertain on what environmental standards to apply to their operations because of ambiguity or lack of direction from regulatory authorities. Ambiguity arises from the existence of many guidelines throughout the world, of varying detail and sophistication, so that there is no one international guideline that can be easily pointed to as representing ‘internationally acceptable practice.’ Some commentators have suggested that a possible solution to the choice of guideline to be used as evidence of ‘best practice’ is to require companies to refer to the most stringent guidelines of the industry association of which they are a member, such as in the energy industry, the International Association of Oil & Gas Producers (OIGP) or the American Petroleum Institute (API).<sup>75</sup> But that solution does not always work that well when the regulatory framework is unclear and the regulatory authorities do not even know where to begin, such as in the emerging and complex area of offshore decommissioning.

In determining the legal and regulatory framework for offshore decommissioning, the international lawyer first looks to the national law of the country of operations, and then to regional and international conventions. The legal issues revolve

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<sup>75</sup> Wawryk, *supra*, at 431-432.

around the removal and disposal of offshore installations.<sup>76</sup> The international legal framework on offshore decommissioning has developed over the last fifty years and is still evolving. On the international front, there are three major conventions and one set of non-binding guidelines that apply to the removal and disposal of offshore installations.<sup>77</sup> The first major international convention concerning the *removal* of offshore installations is the 1958 United Nations Geneva Convention on the Continental Shelf (Geneva Convention)<sup>78</sup> Its critical provision is Article 5(5), which states that: “Any installations which are abandoned or disused must be *entirely removed*.” The second major convention concerning the *disposal* of offshore installations is the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Dumping Convention).<sup>79</sup> It is now generally accepted that the abandonment or disposal of a structure (such as an offshore platform) at sea, either totally or partially, is considered dumping under the definition of the London Dumping Convention. The third international convention is the 1982 United Nations Convention on the Law of the Sea (LOS Convention)<sup>80</sup> which specifically provides for decommissioning, in particular the *removal* of offshore installations. In contrast to the Geneva Convention, the LOS Convention in Article 60(3) requires simple “removal”. The term “entirely” has been omitted. The LOS Convention thus recognizes, albeit implicitly, that partial removal is permissible under certain circumstances. By so providing, the two Conventions have imposed conflicting treaty obligations on signatory countries.

The “generally accepted international standards” provided in Article 60 of the LOS Convention were issued in 1989 by the International Maritime Organization (IMO)

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<sup>76</sup> *Removal of Offshore Installations: A Compilation of International Rules, Guidelines and Standards* (London: OGP) 1993. *Decommissioning Offshore Oil & Gas Installations: Finding the Right Balance* (London: OGP) 2000.

<sup>77</sup> M. A. Ayoade, *Disused Offshore Installations and Pipelines: Towards Sustainable Decommissioning* (London: Kluwer Law International, 2002). P. Cameron, *Decommissioning of Oil & Gas Installations: The Legal and Contractual Issues* (Dundee: Research Paper for Association of International Petroleum Negotiators, 1998). Z. Gao, “International Law of Offshore Abandonment: Recent Development, Current Issues and Future Directions”, in Z. Gao (ed.), *Environmental Regulation of Oil and Gas* (London: Kluwer Law International, 1998).

<sup>78</sup> Geneva Convention on the Continental Shelf 1958, 52 *AJIL* (1958) 858.

<sup>79</sup> London Convention on the Prevention of Marine Pollution by the Dumping of Wastes and Other Matter, 11 *ILM* (1972) 1302. *The London Dumping Convention: The First Decade and Beyond* (London: International Maritime Organization, 1991).

<sup>80</sup> UN Convention on the Law of the Sea, 10 December 1982, 21 *ILM* (1982) 1261.

in the form of the IMO Guidelines and Standards for the Removal of Offshore Installations and Structures on the Continental Shelf and in the Exclusive Economic Zone (IMO Guidelines).<sup>81</sup> They impose a general removal principle on coastal states requiring that all disused installations and structures should be entirely removed, except when special circumstances consistent with the Guidelines can be shown to apply.

Most of the offshore decommissioning in the world has occurred in the U.S. Gulf of Mexico and a detailed regulatory regime has developed there over the years. A number of decommissionings have been completed in the North Sea but each one has been unique given the technical and environmental challenges in that area. The most controversial North Sea decommissioning was the Brent Spar case where Shell was forced to stop their decommissioning plans because of intense NGO pressure that negatively impacted their reputation even though they were acting fully within the regulatory framework.<sup>82</sup>

In other parts of the world, there has been little or no decommissioning activity. For instance, there have been no offshore decommissionings in West Africa. This leads to a number of technical challenges and ethical dilemmas to international oil and gas companies on how best to proceed with offshore decommissioning in that region.

The regional convention for West Africa is the Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region (Abidjan Convention)<sup>83</sup> and covers the coastal area from Mauritania to Namibia inclusive. Article 4.3 requires the Contracting Parties to “establish national laws and regulations for the effective discharge of the obligations prescribed in this Convention.” There is no specific mention in the Abidjan Convention to the decommissioning, removal or disposal of offshore installations, infrastructure, platforms or pipelines.

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<sup>81</sup> IMO Guidelines and Standards for the Removal of Offshore Installations and Structures on the Continental Shelf and Exclusive Economic Zone, IMO Resolution A. 673 (16) adopted 19 October 1989.

<sup>82</sup> Stelios Zyglidopoulos, “The Social and Environmental Responsibilities of Multinationals: Evidence From the Brent Spar Case,” Vol. 36, No.1/2, *Journal of Business Ethics* (March 2002), 141. David Knott, “Brent Spar Drama Turns into Legal Farce,” Vol. 93, No. 22, *Oil & Gas Journal* (May 29, 1995), 18. “Shellman Says Sorry,” *The Economist* (May 10, 1997) at 65.

<sup>83</sup> Abidjan Convention for Co-Operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region 1981, 20 *ILM* (1981) 746.

Given the significant size of its petroleum industry, Nigeria is a good example of how challenging the management of this issue can be. Nigeria has ratified all three international conventions and the Abidjan regional convention. It is also a member of the IMO. However it has not, up to this time, incorporated any of the various conventions' requirements into its own laws.<sup>84</sup> Oil and gas companies are therefore faced with an uncertain approval process for offshore decommissioning in Nigeria. Two of the international conventions which Nigeria has ratified contradict each other on the ability to partially *remove* offshore facilities. Nigerian law does not even contemplate it. None of the international conventions or Nigerian regulations address the proper plugging & abandonment of offshore wells. International law does address the requirements for the *disposal* of offshore structures but Nigeria does not have any process whatsoever to properly deal with this matter. Neither the international conventions nor Nigerian regulations provide detail on how to handle drill cuttings. The same is true for pipelines that may be decommissioned and left *in situ*. The regional convention is simply silent on all of these issues. On all of these matters, Nigerian law simply requires the approval of the Director of Petroleum Resources without any guidance on what is required or how to obtain the necessary approvals. Under these circumstances, what is the appropriate advice that a lawyer should provide?

It would be easy to take advantage of the situation and advocate a low environmental standard for the decommissioning process. But that would be ethically wrong and would be taking unfair advantage of a government that was unfamiliar with international standards. Given the complexity of the subject, the lack of guidance in some of the international conventions and the fact that best practices are only beginning to emerge, a consultative process with the government should be advocated. The company should be prepared to work out a regulatory process with the government that achieved proper environmental standards and allowed the removal and disposal of the offshore facilities in a pragmatic and economical manner.

There are also sound business reasons for taking this approach. Leading international companies are preparing tools such as environmental impact assessments,

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<sup>84</sup> M. A. Igiehon, "Preparing for Abandonment in Nigeria," 4 OGLTR (1998) 146. L. Aldeitan, "Maritime Law Impacts on Offshore Oil and Gas Development," Nigerian Energy Digest (2001), 10. Y. Omorogbe, "The Legal Framework for the Production of Oil in Nigeria", 5 JENRL (1987), 274. C. E. Emole, "The Relationship of Law and Policy in the Petroleum Industry in Nigeria", 3 OGLTR (1997), 91.

even when national laws do not require them, as “a hedge against future liability for failing to meet international standards.”<sup>85</sup>

#### **4.5 Labor**

U.S. and European manufacturing companies have been criticized and boycotted for the unsafe and unhealthy conditions in which their laborers work, in particular in their subcontractors’ factories. They have addressed this issue by demanding that their suppliers meet basic health and safety standards. But now they have a bigger labor problem looming: debt bondage. Workers move from poor countries such as the Philippines, Vietnam and Thailand to manufacturing countries such as South Korea, Taiwan and Malaysia. They do this through labor brokers located in both the country of origin and the country of employment who gouge the workers through broker fees, retain their passports, impose curfews and deduct compulsory savings bonds, or “run-away insurance”, which workers only get back when they complete their contracts.<sup>86</sup>

Energy companies are not typically faced with these dilemmas because their work force tends to be highly educated and trained. This is true for not only expatriate employees, but also for the national workforce in their country of operations. On the rare occasions that it does surface, it tends to be confined to low end local service suppliers and it can usually be addressed by insisting upon stringent safety and health standards.

Instead, energy companies encounter ethical dilemmas concerning labor matters in developing countries around the discriminatory hiring practices of nationals. These practices usually do not originate from the companies themselves. Indeed, most international companies have policies that clearly prohibit such discrimination and which typically have the following kinds of principles: “Extend equal opportunity and fair treatment to all employees without regard to their race, color, religion, national origin, sex, age, disability, veteran status or other characteristic protected by law.”<sup>87</sup>

The difficulties arise when host governments insist upon certain levels of local employment. Companies typically are quite supportive of the nationalization of their workforce. The problem occurs when only certain types of nationals are put forth for employment by government officials and the companies are discouraged, and sometimes

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<sup>85</sup> G. Pring, J. Otto and K. Naito, "Trends in International Environmental Law Affecting the Minerals Industry (Part I)," 17 JERL 39 (1999), 55.

<sup>86</sup> Nicholas Stein, “No Way Out” Vol. 147, No. 1, Fortune (January 20, 2003), 102.

<sup>87</sup> GE Code of Conduct “Integrity: The Spirit & the Letter of Our Commitment.”

even prevented, from hiring from other groups of people, in particular other religions or women.

What kind of legal advice should be proffered when the company's hiring policies are being tested? What is ethical to do: get along with senior government people who control the company's ability to operate in a country or champion minority rights? Companies tend to feel that discretion is the better part of valor. They do their best to accommodate the request of government officials (both formal and informal) and at the same time recruit as many of the best qualified people they can regardless of race, religion or gender. Companies tend to pursue diplomacy and compromise with the hope of making a positive impact on the community rather than take a confrontational approach with government officials and try to impose its set of values on a different culture.

## **5. Conclusion**

International lawyers need to consider many things when dealing with ethical issues on a global basis. The issues are quite often complex, the complete facts undeterminable and the answers not very forthcoming. There are no absolute standards of conduct to apply, just different cultural perceptions and values to consider. In such situations, lawyers need to keep in mind their overarching responsibility to the world they live in, as exemplified by the ABA Model Code of Professional Responsibility: "When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal systems and the legal profession."<sup>88</sup>

When it is not easy to discern the proper conduct that promotes such public confidence, the international lawyer needs to stop and ask himself some simple questions:

- Are you treating others, as you would want to be treated?
- Would you be comfortable if your reasoning and decision were printed on the front page of tomorrow's paper?
- Would you be comfortable if your children were observing you; are you setting the example you preach?<sup>89</sup>
- Have you discussed the issue with colleagues whose opinion you respect?

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<sup>88</sup> ABA Model Code of Professional Responsibility, Ethical Consideration 9-2, August 1980.

<sup>89</sup> Michael Josephson, "Ethical Obligations and Opportunities in Business: Ethical Decision Making in the Trenches" Josephson Institute of Ethics, 1990.

In the end, some simple reality checks, plain common sense and good values go a long way to determine the right thing to do for anyone, including the most experienced global lawyer.

## *APPENDIX*

### **Guideline: Ethical Principles for the Global Lawyer**

- International ethical issues should be considered in their total cultural, social and legal context.
- There are common values in all societies; however, there are differences in how societies' perceive and apply these values, even in relatively similar cultures.
- Ethical standards evolve in response to the concerns of individual societies and global trends.
- Ethical decisions in international business are never easy. They are usually complex, difficult and often arise in opaque circumstances.
- There is no single international ethical standard for lawyers but there is ongoing convergence on major principles.
- Ethical codes are not formalized or enforced in many countries and are often not helpful to international lawyers in establishing an acceptable ethical standard.
- The most relevant ethical standards to international lawyers are usually those of their home jurisdiction or the jurisdiction whose laws have the most significant impact on the business transaction.
- International lawyers need a strong sense of personal values and a solid moral compass in their dealings. They need to be honest, fair and show integrity in all of their dealings.
- International lawyers should be flexible, open-minded and culturally sensitive while applying high ethical standards.
- International lawyers must properly balance their duties to the client, and the societies and legal systems in which they practice by exercising good professional and moral judgment.
- International lawyers must be aware of changing international social standards and appropriately incorporate them into their advice.

- International lawyers must bridge the cultural gap for their client and provide solutions that are both pragmatic and ethical.
- International lawyers should be aware of the standard of conduct required by the rules of professional conduct for lawyers in the country of the transaction and avoid any potential conflict where appropriate and possible.
- International lawyers must be competent in the laws of the country where they do business or use competent advisors for such country.
- When in doubt, stop and ask yourself some simple questions:
  - \* Are you treating others as you would like to be treated?
  - \* Are you comfortable if your decision was on the front page of the newspaper?
  - \* Are you comfortable if your child observed your actions?
  - \* Have you discussed the issue with colleagues whose opinion you respect?