

# INTERNATIONAL LAW

QUARTERLY

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**Focus on Haiti**

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## International Law Quarterly

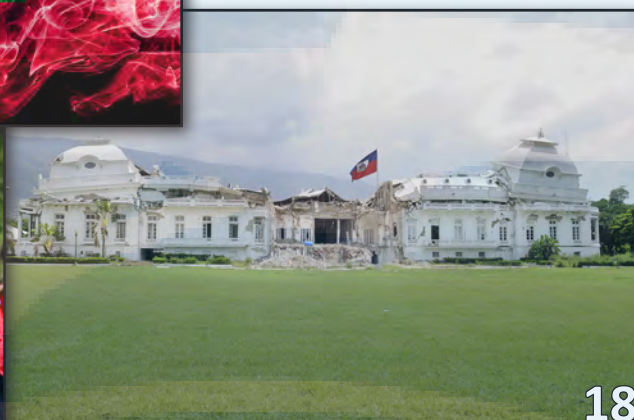
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## Features

### 12 • How the Abuse of Extraordinary Rendition Is Staining the United States' Image Abroad While Weakening the Rendering Countries' Institutions: The Case of Haiti

The United States' uninhibited use of extraordinary rendition under the wide umbrella of the preservation of its national security, particularly in instances where alternative avenues are available to reach the same goal, is staining the country's image abroad. It is also, in no smaller measure, undermining the moral stance that often serves as the justification for the United States' actions on the international scene, while weakening the rendering countries' institutions. The case of Haiti is particularly illustrative of that unfortunate state of affairs.

### 14 • Addressing the Roots Cause of Migration for Haitians: Seeking Safety in a New Land

Migration is a global phenomenon that affects many countries and people around the world. Understanding the root causes for the migration might assist in developing strategies to effectively develop responses that will allow individuals to remain in their country. Moreover, such a process can help decrease the percentage of people leaving their home countries in search of new homes where they must adapt to new cultures and establish a new way of life. For years Haitians have been migrating from Haiti to countries such as the United States, Dominican Republic, Canada, and Europe. There are many contributing factors for such migration, and in this article, we outline a few of those factors. Specifically, this report highlights five main factors influencing migration (safety, economic, environmental, social, and international influences), the psychological impact of such migration, and the transition to the host country. We conclude with some recommendations for consideration.

### 16 • The Fight for the Rule of Law in Haiti Is the Fight for a Just Society

Haiti has once again made international headlines with the assassination of President Jovenel Moïse in his residence and a

major earthquake just weeks apart. The news of Moïse's death in July 2021 capped four tumultuous years of governance marred by continued corruption, insecurity, and social mobilization. Against this backdrop, this article will explore the constant challenges to, and undermining of, the rule of law in Haiti, which has become both commonplace and customary from the citizenry to the presidency.

### 18 • The Effectiveness of Policies in Times of Crisis: Disaster Law & Policy in Haiti

Haiti has a long history of reliance on humanitarian assistance to help victims of major natural disasters that have stricken the country. Recently, on 17 August 2021, a 7.2 magnitude earthquake killed thousands of people and destroyed houses and major infrastructure in the South of Haiti. In this article, we will explore the challenges of delivering humanitarian assistance after the 2021 earthquake. Further, we will highlight the opportunities the Haitian government can use to reinforce its legal framework to protect the humanitarian workers and the victims and to facilitate efficient delivery of relief.

### 20 • Service of Process Considerations When Confirming International Arbitration Awards

Although arbitration continues to gain popularity in Latin America and the Caribbean, there are no standardized service of process rules. Countries in the region have differing service of process rules and requirements that may run afoul of due process concerns under U.S. law. In this article, we will examine how service of process laws of the arbitral seat can affect the confirmation of an arbitration award in the United States under the New York and Panama Conventions, as discussed in the recent Eleventh Circuit decision of *Guarino v. Productos Roche S.A.*, involving a Venezuelan arbitral award. Specifically, when countries have different or conflicting service of process laws, this could trigger the exception regarding proper notice under Article V(1)(b) of the Conventions.





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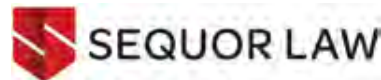
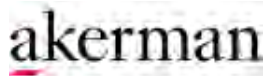
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# Message From the Chair

## Spread the Word!

Quite a few years ago, I had the pleasure of attending a springtime backyard barbecue at a private residence in Washington, D.C. Unbeknownst to me and without any announcement or fanfare, I found myself dining in a very informal atmosphere with none other than Supreme Court Justice Anthony Kennedy. Although I was initially quite starstruck, it did not take him long to disarm me and my companions with his intellect, charm, and wit. He also engaged us by asking about our law practices in Miami. When I told him about the international focus of our work, I had hardly finished before he pulled from the inside pocket of his blue blazer a personalized bookmark captioned “The Rule of Law” that he had signed at the bottom. As he handed this paper to me and my colleagues, he said in a sincere voice, “This is an important message, and I would like you to help me to spread the word.” I have kept that bookmark prominently displayed on my desk ever since.

The text of the marker reads:

1. The Law is superior to the government, and it binds the government and all officials to its precepts.
2. The Law must respect and preserve the dignity, equality, and human rights of all persons. To these ends the Law must establish and guard the constitutional structures necessary to build a free society in which all citizens have a meaningful voice in shaping and enacting the rules that govern them.
3. The Law must devise and maintain systems to advise all persons of their rights, and it must empower them to fulfill just expectations and seek redress of grievances without fear of penalty or retaliation.

*Justice Anthony M. Kennedy*



JAMES M. MEYER

So simple but, as Justice Kennedy said, so important, as society cannot function properly and decently without it. Democracy, freedom, and human rights cannot exist unless there is rule of law. Yet, somehow, as we keep learning the hard way, rule of law is so easy to take for granted.

I am proud that the editorial board of the *International Law Quarterly* (ILQ) decided to dedicate this issue of our premier periodical to the topic of Haiti, as I believe that, by doing so, they are adhering to Justice Kennedy’s advice of “spreading the

word” about the importance of the rule of law to protect and defend fundamental human rights, which the people of Haiti are entitled to enjoy to the fullest extent possible.

On 7 July 2021, President Jovenel Moïse of Haiti was assassinated at the Presidential Palace, leaving no clear successor, a Senate without a quorum (as two-thirds of the senators had already served out their full terms with no new elections being held since), a doubtful capacity to hold a viable election with the confidence of the people for the foreseeable future, and with the highest court in the land being without a leader due to Chief Justice René Sylvestre’s passing from COVID-19. Less than a year earlier, the president of the Port au Prince Bar Association, Monferrier Dorval, was also assassinated, shortly after making public comments critical of the Haitian government.

Clearly, like the vast majority of the countries in the world but perhaps most severely, Haiti has not been able to enjoy what Justice Kennedy defined as the rule of law. Without the rule of law, the good people of Haiti will continue to be deprived of their fundamental human rights.

Since its inception until now, Haiti has received international advice and intervention on this topic (and

## Message From the Chair, continued

many others), probably more than any other country, all of which seem to have just made matters worse, not better.

For purposes of context, while the world today debates reparations for slavery, Haiti's history is truly shocking. In order to gain independence, the newly formed government of Haiti was forced to agree to pay reparations not to the victims of slavery but to the perpetrators, and in amounts so great as to keep the country hopelessly and perpetually in debt for many generations to follow. This resulted in fertile ground for rampant corruption, authoritarianism, and exploitation for centuries. With a start like that, can we really be surprised at some dysfunctionality in Haiti's Rule of Law today? All of this, not to mention some of the globe's most horrific natural disasters, which the good people of Haiti have had to mercilessly endure.

So, what could possibly be the solution to these generational and seemingly insurmountable issues? Obviously, there are no easy answers; however, I would respectfully submit that the amazing success of the Haitian diaspora here in Miami and elsewhere in the

world is strong evidence that the best thing we can do for Haiti is to support the Haitian professionals who have dedicated themselves to building a better Haiti, for Haiti, by Haitians. For that reason and many others, The Florida Bar International Law Section and the editorial board of the *ILQ* are very grateful to the Haitian Lawyers Association and Ayiti Community Trust for their contributions, participation, and scholarship in the preparation of this issue of the *ILQ*, which we are always so proud of but, perhaps, are even more proud of this time around. Haiti is blessed to have them, along with the incredible legal and professional brain trust that they and their respective organizations represent.

With that in mind, I would like to dedicate this issue of the *ILQ* to the courageous and tenacious lawyers and professionals in Haiti and around the world who continue to fight for human rights and the rule of law, sometimes at their own peril. Spread the word!

**James M. Meyer**  
**Chair, International Law Section of The Florida Bar**  
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# From the Editors . . .



LAURA M. REICH



ANA M. BARTON

On Wednesday, 7 July 2021, we awoke to the news that Haitian President Jovenel Moïse had been killed, and his wife seriously injured, when heavily armed assassins stormed the couple's home in Pétion-Ville, a suburb of Port-au-Prince. Following the early morning attack, police tracked the assailants to a house near the scene of the crime where a number of people were captured following a firefight. Of the twenty-eight suspects, police identified twenty-six as Colombian and two as Haitian-American mercenaries from Florida. Financing for the operation is believed to have been arranged, at least in part, in Miami, Florida.

The editorial team at the *International Law Quarterly* (*ILQ*) was naturally shocked and saddened as we watched the unfolding situation in Haiti, which is roughly the same distance from Miami as Atlanta, Georgia. A month prior, the editors had decided on a different focus for this *ILQ* edition, but on the morning of 7 July, we made a change. As emails were exchanged between the executive board of the International Law Section (ILS) and the *ILQ* editors, we decided to focus this *ILQ* edition on Haiti. We were fortunate that ILS Chair Jim Meyer was already in contact with the Haitian Lawyers Association (HLA) and its president, Vladimir St. Louis, whose assistance made this edition possible. The decision to focus on Haiti was made even more timely and important when only a month later, Haiti was literally rocked by a different kind of crisis—a 7.2 magnitude earthquake that struck the southwestern Haitian coast causing large-scale and widespread damage.

In this edition, the *ILQ* will highlight the situation in Haiti and voices of Haitians in our legal community. In our Quick Take, HLA Vice President Veronique Malebranche gives us "A History of Haitian Independence" followed by Frandley Julien's thoughts on how the extraordinary

rendition process in Haiti is damaging the United States' image abroad. Next, Vanessa Joseph, Guerda Nicolas, and Leila Duvivier offer thoughts on the root causes of Haitian migration as Haitians seek safety in lands other than their own.

In "The Fight for the Rule of Law in Haiti," Johnny Celestin and Regine Theodat argue that the rule of law in Haiti is critical to a just Haitian society. HLA Chair-Elect Nadine Gedeon and Vanessa Abdel-Razak offer "The Effectiveness of Policies in Times of Crisis: Disaster Law and Relief in Haiti." Also in this edition, the *ILQ* continues its attention to arbitration with Ana Malave and Sylmarie Trujillo's article, "Service of Process Considerations When Confirming International Arbitration Awards."

The *ILQ* editors and the ILS want to offer their heartfelt thanks to Vladimir St. Louis, the HLA, and its board of directors, several of whom have contributed articles. We look forward to working with you in the future. This edition is dedicated to the Haitian people, who have faced tragedy over and over again, yet remain dedicated to building a better future.

Respectfully,

Laura M. Reich  
Ana M. Barton  
co-Editors-in-Chief



I would like to thank James Meyer, chair of the International Law Section (ILS) of The Florida Bar; the ILS; Laura Reich and Ana Barton, co-editors-in-chief of the *International Law Quarterly* (*ILQ*); and the entire editing team of the *ILQ* for inviting HLA and its members to write articles regarding various topics affecting Haiti.

Over the past decades, Haiti has faced numerous issues across all spectrums including economic, environmental, political, social, and academic. It is important that we as legal practitioners across the globe take notice and take the time to share our insights and opinions as to how Haiti can take steps to strengthen its infrastructure and legal system by promoting the rule of law.

Thank you for reading, and I hope you enjoy this publication of the *ILQ*.

Vladimir St. Louis  
President  
Haitian Lawyers Association







# QUICK TAKE

## A History of Haitian Independence

By Veronique Malebranche, Miami

Located in the Caribbean Sea, Haiti occupies the western third of Hispaniola, the island it shares with Dominican Republic. Its population is estimated to be roughly 11.4 million, making it the most populous country in the Caribbean today. Established in 1804 and once known as the “Pearl of the Antilles,” Haiti is rugged and mountainous with a tropical climate. Haiti is a dynamic and powerful mix of African, Taino, and European cultures, which is evidenced in the Haitian language, music, and religion. Haiti’s culture and history are complex, with stories of resistance, revolt, instability, and different levels of corruption. Its main language is Haitian Creole, a French-based language established in the seventeenth century from contacts between French colonists and African slaves. French, known as Haiti’s second official language, was imposed on the country as the language of commerce when France occupied the country, and it continues to be spoken by a small percentage of Haitians today.

### Early History and European Discovery<sup>1</sup>

The island was initially inhabited by the indigenous Taino people originating from South America and who based their survival on farming, fishing, and inter-island trade in gold, pottery, jewelry, and other goods. In 1492, Christopher Columbus arrived from Spain and named the island *La Isla Espanola* (The Spanish Island), later known as Hispaniola. Columbus sailed around the island on Christmas Eve in 1492. He journeyed with two of his three ships, *La Nina* and *La Santa Maria*. One of those ships, *La Santa Maria*, was shipwrecked. Hearing there was gold on the island, Columbus—who was interested in acquiring as much gold as possible—decided to leave his crew with his wrecked vessel in search of gold. A year later, he set sail in the ship *La Nina* in the company of a third ship, *La Pinta*. Soon after, *La Pinta* went missing



for six weeks and is thought to have disappeared off the coast of Cuba. Columbus suspected the captain of the vessel, Martín Alonso Pinzón, to have deliberately caused *La Pinta* to vanish so that he could leave for Spain to be the first to return to Spain with the news of Columbus’s voyage. Soon after, aboard *La Nina*, Columbus brought the existence of Haiti to the attention of the Spanish Catholic monarchs.

Two centuries later, Spain ceded the western third of Hispaniola under a treaty to France, which formally renamed it as the French colony of Saint-Domingue,



## Quick Take, continued

which would last from 1659 to 1804. Starting in the mid-sixteenth century, French pirates invaded the island and established bases there. With African slaves working the fields under France's reign, the economy evolved and developed rapidly, resulting in Saint-Domingue becoming France's richest colonial possession, exporting coffee, sugar, cotton, and cacao. During that time, the developing Haitian society was gravely fragmented by skin color, gender, and societal class. According to the 1788 census, the population consisted of approximately 25,000 Europeans, 22,000 free colored people, and 700,000 African slaves.

### Haitian Revolution<sup>2</sup>

Led by former slave Toussaint Louverture, Haitians successfully fought the French and obtained their independence, ended slavery, and removed French forces. The success of the Haitian Revolution is known as the largest and most victorious slave rebellion in the Western Hemisphere.

Louverture the son of an educated slave, later became a prominent leader of the Haitian Revolution. Louverture wrote and spoke French poorly and obtained only limited French knowledge, speaking mostly Haitian Creole and an African tribal language. Seeing the black slaves' success in overthrowing French slave owners, Napoleon Bonaparte, the French emperor, attempted but failed to capture Louverture to reinstate slavery and bring back French control. Haiti's independence was not recognized internationally until 1804, resulting in an extremely complex social and political history.

The French refused to accept defeat at the hands of a country composed primarily of black slaves. In 1825, nearly two decades after winning its independence, Haiti was forced to pay an enormous amount of money as "reparations" to the French slaveholders it had overthrown. France demanded compensation of 150 million Francs in exchange for Haiti's freedom and for its loss of slaves during the revolution. In 1838, France agreed to reduce the debt to 90 million Francs to be paid over thirty years. Despite winning its freedom, this price tag on Haiti's freedom caused the country to face

severe financial problems and forced Haiti to borrow money from several countries as well as from French banks.

By the late 1800's, 80% of Haiti's wealth was being used to pay foreign debts to France, Germany, and the United States. In all, Haiti's crippling debt took 122 years to be paid off in full. This debt—referred to as an "indemnity" at the time—severely damaged the country's ability to have a prosperous and wealthy future. Falling victim to extortion is a heavy price to pay for freedom.

### The U.S. Occupation and Its Aftermath<sup>3</sup>

The United States had a profound interest in controlling Haiti following the Haitian Revolution to protect and defend U.S. political and financial interests. Unfortunately, Haiti was considered a threat by many countries as black slaves successfully rebelled against slaveholders to obtain their independence. Following the assassination of the Haitian president in July 1915, U.S. President Woodrow Wilson sent the U.S. Marines into Haiti to maintain political and economic stability and to protect U.S. interests in the country. Indeed, the United States ruled Haiti as a military regime encouraged by American business interests.

The U.S. occupation continued until 1934. During that time, three Haitian presidents were assassinated and two major rebellions resulted in thousands of Haitians being killed or having their human rights violated by the U.S. military. During this time, Haitians continued to face poor living conditions and financial challenges. In 1929, a series of uprisings led the United States to begin withdrawal from Haiti. In 1934, the United States officially withdrew from Haiti while retaining economic connections.

The U.S. presence in Haiti led to the concentration of power in the hands of a minority of wealthy Haitians, primarily the French-cultured mulatto Haitians or "oligarques." This establishment of power continues today, leading to the majority of underprivileged Haitians to resent wealthy Haitians, whom they view as the face of the country's widespread corruption under the watchful eyes of powerful countries.

## Quick Take, continued



**Veronique Malebranche** was born in Haiti. After 15 years, Ms. Malebranche moved to Miami with her family. She is a graduate of Florida International University where she earned a bachelor's degree in international business, followed by a JD from St. Thomas University School

of Law. As an assistant city attorney with the city of North Miami, Ms. Malebranche works on a variety of cases such as eminent domain, contracts, slip and falls,

negligence, and more. In addition to prosecuting cases, Ms. Malebranche is lead counsel at code enforcement hearings. She is the vice president of the Haitian Lawyers Association and a fellow of The Florida Bar Leadership Academy.

#### Endnotes

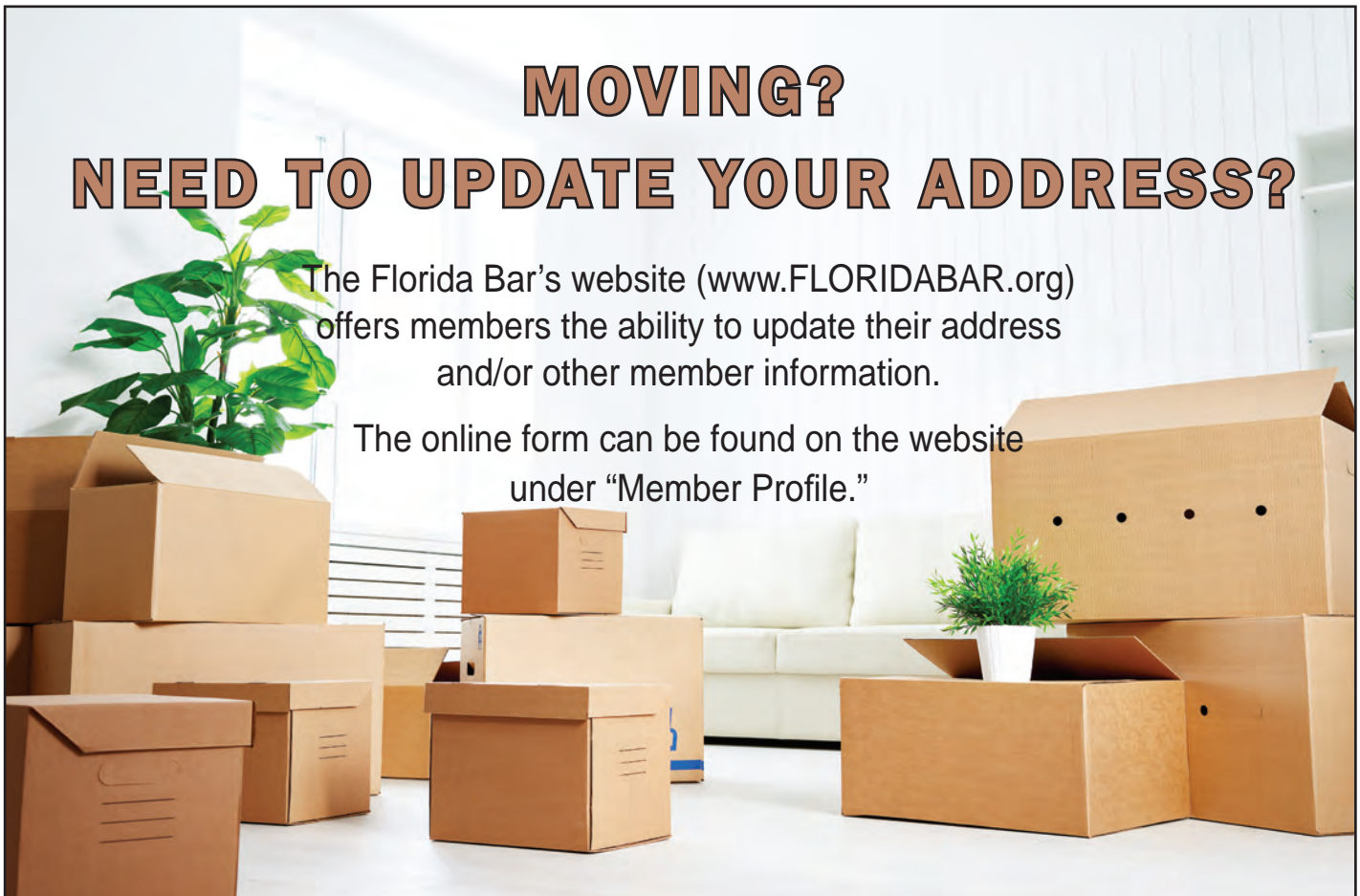
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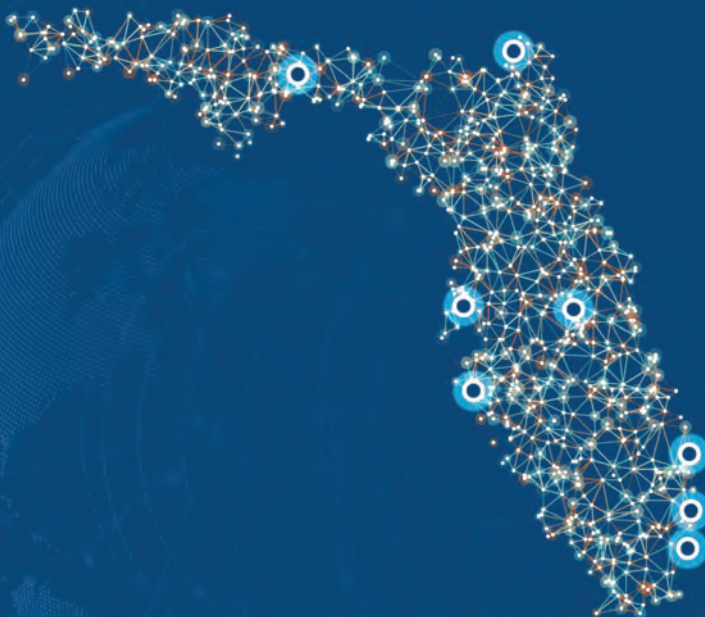




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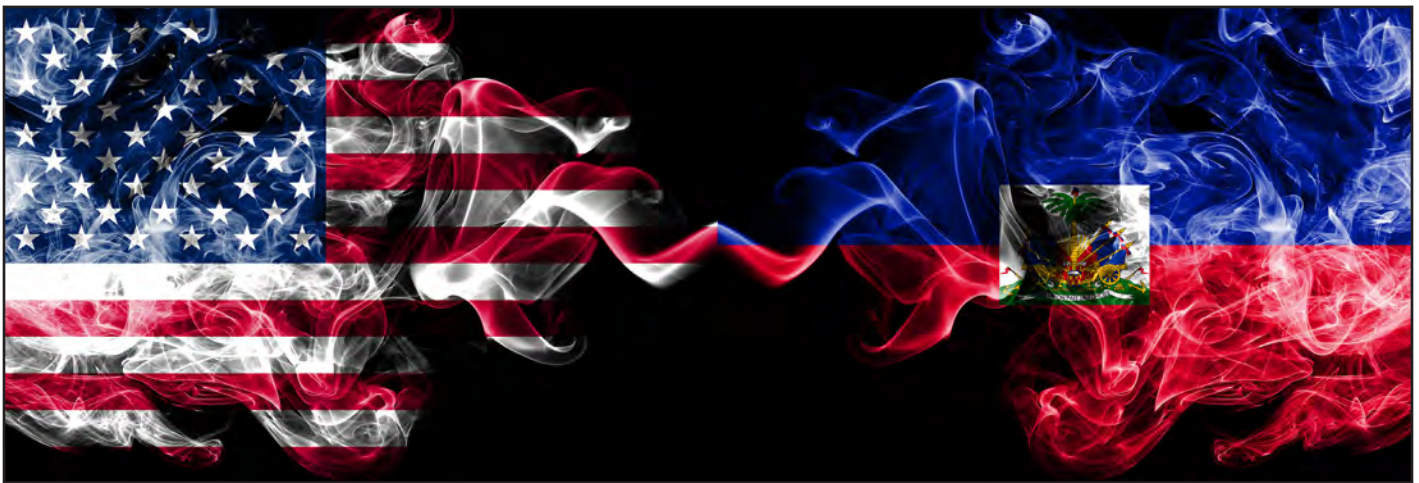
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# How the Abuse of Extraordinary Rendition Is Staining the United States' Image Abroad While Weakening the Rendering Countries' Institutions: The Case of Haiti

By Frandley Julien, North Miami Beach



The United States' uninhibited use of extraordinary rendition under the wide umbrella of the preservation of its national security, particularly in instances where alternative avenues are available to reach the same goal, is staining the country's image abroad. It is also, in no smaller measure, undermining the moral stance that often serves as the justification for the United States' actions on the international scene, while weakening the rendering countries' institutions. The case of Haiti is particularly illustrative of that unfortunate state of affairs, for reasons that will be developed below.

According to data furnished by Haiti's Brigade to Fight Drug Trafficking (BLTS, from its French acronym), from 2002 to 2019, eighty-two individuals were transferred from Haiti to the United States through extraordinary rendition. A large portion of these individuals were former government or police officials involved in drug trafficking, with money laundering as an ancillary charge. These operations are symptomatic of the United States'

tendency, on the international scene, particularly while dealing with weak countries, to apply a thin legal veneer on what are in fact extrajudicial military operations. But the issue does not lie therein. In a world where extremism is ubiquitous, one cannot expect the United States to always play by the book in its pursuit of evasive enemies with stealthy tactics. Sometimes, reality dictates swift action.

Nevertheless, the twofold issue with the abuse of extraordinary rendition by the United States in the Haitian context, is that first, the two countries have an extradition treaty that entered into force on 28 June 1905, and second, Haitian authorities are always eager to oblige whenever Washington asks. Why not use the extradition treaty then? The extradition treaty covers crimes like piracy, forgery, bigamy, etc., but not drug trafficking and money laundering, the two main crimes for which Haitian criminals have been brought to the United States through extraordinary rendition.

## The Case of Haiti, continued

### The United States at Odds With Its Own Laws and Defining Principles

Regrettably, instead of amending the treaty to include modern crimes, the United States prefers to conduct business in Haiti as if it is the Wild West. As a result, each seizure involves many violations not only of the captured individuals' rights, but also of Haiti's domestic law. In the process, the perception of a United States whose *modus operandi* is "might makes right" is reinforced in the court of public opinion.

Unfortunately, this is not the only issue caused by the abuse of extraordinary rendition. Said abuse puts the United States at odds with its own internal laws, particularly the Alien Tort Statute. Indeed, as far back as the 18<sup>th</sup> century, U.S. legislators expressed the need for U.S. courts to serve as fora to noncitizens wanting to lodge claims for violations of human rights that occurred abroad. This laudable intent materialized itself through the enactment, in 1789, of the Alien Tort Statute (ATS), a U.S. law that gives the federal courts jurisdiction to hear lawsuits filed by non-U.S. citizens for torts committed in violation of international law. Unfortunately, in the furtherance of extraordinary renditions, U.S. authorities, officers, and agents find themselves on the wrong side of the very law that was supposed to affirm their country's commitment to human rights in the world. Sadly, most detainees brought to the United States through extraordinary rendition may have a cognizable claim for the violation of their rights against U.S. authorities, agents, and officers, under the ATS.

Moreover, in its abuse of extraordinary rendition, the United States finds itself, in the Haitian context, in the dual position of judge and defendant. Indeed, every year in its annual Country Reports on Human Rights Practices,<sup>1</sup> the U.S. Department of State includes a report sanctioning the Haitian authorities' performance on human rights. Such reports are taken so seriously by immigration judges in the United States during asylum proceedings that, should an immigration defense attorney fail to submit them on behalf of their clients, the court, *sua sponte*, takes judicial notice of them. Awkwardly, in the furtherance of extraordinary rendition

on the island, U.S. agents should have been listed as human rights violators for depriving the subjects of extraordinary rendition of their rights to due process.

Predictably, the position of U.S. courts is an attempt at an *ex-post facto* legitimization of the action of U.S. agents. U.S. courts tend to adjust their opinions on the actions of the Executive Branch in international matters and have done so through a slew of decisions, notably *Sosa v. Alvarez-Machain*,<sup>2</sup> 542 U.S. 692. The position is that absent acts so horrible in nature that they should shock the conscience of humankind, U.S. courts will exert jurisdiction over detainees brought before them through extraordinary rendition. In other words, the fruit of the poisonous tree, once transplanted on U.S. soil, becomes edible.

### A Heavy Toll on Haiti's Already Weak Institutions

Corruption is so rampant in Haiti that those involved in drug trafficking, kidnappings, money laundering, and similar crimes seldom get apprehended, and when they do, it does not take long before a corrupt judge—of which there's no shortage on the island—restores them to their pristine reputation. As a result, honest businesspeople cannot compete with their corrupt counterparts, and law-abiding citizens can hardly scrape together a living in an economy distorted by dirty money. Therefore, each time the United States captures a criminal, much of society rejoices, and hopes for some deterrent effect, since the local justice system is broken.

The issue then becomes the toll these U.S. operations take on an already weak judicial system because extraordinary rendition makes those apprehended look like the innocent victims of an imperial power acting in the margin of the law, whereas we all know they are not because they generally make a poor job of hiding their crimes, and the vast majority of them end up pleading guilty in U.S. courts. Nevertheless, those living on Haitian soil are afforded certain constitutional guarantees, among which is the right to appear before a judge within forty-eight hours of an arrest. Had the United States

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# Addressing the Roots Cause of Migration for Haitians: Seeking Safety in a New Land

By Vanessa Joseph, Guerda Nicolas, and Leila Duvivier, Miami

**M**igration is a global phenomenon, and the research is clear that people migrate from their country of origin to another country for many reasons. Most people do not want to leave their home country voluntarily. Understanding the reasons that people feel forced to migrate can help decrease the number of people leaving their home countries searching for a new land to call home.

Over the last two decades, safety issues have risen in Haiti, which have caused migration to increase as many seek asylum in other countries. These issues include violence, economic hardship, and political persecution. Individuals often look for freedom and the opportunity to live without such stressors, causing them to seek alternative residences to improve their lives. This is true for many Haitians who are migrating to other countries in the Caribbean, Latin America, and

Europe. These issues must not be overlooked as we seek to understand the reasons why many immigrants, including Haitians, are migrating to the United States and other countries.

According to a 2020 report, although Haitian immigrants currently account for less than 2% of the foreign-born population in the United States, this number has been increasing over the years. For example, in 2010, there were 587,000 documented Haitian immigrants in the United States, and this number increased to 687,000 in 2018, accounting for a 17% increase.<sup>1</sup> This does not include the 55,000 individuals granted Temporary Protection Status after the 2010 earthquake.<sup>2</sup> In this article, we focus on (1) the root causes of migration, (2) the psychological impact of migration, and (3) the transition to a new country. The article concludes with some recommendations.





## Seeking Safety in a New Land, continued

### Roots Causes of Migration: An Overview

There has been much research focusing on why many individuals leave their country of origin to migrate to another country. Consistently, these studies have highlighted four main factors associated with the migration of individuals from their home country, all of which are relevant to Haitians: (1) safety, (2) economic, (3) environmental, and (4) social. In addition, we identify a fifth factor, international influences. Below we provide a summary of each of these and their relevance to the Haitian community.

#### 1. Safety Factors

Issues of safety associated with the perception of an individual's heightened sense that their life is in danger are one of the main reasons for the migration out of one's country. Several issues may threaten the life of someone, including persecution and discrimination associated with religious or political affiliation. Irrespective of the issue, the individuals are often looking for the opportunity to live a freer life without such stressors. In addition, formal war and informal gang activities are two other safety factors that may lead to individuals feeling in danger and thus leaving their country. While Haiti was historically a place of freedom for many who sought to be free, the last couple of decades have shown the opposite. Issues of occupations and war as well as the increasing rate of gang activities in the country have led to many people of all ages fleeing for a safer environment.

Following the 2010 earthquake in Haiti, women were essentially excluded from the assessment of the various effects of the earthquake as well as from any considerations of the effects of the disaster on society and the responses they could potentially require.<sup>3</sup> As tent cities sprang up across the capital, women, who were already a vulnerable population, were increasingly victims of gender-based violence, especially after being displaced by the earthquake. Even more troubling is the lack of current statistical data to illustrate just how pervasive the issue of gender-based violence is amongst women and girls. A 2006 study revealed that

sexual violence against women and girls was a common occurrence, even before the earthquake.<sup>4</sup>

According to the Haiti Gender Shadow Report (2010), "the earthquake served to exacerbate existing inequalities . . . . Years of systemic gender discrimination have exposed the women of Haiti to higher rates of poverty and violence—and the disaster, too, has proved anything but neutral. Both overrepresented among the poor and responsible for meeting the basic needs of the vast majority of the population—including infants, children, the elderly and the thousands of newly disabled people—women have consequently suffered disproportionately in the post-earthquake environment."<sup>5</sup> The report reminds us that by not considering the ways that disasters disproportionately affect women, we risk further exacerbating the issue of safety throughout the country.

#### 2. Economic Factors

Another commonly cited reason for permanent or seasonal migration is economic hardship. Individuals move from poorly developed countries to richer ones in the hopes there will be more employment opportunities and higher wages.<sup>6</sup> Despite the country's cultural richness, Haiti is often described as the "poorest country in the western hemisphere" due to the country's economic challenges. According to the World Bank, "With a Gross Domestic Product (GDP) per capita of US\$1,149.50 and a Human Development Index ranking of 170 out of 189 countries in 2020, Haiti remains the poorest country in the Latin America and Caribbean region and among the poorest countries in the world."<sup>7</sup> While many challenges (*i.e.*, hurricanes, earthquakes, social and political unrest) contribute to this conclusion, the economic disparities and inequalities must not be overlooked. The Gini coefficient, which is based on the income aggregate of a country, placed Haiti at .61 in 2012, indicating that 20% of the richest of the population controls 64% of the country's total income.<sup>8</sup> Furthermore, the recent report put Haiti's poverty rate at 60% in 2020 compared to 58.5% in 2012.<sup>9</sup> An added

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# The Fight for the Rule of Law in Haiti Is the Fight for a Just Society

By Johnny Celestin, New York City, and Regine Theodat, Croix des Bouquets, Haiti



*“... the end of law is not to abolish or restrain, but to preserve and enlarge freedom: for in all the states of created beings capable of laws, where there is no law, there is no freedom: for liberty is, to be free from restraint and violence from others; which cannot be, where there is no law: but freedom is not, as we are told, a liberty for every man to do what he lists: (for who could be free, when every other man’s humour might domineer over him?) but a liberty to dispose, and order as he lists, his person, actions, possessions, and his whole property, within the allowance of those laws under which he is, and therein not to be subject to the arbitrary will of another, but freely follow his own.” — John Locke*

## Introduction

Haiti has once again made international headlines with the assassination of President Jovenel Moïse in his residence and a major earthquake just weeks apart. The news of Moïse’s death in July 2021 capped four tumultuous years of governance marred by

continued corruption, insecurity, and social mobilization. Moïse’s term is believed to have ended in February 2021 by a large swath of Haitian civil society, including most respected constitutional law scholars (from the political right and left), human rights organizations, the organized religious community (Protestant, Catholic, and Vodouizan), the major universities, all major trade unions—from teachers to transportation—and the Haitian Bar Federation. Even before the legal conclusion of his term, Moïse was ruling by decree, a power he used to undermine and dismantle

all other state institutions to concentrate power in his office.

On 14 August 2021, Haiti experienced an earthquake that registered 7.2 on the Richter scale. As of the writing of this article, the impact is still being evaluated. So far thousands of people are known to have died in the catastrophe, thousands more are injured, tens of thousands are without shelter, and there is considerable material damage. The Haitian government is well aware that Haiti is positioned on a fault line between huge tectonic plates and is therefore susceptible to large earthquakes. And yet, virtually nothing was done to prepare the population or the state to respond to such an emergency—in fact, to any emergency. The earthquake in August once again demonstrated the state’s inability to exert control over its territory and to fulfill its most basic function: to protect the basic human rights of the population.

Against this backdrop, this article will explore the constant challenges to, and undermining of, the rule

## The Fight for the Rule of Law, continued

of law in Haiti, which has become both commonplace and customary from the citizenry to the presidency. The authors' hypothesis is that the rule of law is the bedrock upon which rest all other components of an efficient system and equitably-run state. It is not only the system that protects citizens from being kidnapped and killed, but it is the only option to bring President Moïse and the thousands of other victims a modicum of justice. The rule of law is not only foundational to the respect of other civil rights such as health care, education, and security but it is also there to ensure that businesses are protected, and therefore allow economic growth. The rule of law concept must be normalized in the most basic human interactions. To that end, it must be taught in civics classes in schools and be reflected in everyday interactions, ranging from citizens' respect for traffic laws to the state being held legally responsible for not providing a basic education to every child.

We will first situate the rule of law in Haiti within time and space through a brief historical outline. Next, we will define the concept of the rule of law and how it has been applied, or not, locally. Then we will move to more contemporary times and the current events that culminated in President Moïse's assassination. We will also briefly show how the absence of the rule of law has made the earthquake response and recovery difficult and impractical, followed by an analysis of the central role the Moïse administration played in continuing to deteriorate the rule of law. Lastly, the paper concludes with a few recommendations on how the actors in the legal system, scholars, as well as how civil society could reinforce the rule of law as an ipso facto step to the country's development.

### Haiti's Emergence as a Nation State

Haiti is the second oldest independent nation in the Western Hemisphere after the United States. Although most people believe Haiti was the first Black republic, in fact, immediately after taking its independence from France, Haiti became an Empire (1804-1806). Between 1806 and 1820, Haiti was divided into three parts: the State of Haiti, the Kingdom of Haiti, and the Republic

of Haiti. After unification, it went from being a republic to an empire and finally to a republic from 1859. Haiti's founding father, General Jean-Jacques Dessalines, was the commander-in-chief of the indigenous army and named emperor by his generals who empowered him with imperial authority. Despite being given all power, Dessalines and the generals created a new constitution that outlined in Articles 3 to 6 the fundamental rights of every citizen:

Article 3. The Citizens of Haiti are brothers at home; equality in the eyes of the law is incontestably acknowledged, and there cannot exist any titles, advantages, or privileges, other than those necessarily resulting from the consideration and reward of services rendered to liberty and independence.

Article 4. The law is the same to all, whether it punishes, or whether it protects.

Article 5. The law has no retroactive effect.

Article 6. Property is sacred, its violation shall be severely prosecuted.

Although it may seem paradoxical, this first Constitution shows clearly how well the founders, and particularly Dessalines, understood the necessity to have fair and equitable laws in order to build a strong nation. His sense of fairness was illustrated in a reported exchange where he was quoted to have said in a meeting with his generals and an administrator, "We made war on others . . . before taking up arms against Leclerc, men of color, sons of whites, did not collect points from their fathers estates; how is it done, since we have driven out the settlers, whose children are claiming their property, so the blacks whose fathers are in Africa will have nothing."<sup>1</sup>

The first few articles in the 1805 Constitution and Dessalines's statement continue to ring true today. Indeed, they go to the heart of the democratic system as we understand it and the fundamental problem in the country, which is the unequal distribution of the state's wealth. According to the World Bank, the richest 20% of the population hold more than 64% of the total income of the country, compared to less than 2% held by the poorest 20%.<sup>2</sup> While Dessalines may not have

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# The Effectiveness of Policies in Times of Crisis: Disaster Law and Policy in Haiti

By Nadine Gedeon, Hollywood, Florida, and Vanessa Abdel-Razak, Port-au-Prince, Haiti

## Introduction

Haiti has a long history of reliance on humanitarian assistance to help victims of major natural disasters that have stricken the country. Haiti has been hit by several natural disasters over the years including earthquakes, cholera outbreaks, hurricanes, and floods. For example, in 2010 thousands of people died and hundreds of properties were destroyed when a magnitude 7.0 earthquake shook the capital and surrounding areas. In addition, a cholera outbreak added a layer to the challenges of an already vulnerable population dealing with the aftermath of the disaster. Recently, on 17 August 2021, a magnitude 7.2 earthquake killed thousands of people and destroyed houses and major infrastructure in the southern part of the country.

Immediately after the latest disaster, several not-for-profit non-governmental organizations (NGOs) raised thousands of dollars in relief funds to help support the emergency response in the South of Haiti. It is estimated there are approximately 10,000 local and international NGOs operating in the country, and Haiti is sometimes referred to as a “Republic of NGOs.” In addition to this negative reference, there have been concerns regarding the way some NGOs have mishandled relief funds, especially after the 2010 earthquake. According to certain reports, NGOs lacked accountability and accomplished little to assist the development of the



The Haitian National Palace (Presidential Palace), located in Port-au-Prince, Haiti, heavily damaged after the earthquake of 12 January 2010.

affected people, even after billions of dollars were collected, since much of the money was used for unsustainable projects. For example, NGOs, including the Red Cross, have been accused of mismanaging or wasting the funds collected for the relief effort in Haiti. Although Haiti has a National Plan Response for emergencies, the Haitian government could not control the malpractice committed by many NGOs.

The National Response Plan for emergencies of the Republic of Haiti provides a framework for interventions and describes the resource mobilization mechanisms and organization for rescues in response to an emergency or a disaster. The inadequacy of the government’s response after the last natural disaster, however, makes evident the lack of means to implement risk and disaster management policies in Haiti. This left a void that was promptly filled by NGOs that lack constraint or a legal framework to coordinate their response.

## Disaster Law and Policy in Haiti, continued

In this article, we will explore the challenges of delivering humanitarian assistance after the 2021 earthquake in the South of Haiti. Further, we will highlight the opportunities the Haitian government can use to reinforce its legal framework to protect the humanitarian workers and the victims and to facilitate efficient delivery of relief.

### **The Current Crisis Faced by the Government and the Population**

On 17 August 2021, a magnitude 7.2 earthquake caused the death of thousands, the destruction of hundreds of houses, and damage of the main infrastructures of cities in the South of Haiti. The Directorate for Civil Protection (DPC), an entity managed by the Ministry of Interior and Territorial Communities (MICT) and in charge of Haiti's risk and disaster management, reported more than 2,200 deaths and more than 12,200 people injured. According to the DPC, almost 53,000 homes were destroyed and more than 77,000 sustained damages.<sup>1</sup> About 800,000 people were affected, of which an estimated 650,000 people need emergency humanitarian assistance. To respond to the emergency, the government of Haiti sent requests for international assistance to the EU delegation, the United States, and several other countries, which in turn pledged millions of dollars to Haiti.

### **The Challenges of Providing Humanitarian Assistance in Haiti: Ineffectiveness of the Relief Policies**

The natural risk prevention policy is part of a legal framework that has grown considerably since the beginning of the 1980's. This legal corpus leads to the implementation of various actions to mitigate the consequences of natural disasters. The enacted laws aim to understand all the effects likely to be caused by natural risks and to promote the capacities of the communities exposed. This involves identifying and monitoring threats to predict their occurrence and to trigger the alert; instituting protective measures to reduce communities' vulnerability in a crisis; regulating urbanization but also initiating land tenure actions

to purge exposed areas of human occupation; and educating populations about the existence of natural risks and the safety measures to be implemented. An appropriate legal framework must underpin the national disaster risk management policy and the institutional structures, which are being put in place gradually, each with a specific objective and a complementary purpose. It is essential to strengthen risk governance for prevention, mitigation, preparedness, and reconstruction.

Many challenges can surface during the response to a national disaster or crisis. In the case of Haiti, the issues at stake mainly involve raising enough money to respond efficiently and adequately to the disaster, protecting the safety of volunteers and humanitarian workers, and protecting the supplies. A disaster may render victims and the general population of the country even more vulnerable. This was the case in Haiti when infected sewage from United Nations peacekeepers contaminated a river causing a cholera outbreak that killed about 10,000 Haitians and made more than 800,000 people sick. Another challenge is to deliver assistance without delay while minimizing the risks of abuses, sexual exploitation, and human rights violations. Factors that can delay the delivery of humanitarian assistance to the affected population include communication problems between the affected areas and the central level, the inability to carry out rapid needs assessments, and the lack of resources at local and departmental levels.

Therefore, the government of Haiti must take steps to protect the health of victims, avoid waste of funds and materials, and fight corruption to diminish the risks during emergency responses. One of the reasons cited for the failure of past disaster responses is the weaknesses of Haiti's public institutions. A better response to the consequences of natural disasters can be achieved by drafting effective laws and strengthening the institutions involved in disaster prevention and relief. Unfortunately, the answer to past natural disasters in Haiti has proved that the Haitian government does not

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# Service of Process Considerations When Confirming International Arbitration Awards

By Ana Malave, Miami, and Sylmarie Trujillo, Miami and San Juan, Puerto Rico

Globalization has undeniably increased the prevalence of international commercial arbitration in Latin America over the past decade. Several factors have led to this growth, including the modernization of local laws to mirror the UNCITRAL Model Law<sup>1</sup> and widespread ratification of the New York Convention<sup>2</sup> and the Panama Convention.<sup>3</sup> Distrust of local judicial systems and the need to solve disputes in a more timely and cost-effective manner also have pushed the rise of arbitration in Latin America. To that end, several arbitral institutions have opened offices and regional committees

As reported in the ICC 2020 statistics, despite COVID-related slowdowns, 2020 was a historical year for arbitration with 929 registered filings in the ICC International Court of Arbitration—“the highest number of cases administered under the ICC Arbitration Rules.”<sup>7</sup> Out of these filings, parties from Latin America and the Caribbean represented 15.8% of all parties, with Brazil and Mexico ranking second and tenth, respectively, by worldwide nationalities.<sup>8</sup> Finally, Latin America and the Caribbean ranked as the third overall region chosen as the situs of arbitration.<sup>9</sup>



Although arbitration continues to gain popularity in Latin America and the Caribbean, there are no standardized service of process rules. Countries in the region have differing service of process rules and requirements that may run afoul of due process concerns under U.S. law. In this article, we examine how service of process laws of the arbitral seat can affect the confirmation of an arbitration award

within Latin America. For instance, the International Centre for Dispute Resolution (ICDR) has a regional office in Mexico and cooperative agreements with eight additional countries;<sup>4</sup> the International Chamber of Commerce (ICC) has fifteen national committees;<sup>5</sup> and the Inter-American Commercial Arbitration Commission (IACAC) has fifteen national sections that work through local institutions.<sup>6</sup>

in the United States under the New York and Panama Conventions, as discussed in the recent Eleventh Circuit decision of *Guarino v. Productos Roche S.A.*, 839 F. App'x 334 (11th Cir. 2020), involving a Venezuelan arbitral award. Specifically, when countries have different or conflicting service of process laws, this could trigger the exception regarding proper notice under Article V(1)(b) of the Conventions.



## Service of Process Considerations, continued

**The FAA and Service of Process Exception Under the Conventions**

Chapters 2 and 3 of the Federal Arbitration Act (FAA) incorporate into U.S. federal law the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and the Inter-American Convention on International Commercial Arbitration (the Panama Convention). The Panama Convention and the New York Convention (together, the Conventions) are identical for all relevant purposes discussed in this article. Notably, the Panama Convention expressly incorporates by reference 9 U.S.C. §§ 202-207, which governs enforcement under the New York Convention.

Confirmation of an arbitral award under the Conventions is a summary proceeding.<sup>10</sup> The FAA requires federal courts to “confirm [an arbitration] award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.”<sup>11</sup>

A party opposing confirmation of an arbitral award bears the burden of establishing one of the seven exceptions under Article V of the Conventions; otherwise, the court must confirm the award.<sup>12</sup> As grounds for nonrecognition of a foreign arbitral award, Article V(1)(b) of the Conventions provides that “enforcement of the award may be refused . . . [where] the party against which the arbitral decision has been made was not duly notified of the appointment of the arbitrator or of the arbitration procedure to be followed, or was unable, for any other reason, to present his defense.”<sup>13</sup>

**Service by Publication: *Guarino v. Productos Roche S.A.***

What happens when service of process rules differ between jurisdictions? The Eleventh Circuit faced this



question in *Guarino v. Productos Roche S.A.*, 839 F. App'x 334 (11th Cir. 2020).

In *Guarino*, the claimant attempted to notify the respondents of the request for arbitration by email and express mail.<sup>14</sup> After several unsuccessful attempts, the Arbitration Center of the Caracas Chamber (ACCC) determined, in accordance with its rules, that notification of the request for arbitration by publication in a Venezuelan journal was sufficient.<sup>15</sup> The respondents did not appear in the proceedings, and the ACCC issued a default award in favor of the claimant.<sup>16</sup>

When the claimant attempted to confirm the Venezuelan award in the United States under the Panama Convention, the respondents opposed the confirmation, arguing that the exception under Article V(1)(b) applied.<sup>17</sup> The respondents alleged they were domiciled in Florida at the time the notice was published and claimed they did not see the notice in the Venezuelan newspaper.<sup>18</sup>

When considering the issue, district courts compare the service procedures followed in other countries—in this case, Venezuela—against U.S. due process standards. The district court, and later the Eleventh Circuit, held

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# WORLD ROUNDUP

## AUSTRALIA



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### **The Yoo-rook Justice Commission is the first truth-telling body to be established in Australia.**

The Honorable Linda Dessau, AC, governor of Victoria, with advice of the premier under section 5 of the Inquires Act 2014 and all other enabling powers, appointed five commissioners to constitute a Royal Commission to be known as the Yoo-rook Justice Commission (Commission) to inquire into and report on:

- the historical systemic injustice perpetrated by state and non-state entities against First Peoples since the start of colonisation;
- ongoing systemic injustice perpetrated by state entities and non-state entities against First Peoples;
- the causes and consequences of systemic injustice, including a historical analysis of the impact of colonisation and an evaluation of the contemporary relationship between First Peoples and the State of Victoria and the impact of contemporary policies, practices, conduct, and/or laws on First Peoples;
- how historical systemic injustice can be effectively and fairly acknowledged and redressed in a culturally appropriate way;
- how ongoing systemic injustice can be addressed and/or redressed including recommended reform to existing institutions, law, policy, and practice, and considering how the State of Victoria can be held accountable for addressing these injustices and preventing future injustice;
- how to best raise awareness and increase public understanding of the history and experiences of First Peoples before and since the start of colonisation; and
- any other matters necessary to satisfactorily inquire into or address the terms of reference.

Yoo-rook means “truth” in the Wemba Wemba/Wamba Wamba language, which is spoken in the North West region of Victoria and is the first truth-telling body to be established in Australia. The Commission will address the grave historic wrongs and past and ongoing injustices and intergenerational trauma from the effects of colonisation

on the First Peoples, which includes the traditional owners of the lands currently known as the State of Victoria, over which they maintain their sovereignty was never ceded.

The State of Victoria also acknowledges its responsibility to advance and uphold the human rights of Victorian citizens, including First Peoples, under the Charter of Human Rights and Responsibilities Act 2006, the Advancing the Treaty Process with Aboriginal Victorians Act 2018, the Traditional Owner Settlement Act 2010, native title rights, and other rights protected by law.

### **Other Jurisdictions**

#### **Canada**

The Indian Residential Schools Settlement Agreement is the largest class-action settlement in Canadian history. One of the elements of the agreement was the establishment of the Truth and Reconciliation Commission (TRC) of Canada to facilitate reconciliation among former students, their families, their communities, and all Canadians. The TRC of Canada was mandated to tell Canadians what happened in the Indian residential schools, to create a permanent record of what happened, and to foster healing and reconciliation within Canada.

#### **South Africa**

The South African TRC was set up by the Government of National Unity to help deal with what happened under apartheid by effecting its mandate under three committees:

1. Human Rights Violations Committee to investigate human rights abuses that took place between 1960 and 1994;
2. Reparation and Rehabilitation Committee to provide victim support to ensure the Truth Commission process restores victims’ dignity and to formulate policy proposals and recommendations on rehabilitation and healing of survivors, their families, and communities at large; and
3. Amnesty Committee to consider that applications for amnesty were done in accordance with the provisions of the Act.

The conflict during apartheid resulted in violence and human rights abuses from all sides. No section of society escaped these abuses.

#### **Australia (Victoria)**

Aboriginal Victorians have been clear and consistent in



their call for truth-telling as an essential part of the treaty process.

The Commission's key functions are to:

- establish an official record of the impact of colonisation on First Peoples in Victoria using First Peoples' stories by inquiring into and reporting on historical systemic injustices perpetrated against First Peoples since colonisation (e.g., massacres, wars, and genocide) as well as ongoing systemic injustices (e.g., policing, child protection and welfare matters, health, invasion of privacy, and exclusion from economic, social, and political life); and
- make detailed recommendations about practical actions and reforms needed in Victoria to determine the causes and consequences of systemic injustices and who is responsible. The Commission is expected to make detailed recommendations for changes to laws, policy, and education, and the types of matters to be included in future treaties. Its first report is expected by June 2022, with a final report by June 2024.

The five Yoo-rrook justice commissioners are:

- Professor Eleanor Bourke (chair) – a Wergaia/Wamba Wamba elder with decades of leadership and dedication to advancing aboriginal education and cultural heritage
- Dr. Wayne Atkinson – a Yorta Yorta/Dja Dja Wurrung elder and traditional owner and accomplished academic with substantial knowledge and experience in human rights, land justice, cultural heritage, and Koori oral history programs
- Ms. Sue-Anne Hunter – a Wurundjeri and Ngurai illum Wurrung woman recognised as a leader in trauma and healing practices
- Distinguished Professor Maggie Walter – a Palawa (Tasmanian Aboriginal) woman descending from the Pairrebenne People of the North East Nation, a distinguished professor of sociology, and leading expert in systemic disadvantage, inequality, and indigenous data sovereignty.
- The Honourable Kevin Bell, AM, QC – director of the Castan Centre for Human Rights Law in the Faculty of Law at Monash University and a former justice of the Supreme Court of Victoria.

**Donald Betts, Jr.**, is a commercial disputes lawyer at the global law firm Norton Rose Fulbright in Australia specialising predominantly in commercial matters. He works closely with Jaramer Legal, Australia's first national majority indigenous owned law firm. His executive leadership experience as a former Kansas state senator and U.S. congressional candidate has taken him on leadership voyages all over the world. Mr. Betts

is an inaugural member of the 2019 AMCHAM Global Leadership Academy, founder and president of the North American Australian Lawyers Alliance, and participant with the RMIT Global Indigenous Trade Routes Program. He has overcome enormous hurdles to serve as the youngest state senator in Kansas's history when elected and Australia's first African-American to achieve a JD at Monash University.

## CARIBBEAN



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### **British Virgin Islands' Economic Substance Act proves successful.**

Following the introduction in the British Virgin Islands (BVI) of the Economic Substance Act (ESA), which became effective on 1 January 2019, there is evidence the ESA has not had a negative impact on the BVI's financial industry.

We reviewed the law and guidance notes on the economic substance of various jurisdictions and concluded the ESA has provisions that make it practical and convenient. Here are four important and clear examples:

The first is the treatment of companies that serve as holding businesses under the ESA. The BVI took a straightforward approach by placing its interest only on the pure equity holding companies that are subject to a reduced substance test, which can be met through the company's registered agent, instead of having different categories of holding businesses as is the case in other jurisdictions.

The second example is the treatment of the financial periods. The ESA has two financial periods depending on whether the company was incorporated before or after the implementation date of the ESA. Therefore, just by looking at the incorporation date of the company, one can deduce its financial period. This method is valuable for corporate service providers because it may have a positive impact on their workload when reporting and advising clients.

The third example is the reporting period. In some jurisdictions, the reporting period is six months and in others nine months, but all jurisdictions have in common that the reporting period is counted from the end of the financial period or fiscal year. Unlike other jurisdictions, in the BVI all companies incorporated before the ESA's effective date have the same financial period and therefore the same reporting period. This makes it easier to manage the annual reporting obligations for a large number of companies.



The last example is the technology. As in other jurisdictions, annual reporting is mandatory in the BVI, but it is so easy to do that it should not dissuade clients from operating in the BVI. The BVI developed a system that enables companies to report electronically to the competent authority instead of having to submit the reports manually.

The BVI Financial Services Commission confirmed that as of 31 March 2021, the Registry of Corporate Affairs has an impressive total of 372,196 companies. This figure demonstrates that the BVI is ready to prevail as one of the world's premier jurisdictions.

### **Belize makes major improvements to its tax law.**

The amendments to the Belize Income and Business Tax Act (Tax Act) published in June 2021 now render all companies taxable depending on a company's activity and place of business. All companies will be required to obtain a tax identification number (TIN) and file a tax return.

In the case of companies incorporated or existing under and by virtue of the Tax Act, the tax returns shall be made annually and shall be filed on or before **31 March** following the end of a basis year. The Belize Tax Services shall issue clarification related to the tax return filing process.

If an international business company (IBC) is filing taxes in another jurisdiction, then it may apply for a Belize tax exemption certificate. It has not been established if IBCs that were granted a tax exemption certificate will need to file an annual tax return. Perhaps only a nil tax report will be required; authorities are to determine this soon.

The Tax Act includes the following important exemptions for IBCs with business interests outside of Belize:

- A pure equity holding company, a company that only holds equity participations and earns only dividends and capital gains or related incidental income, has a tax rate of 0%.
- A holding company not engaged in an active trade or business or in relevant activities for the purposes of the Belize Economic Substance Act has a tax rate of 0%.
- A company that pays dividends shall not deduct the tax from the dividend if the dividend will be paid to a related party or to a company that:
  1. Is a resident of a country other than those on the European Union's list of non-cooperative jurisdictions for tax purposes;
  2. Has no permanent establishment in Belize; and
  3. Self-certifies in a prescribed form that the dividend is taxable under the laws of its country of residence.

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## **CUBA**



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### **President Biden's approach to Cuba has been tougher than President Trump's.**

Before the last presidential election, many Cuban Americans were hopeful

President Biden would return to the Obama days when the relationship between the United States and Cuba eased for the first time after more than 50 years of hostility. Since President Biden's election, there have been rumors about opening flights from Miami to the Cuban provinces, the possibility of again allowing remittances, and a plan to restaff the United States Embassy in Havana. None of that has happened.

Instead, the Biden administration is taking an even more rigid stance on Cuba than did the Trump administration. After the incident on 11 July 2021, when hundreds of Cuban protesters took to the streets in cities across Cuba, President Biden decided to bring new sanctions. On 22 July 2021, the U.S. Treasury Department's Office of Foreign Assets Control (OFAC) listed Alvaro Lopez Miera, a Cuban military and political leader, and the Brigada Especial Nacional del Ministerio del Interior, or Interior Ministry Special Brigade, on the OFAC sanctions list. Additionally, due to a lack of internet access during the 11 July protests, the Biden administration is looking into ways to provide internet access to the people in Cuba.

Many believe it is imperative to keep pressuring the Cuban government and to prevent any cash from flowing into the country that might end up in the government's hands. But for others, the focus is on the hardships their relatives and friends are experiencing on the island due to governmental pressures. These are challenging times, and they are only made worse by the COVID-19 pandemic. Over the next few months we will be watching to see if President Biden proceeds with further sanctions

or moves to open relations between Cuba and the United States.

*Karel Suarez is the founding and managing partner of The Legal Team PLLC. He practices complex commercial and international litigation at the trial and appellate levels. He also advises clients on international law with a focus on Cuba. Mr. Suarez is a member of the Cuban American Bar Association (CABA) and the Cuba Committee of the International Law Section of The Florida Bar.*

## INDIA



**Neha S. Dagley, Miami**

### **The government of India does away with controversial retrospective tax.**

The history behind the controversial retrospective tax law dates to 2007 when Indian authorities sought to tax Vodafone International

Holdings BV's 2007 purchase of shares in a Cayman company—an offshore transaction between two non-resident companies. At issue was a capital gains tax of approximately US\$2.2 billion assessed against Vodafone's Netherlands holding company. The Supreme Court of India declared that Vodafone was not liable to be taxed in India. According to Justice Radhakrishnan, the Indian tax authorities' demand of "nearly Rs.12,000 crores by way of capital gains tax, in my view, would amount to imposing capital punishment for capital investment since it lacks authority of law." Vodafone's victory was short-lived, however. After the favorable Supreme Court ruling, the finance minister of India introduced the Finance Bill (2012), which contained retrospective amendments favorable to the government's position. The amendments were passed permitting the Indian tax authorities to renew their demand on Vodafone.

The 2012 retrospective tax legislation was also applied to certain transactions undertaken by Cairn Energy in 2006. Both the Vodafone and Cairn taxation events led to protracted arbitration proceedings: (1) *Vodafone International Holdings BV v. India (I)* (PCA Case No. 2016-35); and (2) *Cairn Energy PLC and Cairn UK Holdings Limited v. The Republic of India* (PCA Case No. 2016-07). The Permanent Court of Arbitration ruled against India in both arbitration proceedings. In the Cairn proceeding, the PCA entered a 500-plus-page award that assessed damages in the amount of US\$1.2 billion plus interest and costs. Cairn has been actively identifying Indian state assets to seize including several state-owned properties and assets in France.

The passage of the tax law and its retrospective application impacted the reputation of the Indian economy and shook investors' confidence globally. Recognizing this, in August 2021, Finance Minister Nirmala Sitharaman introduced the Taxation Laws (Amendment) Bill 2021 in the Indian Parliament. The bill proposes certain amendments that would essentially scrap the controversial retrospective application of the Finance Act, 2012.

The bill proposes to "amend the Income-tax Act, 1961 so as to provide that no tax demand shall be raised in future on the basis of the said retrospective amendment for any indirect transfer of Indian assets if the transaction was undertaken before 28th May, 2012." The Taxation Laws (Amendment) Bill, 2021, Statement of Objects and Reasons, ¶ 5. The bill further proposes to nullify any demand raised for indirect transfer of Indian assets before 28 May 2012 "on fulfilment of specified conditions such as withdrawal or furnishing of undertaking for withdrawal of pending litigation and furnishing of an undertaking to the effect that no claim for cost, damages, interest, etc., shall be filed." Finally, the bill proposes to "refund the amount paid in these cases without any interest thereon." *Id.*

The rationale behind this surprise move by the Indian government is suggested in the proposed bill: "The said clarificatory amendments made by the Finance Act, 2012 invited criticism from stakeholders mainly with respect to retrospective effect given to the amendments. It is argued that such retrospective amendments militate against the principle of tax certainty and damage India's reputation as an attractive destination. In the past few years, major reforms have been initiated in the financial and infrastructure sector which has created a positive environment for investment in the country. However, this retrospective clarificatory amendment and consequent demand created in a few cases continues to be a sore point with potential investors. The country today stands at a juncture when quick recovery of the economy after the COVID-19 pandemic is the need of the hour and foreign investment has an important role to play in promoting faster economic growth and employment." *Id.* at ¶ 4.

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# ILS Annual Meeting

## 2021 June 25-27

### Biltmore Hotel, Coral Gables, Florida

The 2021 annual meeting of the International Law Section offered both in-person and virtual options to allow more members to participate in the meeting of the ILS Executive Council, which included the installation of the 2021-2022 Executive Council: Chair James M. Meyer, Immediate Past Chair Robert J. Becerra, Chair-Elect Jacqueline Villalba, and Secretary Richard Montes de Oca.

The meeting featured the 2020-2021 ILS awards presentations, and as one of his last acts as ILS chair, Bob Becerra recognized the contributions of members Jackie Villalba, Katie Sanoja, Adrien Nuñez, and David Macelloni. Following these presentations, incoming Chair Jim Meyer surprised Bob with a sculpture of an eagle, a symbol of the dedication and tenacity with which our outgoing chair served the section and its members.



Members attend the meeting of ILS Executive Council via Zoom.



In-person attendees participate in the meeting of ILS Executive Council.





Jackie Villalba is recognized for her work as chair of the Foreign Legal Consultants Committee.



Katie Sanoja is recognized for serving as chair of the CLE Committee.



Adrien Nuñez is presented an award for serving as chair of the highly successful Richard DeWitt Memorial Vis Pre-Moot.



Davide Macelloni is recognized for his work as editor of the weekly *ILS Gazette*.



Jim Meyer presents Bob Becerra with an award recognizing both his exceptional work as 2020-2021 ILS chair and his dedication to the section.



Members of 2020-2021 ILS Executive Council conduct their final 2020-2021 meeting. Pictured are Jim Meyer (chair-elect), Bob Becerra (chair), Jackie Villalba (treasurer), and Richard Montes de Orca (vice treasurer). Not pictured are Clarissa Rodriguez (immediate past chair) and Rafael Ribeira (secretary).

## World Roundup, from page 25

## LATIN AMERICA



**Cintia D. Rosa, São Paulo, Brazil,  
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### Brazil enacts new public procurement law.



In April 2021, Brazil enacted Law No. 14,133/21 (new public procurement law) establishing a new legal framework for public procurement. Law No. 14,133/21 replaces Law No. 8,666/93, which was in force for twenty-seven years, and incorporates relevant provisions of several other laws. Brazil's Public Administration

plays a large role in the local economy as a provider of public services, and so the new public procurement law regulates some of the major contracts in Brazil.

The new public procurement law incorporates international best practices, including the so-called “competitive dialogue.” Inspired by European law, the competitive dialogue consists of interactions between the Public Administration and previously selected bidders, based on objective criteria, in order to encourage debate for the construction of effective alternatives to meet the needs of a specific contract for works, services, or supplies. At the end of this process, the bidders present their final proposal. The disruption of the traditional model of rigid public notices allows the Public Administration to act dynamically by collecting innovative solutions and alternatives from the market.

Another important aspect of the new bidding procedure is the introduction of the environmental, social, and corporate governance (ESG) concept to public procurement by providing guidelines on:

- Guardianship of the life cycle of the auctioned objects;
- Prohibition of the participation of those convicted of using child labor;
- Possibility of requiring that part of the workforce be composed of women victims of domestic violence and ex-prisoners;
- Preferences for recycled, recyclable, or biodegradable goods, as applicable; and
- Assigning as a tiebreaker the existence of diversity initiatives in the workplace and the implementation of an effective integrity program.

The new public procurement law also provides guidelines on (1) the guarantee insurance requirement for significant works; (2) the provision of the possibility for the insurer, as an alternative to indemnity, to undertake the contracted party's rights and obligations in case of default; (3) the adoption of a risk matrix to predict liability in harmful events; and (4) express provision for conciliation, mediation, the creation of a dispute resolution board, and arbitration as alternative means for solving conflicts in contracts governed by the new public procurement law.

The new public procurement law is extensive and brings the most significant changes to Brazil's consolidated procedures in nearly thirty years. It has been celebrated by jurists and the market as a fundamental step toward the modernization and maturity of the public contracting process in the country.

### Colombia reduces the maximum weekly working hours.

On 15 July 2021, Colombia enacted Law 2101 to reduce working hours from forty-eight to forty-two hours a week without decreasing wages or affecting workers' rights and guarantees.

The distribution of the forty-two-hour work week may be defined by mutual agreement between the employer and the employee, distributed between five or six days a week, always ensuring one day of rest per week. It is noteworthy that, in addition to reducing the maximum working hours, Law 2101 also provides for a reduction in the maximum hours worked per day from ten to nine hours.

It should be noted that the reduction in the maximum working hours will not take effect immediately. Law 2101 provides for a gradual reduction of one hour per year from 2023 to 2027. This measure was adopted to allow employees and employers to adapt to the change and to identify how best to implement the new policies. With this objective, article 1 of Law 2101 calls on workers and unions to engage in technical debates to strengthen productivity and to “mitigate the possible negative impact of the reduction of the working hours.”

This reduction aims to meet the demands of the International Labor Organization (ILO), which, since 1962, has been pressuring Colombia to adapt to the parameters established by the organization to safeguard the quality of life, leisure, and rest of workers. Despite Law 2101 reducing the maximum working hours from forty-eight to forty-two hours per week, Colombia will continue to be above the maximum recommended by the ILO, which is forty hours per week.



## Chile changes its intellectual property law.

After years of discussion, on 20 April 2021, the National Congress of Chile approved the so-called Short Intellectual Property Law (*Ley Corta de INAPI*), which modifies the current Chilean Industrial Property Law No. 19,039 and the National Institute of Industrial Property Law (INAPI), and also amends the Chilean Criminal Code. The objective was to facilitate and modernize INAPI's internal procedures. The new law also harmonizes international standards and should enter into effect by October 2021.

The Short Intellectual Property Law brings changes on several topics, particularly trademarks and patents. Regarding trademarks, new and less conventional categories were recognized, such as scent brands and three-dimensional brands. In addition, the conduct of "trademark counterfeiting" was, for the first time, defined as a crime, which can be punished with a prison sentence of up to three years. Regarding patents, provisional patent applications were created, making Chile the first country in Latin America to recognize this concept.

The Short Intellectual Property Law must now be submitted to the local executive branch for approval. It may enter into force after its implementing regulation is published in the Federal Official Gazette, which shall occur six months after its approval.

**Cintia Rosa** focuses her practice on internal corporate investigations and compliance matters, leveraging her experience with criminal proceedings and white-collar crime from when she worked at the Brazilian Federal Police. She earned her law degree (LLB) from the Pontifical Catholic University of São Paulo (PUC-SP) and has specialization in compliance from the GV São Paulo Law School.

**Rafael Szmíd** is a dual qualified lawyer (NY/USA and Brazil) with ten-plus years of experience advising clients on anticorruption, antitrust, compliance, and corporate governance matters. He also has experience working at the Brazilian Competition Authority and as a compliance lawyer of a Fortune 100 multinational conglomerate. He holds a PhD from the University of São Paulo, an LLM from Stanford Law School, and a Master of the Science of Law from the University of São Paulo. He was a visiting student at the University of Barcelona, Spain.

## MIDDLE EAST



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### The Council of Arab Economic Unity establishes new Arab Court of Arbitration.

Egypt's Ministry of International Cooperation and the Council of Arab

Economic Unity have cooperated to establish the Arab Court of Arbitration. This new court of arbitration will be independent and based in Cairo, Egypt. The court's aim is to focus on settling economic, trade, and investment disputes through arbitration between investors and countries. The court will also develop an international mediation and arbitration academy to train and educate practitioners.

### Kuwaiti logistics firm Agility loses arbitration against Iraq.

In 2011, Agility and France's Orange Group acquired 44% of Iraqi telecom provider Korek through joint venture company Iraq Telecom. In 2014, Iraq's Communications and Media Commission (CMC) annulled the investment made by Agility and Orange. CMC had cited as its reason for the decision Korek's failure to meet certain requirements regarding coverage and service quality, which had been imposed as conditions for its approval of Agility and Orange's investment. As reported here several years ago, Agility filed an expropriation claim against Iraq with the International Centre for Settlement of Investment Disputes (ICSID) based on the Iraq-Kuwait investment treaty. The ICSID panel held in Iraq's favor, denying Agility's claims that Iraq had expropriated Agility's investment or otherwise breached its treaty obligations, and holding that it had reservations about the basis for Agility's claimed damages even if the claims had been made out. The panel also awarded Iraq its full legal fees, plus interest.

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## NORTH AMERICA



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### Canadian federal election occurs while COVID-19 remains top of mind.



On 17 August 2021, Prime Minister Justin Trudeau—ahead in the polls and with public opinion generally in his favor over his handling of the COVID-19 pandemic—called for a general federal election on 20 September 2021. Accordingly, Canadians will vote to elect members of the House of Commons to the 44th Canadian Parliament, deciding

which federal political party best aligns with their needs, values, and priorities.



Many Canadians did not support the timing of the call for a snap election, believing it was called primarily to shore up support for the prime minister's Liberal Party of Canada. Some opponents went as far as suggesting that Governor General Mary May Simon, the nominal representative of Queen Elizabeth II in Canada, should veto Prime Minister Trudeau's call for an election. Such a veto, however, which would have been an unprecedented act of royal interventionism in modern Canada, did not occur, and the snap election continued.

### Withdrawal from Afghanistan tests U.S. president.

Less than two weeks after confidently declaring the Taliban were unlikely to overtake all of Afghanistan following the U.S. withdrawal, President Biden faced precisely that situation as extremists quickly took over the Afghan countryside followed by Kabul and its international airport. As a result, the United States struck an uneasy arrangement with the Taliban to evacuate thousands from the Kabul airport, with a deadline for complete withdrawal by 31 August 2021. That evacuation was marred by confusion and chaos as desperate people swarmed the airport in hopes of getting a flight out of the country.

In late August, the Islamic State group ISIS-K struck the airport via suicide bomber, killing more than a dozen U.S. forces and several dozen Afghans attempting to flee Kabul and resulting in a U.S. targeted drone strike in retaliation. As the United States ends its twenty-year military mission in Afghanistan, the Biden administration warns there is a high risk of further Taliban, ISIS-K, and other extremist attacks in the country.

### Mexico aims to give citizens at least one COVID-19 vaccine dose by October.

Following new research from the University of Washington School of Medicine showing that COVID-19 deaths are significantly underreported in almost every country, Mexico's reported COVID-19 death toll rose to an estimated 600,000. Based on some estimates, Mexico has the third highest number of COVID-19 deaths, following the United States and India. As of the end of August, Mexico had received 91.2 million doses of five different vaccines, about 73 million of which had been applied. The United States has pledged to send an additional 8.5 million doses.

**Laura M. Reich and Clarissa A. Rodriguez** are the founding shareholders of Reich Rodriguez PA. The firm specializes in commercial litigation, international arbitration, and alternative dispute resolution. Reich Rodriguez's practice areas include art law disputes with an emphasis in recovery and restitution of stolen and looted art, with a focus on European art and art of the Americas.

## SOUTH KOREA



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### South Korea imposes stricter regulations on cryptocurrency trading.

Since the 2017 crypto boom, South Koreans have been among the major players. The South Korean government is trying to restrict the use of anonymous accounts in trading of virtual currency to meet the recommendations issued by the Financial Action Task Force (FATF) and to enhance the supervision of virtual assets.

In March 2020, as a result of such efforts, South Korea passed new legislation that introduced the concept of "real name bank accounts," which would help establish the verified identity of a trader of the virtual assets. Under the new legislation, all financial companies that trade and manage virtual assets must: (1) issue "real name bank accounts" from the financial institutions; (2) be certified by the Information Security Management System (ISMS); and (3) register with the Korean Financial Intelligence Unit (KFIU) to operate the virtual assets in South Korea.

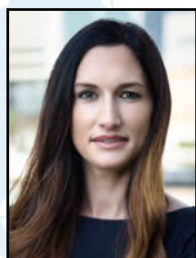
The new law became effective as of March 2021, and enforcement began on 24 August 2021, with penalties of a five-year prison sentence or a fine of 50 million Korean won (approximately US\$43,000). These stricter regulations are expected to help enhance anti-money laundering (AML) and counter-terrorist financing (CTF) efforts by not allowing crypto traders to be anonymous.

South Korean crypto exchanges could be shut down if crypto companies do not comply with the new legislation. For some exchanges, such a shutdown seems to be inevitable due to the FATF "Travel Rule." The Travel Rule requires financial institutions and crypto companies located in FATF-member countries to collect personal data on participants in financial transactions exceeding US\$1,000. South Korea's "big four" crypto companies, UPbit, Bithumb, Coinone, and Korbit, are undergoing risk assessments by a handful of large banks in South Korea, such as Shinhan Bank and LH Bank. Complying with the more stringent regulations will require the banks to spend more time and money to ensure the new system meets the Travel Rule and other reporting requirements. Although the National Assembly of the Republic of Korea considered proposing a bill that would grant the crypto companies a grace period for the reporting requirements, the banks are still considering filing a lawsuit against the government and the financial regulator. They allege the new law is unconstitutional because it places all

responsibility on the commercial banks, which are inherently risk-averse, thus likely requiring them to give up on the crypto market altogether. Since South Korea is among the first countries to develop such a foundational framework, it will be worth watching how this plays out in the months to come.

**Hyewon Son** is a JD candidate at the University of Miami and intends to specialize in tax law. She earned an LLB from Hankuk University of Foreign Studies in Seoul, Korea, and an LLM in financial laws from Boston University.

## WESTERN EUROPE



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### European Green Deal is Europe's plan for climate neutrality by 2050.

On 14 July 2021, the European Commission adopted a series of legislative proposals concerning how to aim for climate neutrality by 2050. The European Green Deal consists of several measures ranging from cutting greenhouse gas emissions, to investing in research and innovation, to preserving the continent's natural environment. The proposals suggest to revise several climate legislations such as the EU Emissions Trading System, the Effort Sharing Regulation, and transport and land use legislation.

Europe aims to become the world's first climate-neutral continent and climate-resilient society by 2050. To achieve its goal, Europe will require extensive investments, research, and innovation combined with new methods of producing and consuming. Changes will affect energy, finance, industry, transport, environment, climate, and agriculture and food. The EU's budget will be strictly monitored to ensure spending will benefit the environment. Additionally, Europe's citizens must change their daily habits, such as use of transportation. The proposals further include strategies on how to realize the EU's target of at least 55% net reduction in greenhouse gas emissions by 2030.

### EU Commission approves acquisition of SITECH by Brose.

After a rigorous merger review process pursuant to the EU Merger Regulation, the EU Commission has approved the acquisition of SITECH Sp. z o. o. (SITECH), a Polish company, by Brose Fahrzeugteile SE & Co. KG (Brose), a

German company. SITECH is a wholly owned subsidiary of Volkswagen AG (VW), which produces vehicle parts such as seats, metal seat structures, and seat structure components. Brose supplies vehicle components and manufactures mechatronic systems for vehicle doors, seat structures, electric motors, and electronics. Following the acquisition, Brose and SITECH will combine their production efforts in regard to producing seats and seat structures for VW.

The EU Commission approved the acquisition because the non-controlling share of VW in the merged entity has no adverse effect on competition. The EU Commission stated further that Brose and SITECH are not close competitors and that several dominant companies in relevant markets remain despite the acquisition.

### EU Commission calls on member states to comply with EU copyright rules.

The EU copyright rules, adopted two years ago, had the goal to harmonize the playing field between the EU's creative industries and online platforms such as Google and Facebook. Several EU member states, including Spain, France, and Italy, have not submitted national transposition measures or have communicated them only partially. The deadline for implementing the EU directives into national law was 7 June 2021. Therefore, the EU Commission decided on 26 July 2021 to begin infringement procedures and sent letters of formal notice.

The notice included a request to communicate how Directive 2019/790/EU on copyright in the digital single market and Directive 2019/789/EU on online television and radio were enacted into national law. Both directives aim to modernize EU copyright rules, strengthen the creative industries, and permit more digital use in essential areas of society. Additionally, the directives facilitate the distribution of radio and television programs across the EU.

The respective member states have two months to respond to the letter of formal notice, which is the official start of an infringement procedure, and to take the necessary actions. In case of noncompliance, the member state will receive a so-called reasoned opinion before the case will be transferred to court.

**Susanne Leone** is one of the founders of Leone Zhgun, based in Miami, Florida. She concentrates her practice on national and international business start-ups, enterprises, and individuals engaged in cross-border international business transactions or investments in various sectors. Ms. Leone is licensed to practice law in Germany and in Florida.





## The Case of Haiti, from page 13



resorted to an amended version of its current extradition treaty with Haiti, those constitutional guarantees would not have been trampled.

The use of an extradition treaty involves a dual process comprising both judicial and executive components where the apprehended individual is allowed to challenge the charges before a judge if there is even the possibility of appeal. It's only after exhaustion of this process that an executive authority of the requested country decides on the opportunity to issue a surrender order. Extraordinary rendition is devoid of all judicial aspects, and unlike what happens in the furtherance of an arrest based on an extradition treaty, is generally referred to as a "lightning grab" operation whose characteristic celerity aims at avoiding judicial intervention.

As a result, each time a high-profile individual is the subject of extraordinary rendition, the Haitian authorities struggle to face public opinion. The best-known of these cases involves Guy Philippe, a senator-elect who was apprehended by Haitian police on 5 January 2017, a mere four days before he was to be sworn in as senator. The same day, he was transferred to the DEA and flown to the United States to stand

trial. Mr. Philippe's arrest was so embarrassing for the authorities that then Justice Minister Camille Edouard, Jr., in his first appearance before the press, stated that the Haitian government was not aware of the operation. A few days later, in an article penned for Haiti's *Le National*, yours truly published a copy of the order issued by Mr. Edouard himself to the police, in which he asked them to apprehend "the fugitive" Guy Philippe, the same person who had just been elected senator of

the Republic after an extensive campaign.

The main issue with extraordinary rendition is the fact that it completely bypasses the rendering country's justice system. In Haiti, everyone knows that the constitutional guarantees dealing with freedom of movement and protection against unlawful search and seizures, to name only two, are junior to any decision of the U.S. authorities to conduct a lightning grab operation. This is a heavy burden for a country to bear, particularly in light of the frequency with which the United States resorts to extraordinary rendition in Haiti.

To summarize, in certain instances, particularly the war on terror, the use of extraordinary rendition is often justified. In the case of Haiti and other countries with an extradition treaty with the United States, and local authorities who are willing to collaborate in the fight against crimes, the United States would be best served to resort to its extradition treaties in the capture of criminals. The image of a nation driven by national machismo, unnecessarily committing human right violations in the furtherance of justice, is counterproductive. The European Union has been addressing this issue head on. Perhaps it is time for the United States to follow, for a change.



## The Case of Haiti, continued



***Frandley Julien** is a former political activist and journalist who embraced the law as a second career. Upon graduating from law school, he briefly worked as a Miami Dade prosecutor before starting his eponymous law firm in North Miami Beach, where*

*he offers representation in the fields of criminal defense, family, personal injury, and immigration law. Before he started working as an attorney, Mr. Julien published a slew of articles in the Miami Herald, the Sun Sentinel,*

*Le National, Le Nouvelliste, and Jamaica Observer on issues related to democracy, human rights, and the concepts of state and nation in the Haitian context. Mr. Julien holds a JD from the College of Law at FIU where he earned the Outstanding Contribution to the Trial Team Award.*

#### **Endnotes**

1 <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/>.

2 This case involves a Mexican national, Alvarez-Maicham, who was accused of torturing and killing a DEA agent. The DEA, in the face of the Mexican authorities' refusal to extradite Alvarez-Maicham, hired a group of Mexican mercenaries who kidnapped and transferred him to the United States. The case went all the way to the U.S. Supreme Court, which found: (1) such a capture may give rise to civil suits by the captured individual under the Alien Tort Act; and (2) the government may try a person who was forcibly abducted.



# ADVERTISE IN THE ILQ!

*In addition to being sent to our section database of 761 members, the ILQ will be distributed at select events during the year.*

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## Seeking Safety in a New Land, from page 15

complication is that two-thirds of those at the poverty level reside in rural areas where there are significant adverse conditions for the production of agriculture. Such situations do not create economic opportunities for the majority of the population and thus force many individuals to migrate out of the country in search of a livelihood.



### 3. Environmental Factors

Over the past couple of decades, we have witnessed an increase in migration due to the environmental conditions in the home country. Environmental factors such as natural disasters (*i.e.*, hurricanes, earthquakes), global warming, and climate change (*i.e.*, seawater rise), while involuntary in nature, all significantly impact the lives of individuals and contribute to mass migration out of the affected countries. The January 2010 earthquake in Haiti that claimed the lives of more than 100,000 and displaced more than 1.5 million people is an excellent example of an event that disrupted an entire country, forcing many individuals to leave the country. Similar issues such as seawater rising, droughts, crop failure, etc., also significantly impact the livelihood of a society. This is particularly true for a country such as Haiti that relies on agriculture as its primary source of income. Collectively, these factors can put individuals at serious health risks, forcing them to search for a better life for themselves and their families.

### 4. Social Factors

Personal needs and a desire to have a better life are some of the social factors associated with migration.

Specifically, individuals are naturally inclined to seek a better quality of life for themselves, and their love for and desire to better the quality of life for their children has been a driving force of mass migration to countries such as the United States and Canada.

### 5. Foreign Policy/International and Haiti

While there are many challenges within the home countries of those who are migrating, we must not underestimate the international communities' role in these countries. In addition to the four main factors outlined above, foreign policy and international aid contribute to the lack of development of societies, particularly in low-income countries. Relief and aid efforts in countries like Haiti, along with trade agreements, serve as significant barriers to the country's development. International aid's objective and focus are to provide aid/relief to a country and not to support the country's development. Achieving such an objective would end the mission of these international NGOs. Furthermore, political interference by the international communities in these countries does not allow for a true democratic process and state to develop. Addressing the root cause of migration calls for a deep analysis and

## Seeking Safety in a New Land, continued

reconstruction of the international communities' role in countries like Haiti that have high rates of migration.

### The Psychological Impact of Migration for Haitians

The migration process can be psychologically challenging for many. This is due to a number of factors, including not being prepared, challenges in adjusting to a new environment, navigating complex institutions, language barriers, cultural and racial disparities, etc. Collectively, these factors contribute to the stress experienced by individuals, often impacting their mental health. Therefore, understanding the psychological impact of migration requires understanding three main areas: acculturation, acculturation stress, and migration trauma.

Psychological acculturation is the process that immigrants experience as they adapt to the new country's culture.<sup>10</sup> But this process must be understood within the experience of the immigrant prior to arriving,<sup>11</sup> the resettlement location,<sup>12</sup> and the economic context of the larger society where the individual is settling. Acculturation is a multidimensional process that involves changes in many aspects of immigrants' lives, including language competence and use, cultural identity, attitudes and values, food and music preferences, media use, ethnic pride, social relations, and cultural familiarity and social customs. Such complexities inherent within the process of acculturation may lead to another phenomenon known as acculturative stress.<sup>13</sup> Specifically, stressful life events associated with the acculturation process can have negative impacts on one's mental health.

In addition, trauma is another area that must be understood and addressed. Three types of traumas occur during migration: peri-migration, migration, and post-migration. Peri-migration stress is the experience of individuals both before and during migration from their country of origin. The process of leaving loved ones and their place of birth can be significantly stressful for many individuals. In addition, the trauma experienced for many during the migration to the host country, especially those traveling under the most extreme

conditions, can have a lasting psychological impact on these individuals. Lastly, post-migration trauma results from the experiences individuals face upon arrival to the host country, which might be significantly different from what they expected. All three of these types of trauma are associated with the acculturation and acculturative stress highlighted above. Collectively, these psychological impacts can be avoided if more focus is placed on building the countries of fleeing individuals so they can prosper and thrive at home as opposed to migrating to another country in the hope of a better future.

### Strangers in a New Land: What Happens When Haitians Get to Their New Country

As Haitians are forced to flee their homes, they must make considerable sacrifices as they risk their lives in search of safety. Before making what is frequently a treacherous journey, they sell all of their valuables, including land and personal property. Unfortunately, in many cases, this money is only just enough to allow them to arrive at their final destination.

Those who travel through South America to arrive at the southern border of the United States must go through jungles, cross rivers, and sometimes witness the deaths of companion travelers as they attempt to enter the United States.<sup>14</sup> Depending on immigration laws in place at the time of their journey, they are faced with significant obstacles at the U.S. border.<sup>15</sup> For those able to enter the United States, the battle continues within the immigration system.<sup>16</sup> Even for those who are not detained, there are significant obstacles to someone who wishes to regularize their U.S. status. After arriving in the United States, many are thrust into an immigration system that is complex, archaic, and prejudiced. In addition to having to face a judge or a deportation officer who cannot relate to the conditions in their home country,<sup>17</sup> Haitians have the added misfortune of having difficulty finding immigration attorneys who speak their language and that they can afford. While immigrants have the right to an attorney, an attorney is not provided at the federal government's expense. Instead, respondents must find an attorney to represent



## Seeking Safety in a New Land, continued

them, a costly expense in addition to immigration fees. While waiting for the outcome of their applications for relief, many immigrants can acquire work authorization. Still, language barriers and low wages make it difficult for many to earn enough to support themselves and the families they have back home.

### Conclusion and Recommendations

Despite the singular perspectives of migration, the research is clear that there are multiple reasons for migration, and deep analysis is needed of each of these factors, especially as they pertain to Haiti. To date, such research has not been conducted. The reasons for migration outlined in this article are simply those that are most common. The reasons for leaving are many. The lack of such understanding does not allow the development of strategies and interventions that can be integrated into the country to address these factors. While understanding the root causes within the country is needed, we must acknowledge the role that international organizations play in contributing to the mass migration of Haitians from their homes. As advocates, we must demand that the United States and other international players reassess how they engage with Haiti. Whether following a disaster such as the 14 August 2021 earthquake in the southern coast or in everyday engagements, we must demand that Haiti and its people be respected, and their dignity be recognized and preserved.

For those Haitians who arrive in the United States, we must demand a more just immigration system, complete with independent courts that can objectively provide relief and justice to those fleeing horrific conditions back home. Moreover, we must ask our local, state, and federal elected leaders to support and fund a universal representation model that would make it possible for immigrants (who are unable to afford the services of a private attorney) to be provided an attorney at no cost, especially for those in detention. While these are essential needs that require attention, ultimately we must create conditions in the country of Haiti that allow for Haitians to live a prosperous life in their own country,

building a society where future generations will thrive. This must be the priority of all who care about Haiti and her people.



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## The Fight for the Rule of Law, from page 17

been conversant in the writings of the enlightenment philosophers, he understood very well the human condition as explained by Hobbes's state of nature. He embodied what political philosopher Immanuel Kant called the "only one innate right," which is "Freedom (independence from being constrained by another's choice)," while rejecting Kant's universal law, which Kant believed could not be the basis of state power. In a post-colonial state, Dessalines expressed the desire for what John Rawls theorized as the principle of justice wherein, "Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others."

Yet, for all of his foresight and efforts, the father of the nation would not realize his dream as he was assassinated at the Pont Rouge, north of Port-au-Prince, on 17 October 1806 while trying to suppress a mulatto revolt. Dessalines's vision was rooted in principles of equality and fairness, which are the necessary foundation for a functioning democracy. Consider that in his famous book *Le Pays en Dehors* (The Country Outside), Gérard Barthélemy, anthropologist and author, explained the Haitian context thusly:

The opposing economic interests of the exploiting part (Creole—mixed children of the French colonizer and slave women) and the exploitable part (Bossale—African born slaves) have not failed to arouse, since independence, the conditions for a permanent confrontation between the two protagonists.

Thus the Creole environment, colonizer, monopolized the use of the state and confined it to a quasi-exclusive role of state-control chief forcing the Bossale to produce, while neutralizing the potential danger, represented by this immense majority whose deaf presence arouses discomfort. On the peasant side, this tenacious opposition never aimed to eliminate its protagonist, to take power. Its sole purpose was to permanently differentiate itself from it and to keep it outside while repelling it, in case of unbearable interference (Water - Pickets - American Occupation).

For the rest, the rural environment has never ceased to be defined and to define itself as the country outside "pays andeyò" . . . . For if, in essence, this state power is harmful, so much so that it is evil, unjust, excessive, predatory. At least it then justifies itself in its position as an external element, and its rejection is only more

automatic, more normal, since its confessed purpose has always been the domination of the peasant or his rejection.<sup>3</sup>

The majority of citizens have always had an *andeyò* (outsider) relationship with the Haitian state. Further, this conflict between the *bossales* and the *affranchis* continues to this day and is part of the chasm that engulfs the country in a cycle of poverty, thereby defining the country's evolution and its social construct over the past 217 years.

### Haiti's Historical Disconnection With the Rule of Law

It is a generally agreed principle that the law should be an instrument for justice. In alignment with political philosophers like Hobbes and Locke, Haitians entered into their own social contract, which was formalized in Article 19 of the founding 1805 Constitution: "The State has the absolute obligation to guarantee the right to life, health, and respect of the human person for all citizens without distinction, in conformity with the Universal Declaration of the Rights of Man." Indeed, for this social contract, Haitians gave up some of the personal liberties they gained after the war against Napoleon's army to achieve independence from France.

It must not be taken lightly that former slaves, who fought hard to gain their freedom, would agree to limit this newfound freedom in the hope that the state would work to better their lives. The law was to be the great equalizer that would ensure the respect of basic human rights. Instead, in Haiti, the law, when it existed, was more often used as a tool of oppression and control. In essence, for nearly all of the nation's history, Haitians have lived under a system in which the law has been used as an instrument of oppression.

To illustrate, under Emperor Dessalines, the law was used to limit the movement of newly freed men, forcing them to stay and work on the same plantations.<sup>4</sup> In an attempt to eliminate all dissent, on 28 April 1969, Duvalier passed a law that declared all "Communist activities, no matter what their form, are hereby declared crimes against the security of the State . . . . The authors of an accomplices in crimes listed above shall receive the death penalty,



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and their goods and chattels shall be confiscated and sold for the benefit of the State”<sup>5</sup> President Moïse took a similar approach in November 2020 when he published a decree that expanded the definition of “terrorist act,” to include robbery, extortion, arson, and the destruction of public and private goods, threatening residents’ civil rights and the rule of law.<sup>6</sup>

These perverse uses of the law have created an adverse effect wherein most Haitians have come to distrust the law, and therefore the state, in all of its forms, to the present day.

At the same time, the Haitian state has never taken the responsibility to build or to make accessible the institutions and processes necessary to administer justice to its citizens. For example, most citizens in rural areas do not have access to the courts or other basic services such as schools and health care facilities. In that context, the relationship between the state and its citizens has been one of contestation. Since the fall of the Duvalier dictatorship in 1986, Haiti has chosen democracy as its system of governance. Haiti is a sovereign constitutional republic and its “Citizens directly exercise the prerogatives of sovereignty” through elections as outlined in Article 58 of the amended 1987 Constitution.<sup>7</sup> This post-Duvalier Constitution delegates the exercise of national sovereignty to three powers of government: the Legislative, Executive, and Judicial branches (Article 59). Additionally, each branch “is independent of the other two in the powers it exercises separately” (Article 60) and “None of them may, for any reason, delegate their powers in all or in part, nor go beyond the bounds set for them by the Constitution and by law” (Article 61).

This short historical sketch helps to frame Haiti’s contemporary challenges. To summarize, the Haitian people have never enjoyed the protection of the state. For most Haitians, the relationship with the country’s successive governments has essentially been one of oppression, which undermines any possibility for a democratic state based on the rule of law. If Haiti is to have a chance at transforming itself into a true democratic state, it must tackle and resolve the challenges to the rule of law.

## The Decline of the Rule of Law Under the Moïse Regime

In November 2016, Haitians elected President Jovenel Moïse after a long campaign rife with irregularities and the flaunting of election laws by all of the candidates. In a speech given a few hours after the electoral council had declared him the winner, Moïse said, “With your ballot paper, you wrote another page of history on November 20th. You have chosen the path of progress, democracy, national production and political stability, order, discipline and progress.” He continued to say that he would work “to consolidate the republican values that unite us as a free and independent people.” He pledged that he would work to strengthen the republican institutions and consolidate democracy in the country. He also noted that “the November 20 vote indicates the will of the people to return to the constitutional order that will allow the country to play its full role on the international stage (. . .) 7 February 2017 will mark a turning point in the way we manage the affairs of the nation. We will end corruption.”<sup>8</sup>

Despite these declarations, his administration did not make the promised efforts to create or reinforce state institutions in order for them to live up to the state’s obligations or the president’s promises. Moïse often acted unilaterally, using his authority in ways that created an antagonistic relationship between his administration and the judicial system. Since the executive is responsible for developing and presenting the national budget to Parliament, Moïse’s office consistently underfunded the Judicial Branch while promising to provide the resources it needed to function. Unfulfilled promises<sup>9</sup> and often outright disdain for the justice system resulted in judicial officers, from lawyers to judges, going on strike and shutting down the administration of justice for months on end throughout Moïse’s tenure.<sup>10</sup>

An example of the administration’s disdain for the justice system was its disregard for rulings by Haiti’s Superior Court of Auditors and Administrative Disputes, *Cour Supérieure des Comptes et du Contentieux Administratif* (CSCCA). The CSCCA has been around for almost 200

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years and its role is to control state spending. The court has an a priori role to advise on contracts that are binding on the state. It also exercises an a posteriori evaluation of the performance of contracts that are in progress or have been completed. Its most important role, though, is to prevent the squandering of state funds.

On 31 May 2019, in a report of an audit demanded by the Haitian Senate, the court concluded that two companies belonging to Mr. Moïse had participated in



“collusion, favoritism and embezzlement,” directly linking the embattled head of state to massive corruption in the spending of about \$2 billion from Haiti’s PetroCaribe Fund.<sup>11</sup>

Nearly two years later, the court ruled that the president’s wife<sup>12</sup> had used her influence to negotiate a contract with Dermalog, a German company.<sup>13</sup> Moreover, the court refused to validate this contract because the administration did not respect the procurement processes. In response to the court’s refusal, the government decided to classify the contract as a matter of public safety,<sup>14</sup> which allowed it to bypass the

procurement rules. This maneuver, according to the commission, resulted in another refusal by the court to validate the contract. This ruling should have stopped the process, but the government went ahead anyway.

As of this writing, Haiti’s three branches of government are either nonexistent or dysfunctional. Additionally, given that the Executive Branch did not hold the scheduled November 2019 legislative elections, the mandate of the Chamber of Deputies and two-thirds of the Senate expired. The lower house of Parliament

subsequently was dissolved and the Senate, unable to have a quorum because it was reduced to ten members from thirty, became dysfunctional on 13 January 2020. The country has been without a functioning Parliament for eighteen months, and until his death, the president ruled by decree without any countervailing forces and the balance of power necessary in the functioning of a democratic republican system. Indeed, in the months before his assassination, the administration undertook a systematic and accelerated process of weakening and dismantling the constitutional limits.

For example, Moïse published dozens of decrees (*decret-lois*) that are akin to executive orders and do not carry the weight or legitimacy of law, since it is the sole purview of Parliament to make the

laws. In 2020 alone, while the Legislative Branch was inoperative, the Moïse administration published forty-one decrees. The two most egregious ones included a decree that redefined the responsibilities of the Superior Court of Auditors and Administrative Disputes published in *Le Moniteur* of 6 November 2020 and another on 26 November 2020 creating the National Intelligence Agency (ANI).

According to the 6 November 2020 decree, if the Court of Auditors gives an unfavorable opinion, the government can decide to move forward regardless. It stipulated that the opinions of the Court of Auditors

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do not bind the National Commission for Public Procurement, or the authorities of the executive power, or the authorizing officers. In its closing paragraph, this *decret-lois* stated: “This decree repeals all laws or provisions of laws, all decrees or provisions of decrees, all decree-laws or provisions of decree-laws which are contrary to it.”<sup>15</sup>

Given Haiti’s experience with secret services, mainly the Tonton Makouts under the Duvalier dictatorship, the decree creating the new secret police (ANI) alarmed human rights organizations as well as the international community. The decree stipulated that the ANI agents would not report to the Haitian National Police chain of command. Instead, the unit reports to the Ministry of Interior, and the president has the sole authority to name its director general and other high-level positions (Article 54).<sup>16</sup> In a summary of the decree, the Center for Economic and Policy Research (CEPR) stated:

The ANI will be staffed by individuals recruited from the National Police Academy and from the military. The decree includes scant information on the vetting of ANI officers, but notes that recruits will be subject to testing as well as to psychological and moral inquiries (Article 32).<sup>17</sup> The officers, whose identities will remain anonymous due to national security concerns, will also be armed (Article 51).<sup>18</sup> The decree also grants total secrecy to the ANI’s operations. The ANI is authorized to conduct surveillance and will have access to all relevant government databases. Officers will also be able to enter private homes or businesses at any time in order to access documents, objects, or anything else relevant to an ongoing investigation (Article 55).<sup>19</sup>

The report quoted the Core Group in Haiti and the United Nations Integrated Office in Haiti (BINUH, from its French acronym), which issued a press release “expressing concern” over the new decrees. This was an astonishing development given the consistent support that both groups provided to the Moïse regime. The Core Group stated further that the decree gives “the agents of this institution virtual legal immunity, thus opening up the possibility of abuse.” Taken together, they added, these decrees “do not seem to conform to certain fundamental principles of democracy, the rule of law and the civil and political rights of citizens.”<sup>20</sup>

On 8 February 2021, Moïse unconstitutionally removed three supreme court (Court of Cassation) judges he accused of being part of a political coup, which rendered the court dysfunctional. It is important to note that Article 177 of the 1987 Constitution establishes that the “Judges of the Supreme Court, [. . .] may be removed from office only because of a legally determined abuse of authority or be suspended following and indictment leveled against them. They may not be reassigned, without their consent, even in the case of a promotion. Their service may be terminated during their term of office only in the event of a duly determined permanent physical or mental incapacity.”<sup>21</sup>

The Moïse administration also reduced the oversight authority of the anticorruption unit (known in French as *Unité de Lutte Contre la Corruption* – ULCC) and transformed the agents of the Protected Areas Security Brigade (BSAP, from its French acronym) into a repressive paramilitary unit.

By far, the most appalling act of the Moïse administration was its attempt to write a new constitution through referendum. The ability to amend the constitution is the prerogative of Parliament, according to Article 282 of the 1987 Constitution. More importantly, Article 284.3 specifically prohibits constitutional changes through referendum.<sup>22</sup>

The Moïse administration’s steady erosion of democratic rules and principles not only served to diminish the Judicial Branch, but weaponized the law against citizens who, it believed, were not acquiescent or might challenge its authority. Furthermore, under the Moïse administration, the country’s socio-political, economic, and security context deteriorated to such an extent that in the end, the president himself became its victim. On 7 July 2021, gunmen walked past the president’s entire protective security detail and riddled his body with bullets. He was assassinated the day before he was to install his newly nominated prime minister, his seventh since taking office and the third nominated by decree, since his nominees could not be approved by the Parliament as constitutionally required since the Legislative Branch was no longer functioning.



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**The International Community's Role in Undermining the Rule of Law**

More recently and operating under chapter 7, the United Nations Stabilization Mission in Haiti (MINUSTAH) operated in Haiti for thirteen years (2004-2017). It was charged by the Security Council to “to ensure a secure and stable environment within which the constitutional and political process in Haiti can take place.”<sup>23</sup>

The UN closed the MINUSTAH mission in 2017. Haitians considered the mission a disaster particularly in light of the reported sexual abuses by some of its forces and the introduction of cholera in Haiti by MINUSTAH's soldiers.<sup>24</sup> According to the U.S. Centers for Disease Control, the “cholera outbreak was the worst in recent history with over 820,000 cases and nearly 10,000 deaths.”<sup>25</sup> Despite recognizing that its soldiers introduced cholera in Haiti, the UN never compensated the victims or their survivors. Additionally, the UN's \$400 million cholera plan still has not been fully funded or implemented. As of 6 February 2020, international donors had pledged only \$20.5 million to the fund.<sup>26</sup>

The Security Council approved a smaller Mission for Justice Support in Haiti (MINUJUSTH) with a focus on rule of law, development of the Haitian National Police (HNP), and human rights, “to support the Government of Haiti in consolidating the stabilization gains and ensuring their sustainability.”<sup>27</sup> In October 2019, MINUJUSTH was replaced by a special political mission, the United Nations Integrated Office in Haiti (BINUH) that had a mandate to advise the government of Haiti on strengthening political stability and good governance.

More specifically, according to the UN Security Council Resolution 2476 (2019), the BINUH is mandated to advise the government on promoting and strengthening political stability and good governance, including the rule of law. The UN Security Council's resolution on BINUH directs it to help Haiti plan and carry out elections; reinforce the HNP through training on human rights and responding to gang and sexual and gender-based violence; develop an inclusive approach with all social sectors to reduce intercommunal violence (particularly gang violence); address human rights abuses and

violations and comply with international human rights obligations; improve administration of Haitian prison facilities; and strengthen the justice sector through adoption and implementation of key legislation.<sup>28</sup>

As noted above, before President Moïse's assassination, the administration was attempting to write a new constitution through an illegal and widely rejected referendum as well as by organizing rushed elections. The current de facto council of ministers that is now headed by Prime Minister Ariel Henry (who was to be installed the day of the president's assassination) has signaled its intent to continue with the same strategy; however, this strategy continues to present three main challenges. First, there is no Parliament and the council alone cannot undertake the process of amending the constitution, which is the prerogative of Parliament, according to Article 282 of the Haitian Constitution of 1987. Second, Article 284.3 specifically prohibits constitutional changes through referendum.<sup>29</sup> Third, as a result of the constitutional vacuum, there are no legal mechanisms to call elections as this is a presidential prerogative. Haiti is in a legal vacuum where the laws do not apply and all of the state's institutions are dysfunctional.

On 8 July 2021, the day after Moïse was assassinated and in a blatant illustration of international interference, the “UN Special Representative for Haiti . . . acknowledged the legitimacy of Prime Minister Claude Joseph to lead the Caribbean nation, following the ‘cowardly’ assassination of President Jovenel Moïse on Wednesday, and welcomed his government's commitment to hold national elections later this year.”<sup>30</sup> This decision was reversed days later, on 19 July, when the United States decided that Dr. Ariel Henry would instead be the prime minister. *The New York Times* reported in an article that “Ever since the assassination on July 7, Haitian politicians have been at loggerheads, grappling for control of the government. And the scramble for power is being heavily influenced—even directed, some Haitians say—by foreign countries, including the United States, which has held enormous sway in Haiti since invading the country more than 100 years ago.”<sup>31</sup>

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The aforementioned article quoted the president of the Senate, Joseph Lambert, who said, “Haiti has become a baseball being thrown between foreign diplomats.” Senator Lambert added that “pressure from American diplomats was a major factor in the reshuffling of Haiti’s leadership.” The article also noted that “Mr. Lambert said he had sought to lead the nation after the president’s death. But, he said, the United States urged him to stand down.” The most telling quote was Mr. Lambert’s statement that he “received calls from certain American diplomats in Haiti,” adding that he also “received calls from diplomats in the U.S. State Department, who asked me to postpone so we had time to build a larger consensus.” This is the latest of many instances highlighting the ways in which the international community has maintained its control over Haiti’s politics and governance since the United States ended its occupation of the country in 1934.

In the midst of the total disintegration of all three branches of government and the marginalization of the rule of law, there is a small ray of hope. Since the president’s assassination, hundreds of civil society organizations—including representatives from the diaspora to peasant associations, the different church denominations, Vodou leaders, feminist organizations, human rights groups, universities, labor unions, political parties, and the national bar association— have come together to create the Commission for a Haitian Solution to the Crisis (*Commission pour une Solution Haitienne a la Crise*). The commission is engaged in a process that it hopes can lead to a national consensus and allow the public institutions to once again fulfill their republican roles. The rule of law and the reinforcement of the judicial system must be central to that transformation effort. Indeed, the draft convention between the parties begins by stating that “this Agreement aims to create the conditions for national stability with a view to the return to constitutional normality and the restoration of democratic order” (Article 1).<sup>32</sup> It states further in Article 2 that the “parties to the Agreement, reiterate” their “respect for the sovereignty of the State as well as its republican form and character democratic and secular.”<sup>33</sup> This strong and affirmative commitment to a

return to constitutional order provides a solid framework for the reinforcement of the rule of law and makes it central for the country’s socio-political and economic development.

### Conclusion

Based on Haiti’s historical experience of the law being used as an oppressive instrument, the Haitian people have developed a normative expectation that the law regulates and provides for an unequal treatment of citizens based on social status. The undermining or absence of the rule of law is reflected in every aspect of social life from justice to education, health care, infrastructure, and the lack of a state response to yet another devastating earthquake.

Haiti’s ancestors and its founder, Emperor Dessalines, fought for a state in which the former slaves and their progeny would be equal to any other human being on earth. They agreed on a social contract that required a fair distribution of the country’s resources. In response to the unfair distribution of land to the masses, Dessalines declared that “we have all fought against the whites, the properties we have conquered by shedding our blood belong to all of us, I expect that they are shared equally.”<sup>34</sup>

In a democratic system of governance, Haiti’s chosen model, the rule of law is the great equalizer that ensures the laws are applied equally to everyone, from the poorest to the wealthiest citizens to the most powerful government officials and elected leaders. It ensures a fair and independent judicial system that is available to all citizens.

One of those citizens was President Moïse himself. Sadly, one of the outcomes of president’s dismantling of the judicial system is that, unfortunately as of this writing, the chief magistrate has been unable to find a judge willing to take on the case of Moïse’s assassination and bring the president’s killers to justice. Like the hundreds of citizens who were kidnapped and murdered under his tenure, often in broad daylight, and whose families never got justice, President Moïse is a victim of a weak system that is filled with corrupt judges. He is the victim of a

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politicized police and an underfunded judicial system. He has fallen victim to the endemic corruption and impunity that were reinforced by his administration's blatant disregard of the country's republican institutions.

We recognize the difficulty of making recommendations in Haiti's current socio-political context. Nonetheless, we believe that whatever the possible solutions, the starting point is for Haitian civil society to accept that the task of nation building is its sole responsibility. Lawyers and members of the judiciary in the United States who are interested in such issues can play a marked role in making this a reality. Some concrete actions they could take include:

1. Supporting Haitian lawyers when they undertake civil disobedience by advocating to international actors and amplifying Haitian lawyers' voices on social media platforms and in relevant lawyer associations
2. Interfacing with U.S.-based civil servants and elected officials on the current foreign policies on Haiti, including lobbying government entities for fairer and more transparent treatment of Haitian sovereignty as it relates to the rule of law
3. Building linkages with Haitian lawyers through the creation of subject matter specific associations and task forces to support their work
4. Encouraging exchanges and facilitating learning, mentoring, and experiential learning exercises for law students in Haiti
5. Connecting with and amplifying the work of international law and advocacy groups filing claims against international actors that have engaged in malfeasance in contravention of international law

For these recommendations to have the slimmest of chances of being implemented, a few key things need to happen. It starts with Haitians reaffirming their commitment to democracy as their chosen form of governance and the rule of law as its foundation. A large swath of civil society has already committed itself to this effort, and the lawyers, in particular, who are officers of the court, must demand scrupulous respect for the rule of law as the country returns to constitutional order. They

can advocate for the court to be closer to the people irrespective of whether the physical infrastructure exists. They can also ensure that all proceedings are held in Kreyol—the language spoken by all Haitians—instead of French. Finally, lawyers must play a proactive role in educating the general public about the basics of the law and the connective role of the rule of law in people's daily lives.

It will also require that the United States, which currently has veto power over Haiti's political process and the actors, to step back and allow Haitians to run their own affairs. This does not mean disengagement, but it does mean the Biden administration will need to live up to its rhetoric that places the strengthening of *democracy* abroad at the center of its foreign policy.<sup>35</sup> The United States has an opportunity to show its commitment to this policy by supporting Haitian civil society's efforts. In short, those who believe in the rule of law must step up to defend it as a fundamental principle of democratic order. Most important, Haitians who believe in the country must reaffirm this commitment by supporting the efforts to rebuild, and grow confidence in, the judicial system. As Haitians pick up the broken pieces of a country shaken by both natural and manmade disasters, one fact remains true. In order for Haiti to rise from its ashes and live up to the promises of its founders, Haitians have to accept to fight for the rule of law as the path for a just society that makes all of its citizens part of the *peyi andedan* (the country inside).



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## The Fight for the Rule of Law, continued



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**Editor's note:** Quotations translated from French reflect original punctuation and capitalization, which may not be standard in English.

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## Disaster Law and Policy in Haiti, from page 19



have the capacity and resources to control, supervise, and coordinate relief and aid, or to supervise the work of NGOs, some of which have been free to commit malpractice. When responding to a disaster, the main goal should be to deliver effective and efficient assistance to the affected population and areas. To achieve this goal, the government must be strong and effective.

### The Inefficacy of the Current Law Governing NGOs

The operations of NGOs are still governed by the Presidential Decree of 5 October 1989, which gave the Ministry of Interior and Territorial Communities (MITC), the Ministry of Interieur (MI), and the Ministry of Foreign Affairs (MEA) the power to oversee and control the activities of NGOs. It provides the manner in which the NGOs are recognized by the government

and a mechanism for coordinating and supervising the NGOs. The MITC, through its agency, is responsible for developing the National Plan for Humanitarian Response, but the inadequacy of the government has resulted in a lack of facilitation of effective relationships between international NGOs and the government. For instance, the Haitian state does not know the exact number of NGOs in its territory and can hardly identify all the areas in which they intervene. It has only incomplete information on this subject, despite the existence of the Law of October 1989. As in other cases, the law exists but is not enforced. An update of the Law of October 1989 is needed to clearly define the new partnership framework between the state and the NGOs. NGO activity programs must be periodically monitored by the ministerial department dedicated to this task, such as the MITC. While favoring negotiation between the state and NGOs in all areas,

## Disaster Law and Policy in Haiti, continued

the law should make it compulsory for NGOs to register, to obtain an annual establishment permit, to specify their fields of expertise and their programs, to provide their contact details, and to submit yearly reports to the Ministry of Planning. The law must also give the Haitian state the capacity to assign, after negotiations, an NGO to a specific territory according to its competencies and the government's objectives defined in the national development plan. Finally, the law must provide for cases where the Haitian state may decide to revoke a permit to establish an NGO in Haiti. The application of and respect for this law is the first condition for the success of a new "NGO-Haitian state" partnership framework.

### Opportunities to Reinforce and Improve the Existing Legal Framework

Haiti has developed a risk and disaster monitoring system to provide for institutional management during natural disasters. Currently, this system is supported by the Constitution of the Republic of Haiti, particularly articles 19, 23, 136, 111, 111-1, 111-2, and 236, and special procedures and other legislative provisions in force. First, the Law of 16 September 1966 creating the Emergency Fund establishes a financing mechanism for specific funds for disaster response, by levying a tax of 1% of the salary of state and private-sector employees. This fund is not subject to the ordinary budget regime. Second, the Decree of 17 May 1990 foresees the organization and

functioning of the Ministry of the Interior and Territorial Collectivities. This organic decree attributes competence in matters of civil protection to the ministry and authorizes it to take preventive and control measures and to provide for assistance necessary to safeguard the population, particularly during public disasters. Based on that, in 1997, the government of Haiti activated the Directorate of Civil Protection (DPC), whose mission is to coordinate all emergency response operations and all management actions and risks, particularly in the face of emergencies and disasters. Third, the Decree of 12 October 2005 provided for the management of the environment and the regulation of the conduct of citizens for sustainable development deals with the responsibility of the state in the prevention of and response to disasters; the identification and mapping of risk; and the adoption of standards for the prevention and mitigation of climatic, meteorological, and seismic hazards. Finally, the Law of 15 April 2010 amended the State of Emergency Law of 9 September 2008. Under this law, the central and local authorities, and the departmental delegates at the request of the mayors of the affected areas, can take measures deemed to be for the protection of people and properties in the event of an actual or imminent natural disaster through intervention and recovery measures after the event. The measures adopted during the state of emergency may be appealed before the administrative court.



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## Disaster Law and Policy in Haiti, continued

Also, a series of specific environmental laws have been enacted as preventive measures for natural disasters, to cite a few: (1) the Law of 4 June 1936 establishing measures to stop deforestation; (2) the Decree of 8 October 1938 prohibiting the export of charcoal; (3) the Decree-Law of 27 June 1945 on the felling of certain trees; (4) the Law of 17 August 1955 regulating crops, cutting and timber trade; (5) the Law of 19 September 1958 protecting soil against erosion and regulating logging; (6) the Decree of 6 January 1982 fixing with the requirements imposed by the ecological environment and in accordance with the economic and social evolution of the country, the specific rules relating to the housing and development of the cities and rural and urban agglomerations.

### Lack of Effectiveness and Efficiency of the Legal and Institutional Framework

As mentioned above, the response to natural disasters in Haiti has always been characterized by a lack of resources allocated to the population's needs. Further, various factors contribute to a lack of effectiveness and efficiency, such as the ineffectiveness of standards in this area, the inadequacy of intervention plans, the uneven implementation of existing programs, and the lack of human and financial resources. Having an adequate standard constitutes the preliminary stage in implementing public policies and the means of legitimizing any government action. Regarding the criteria established by the doctrine, a quality law is based on studies and research linked to objective experience and observation of the reality, regardless of any preferences, ideas, partisan opinions, or ideologies (Urvoas, 2018).<sup>2</sup> A law of quality leaves no room for interpretation; it is accessible, drafted for the general interest, and allows for resolving issues with adequate resources, without compromising the economy of the actions it imposes. Furthermore, said law or policy must fulfill its objectives without constraint. We saw above that Haitian legislation provides mechanisms and provisions for the prevention and resolution of situations

arising from natural disasters, but it is evident that they are ineffective.

Efficiency usually refers to the character of what produces the expected effect. It is also considered to be the ability to produce the maximum results with minimum effort or expense. According to some authors, in the narrow sense, efficiency is the ability to achieve the objectives of the law or public policy. It is measured against the results, the outcomes, that is to say, all the effects that are causally attributable to a public policy. Finally, efficiency compares the resources invested in a law or a policy and the results obtained. In summary, a policy is effective if the results correspond to its objectives; it is efficient if the resources used to achieve those objectives meet an economic goal.

The issue of the effectiveness and efficiency of laws has its roots in fundamental problems that affect governance and the Haitian justice system. Indeed, the environmental law standards intended to prevent natural disasters have no binding effect when the means of the Executive and the Judicial branches are limited and the basic principles of a rule of law are missing.

### Conclusion

It is recommended that when establishing or revising institutional structures for risk management, legislators and governance bodies ensure their long-term sustainability measured against available government resources. For example, it would be helpful to allocate more resources and to strengthen existing resources through training to support legislative responsibilities devoted to risk and disaster management at the local level, or to examine how local institutions could carry out their duties more effectively through increased participation of the community and civil society in accordance with established norms and legislative tools.

The purpose of having efficient rules and regulations is to ensure that humanitarian assistance is delivered

## Disaster Law and Policy in Haiti, continued

safely and effectively. The government of Haiti should prioritize the safety of the population during humanitarian responses. In addition, the Haitian government should reinforce its institution to prevent abuse and waste by the NGOs. Bilateral agreements should provide immunity waivers and mechanisms to facilitate the prosecution and punishment of anyone liable for gross negligence or misuse of funds and materials collected on behalf of victims. In addition, the bilateral agreements should provide for an audit mechanism to inspect and investigate the books of the organizations claiming to have received relief funds for Haitian victims. The Haitian government should implement the laws that provide for the conduct of NGOs during humanitarian responses, and the treatment and protection of the victims. It should provide for the safety of humanitarian workers by creating criminal liabilities for individuals who attack humanitarian personnel and supplies. The Haitian government should also improve and enforce the compliance devices to ensure that NGOs comply with national laws and human rights principles and regulations. The actions of the NGOs should not cause any harm to the health of the victims and the environment they are supposed to assist. The government of Haiti must set the tone and dictate precisely the type of help the victims need by rethinking the emergency response coordination. The government should approve every intervention and monitor the distribution of all the materials and supplies shipped to Haiti. The rule of law must be respected even during disaster relief responses.



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## Service of Process Considerations, from page 21



that the claimant's repeated email attempts to notify the respondents of the arbitration did not violate due process because the emails were "reasonably calculated" to notify the respondents of the arbitration proceedings.<sup>19</sup> As the Eleventh Circuit stated, "successful actual notice is not required; the adverse party need only prove an attempt to provide actual notice."<sup>20</sup>

The court further found that the respondents had consented to service by publication in a Venezuelan newspaper because the arbitration clause the parties agreed to provided for arbitration in Venezuela, pursuant to Venezuelan law, and in accordance with the ACCC Rules. Since the ACCC Rules allow service by publication, the court found the respondents had adequate notice, even though the request was published in a foreign newspaper.

### **Service and Due Process Considerations in Arbitration Agreements**

To avoid a situation in which a client is served through unconventional or unfamiliar means, when drafting an arbitration clause, the parties must be fully aware of the forms of service of process allowed not only by the law of the chosen state, but also by the rules of the selected arbitration center. The parties must bear in mind that the right to due process does not necessarily include the same procedural rights as U.S. procedural rules.<sup>21</sup>

As demand for arbitration continues to rise internationally, counsel must become increasingly familiar with service procedures to ensure a client's access to due process, both at home and abroad. To ensure clients receive proper notice of an arbitration, practitioners should consider:

- The forum state's service of process rules and procedures;



## Service of Process Considerations, continued

- The arbitration center's applicable notification rules; and
- The client's access to the different notification methods that the rules allow.

If there are means of notification permitted by the forum state's laws or by the arbitration center to which the client does not have regular access, these may be expressly excluded in the arbitration agreement.

Taking these issues into consideration when drafting arbitration clauses in international contracts can prevent challenges to the confirmation of potential arbitration awards under the Conventions.



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