



Annual Conference and Annual Grotius Lecture 2012

BMA House, Thursday 25 October

The Annual Conference and Grotius Lecture, hosted by the British Institute of International and Comparative Law (BIICL) on 25 October 2012 included 13 distinguished speakers – among them Professor Cherif Bassiouni, Emeritus Professor at DePaul University and recipient of the Hague Prize – and a host of participants for a day of prolific academic discussion and debate.

Dame Rosalyn Higgins DBE QC, President of the British Institute of International and Comparative Law, welcomed the audience and referred to the main activities and research projects led by BIICL throughout the year, particularly on business and human rights, treaty practices in Southeast Asia and comparative collective redress issues. Dame Rosalyn introduced the chairs for the three Panels of the day, and formally opened the Conference.

‘International Law, the Rule of Law and Constitutional Change in the context of the Arab Spring’

Panel One: The Rule of Law

The first panel of the Conference was chaired by Elizabeth Wilmshurst, Fellow of the Royal Institute of International Affairs, Chatham House, and Visiting Professor at University College London, and included as speakers: (1) Professor Marc Weller, Director of the Lauterpacht Centre for International Law, University of Cambridge; (2) Naina Patel, Barrister, Blackstone Chambers and Director of Education and Training, Bingham Centre for the Rule of Law; and (3) Dr Tariq Ali Baloch, Freshfields Bruckhaus Deringer. The presentations focused on the rule of law in relation to the “Arab Spring”.

In her opening address, Elizabeth Wilmshurst referred to the current approaches to the meaning of the rule of law, which address the rule of law at national and international levels, including the September 2012 Declaration of the High-Level Meeting of the United Nations General Assembly on this subject. In this respect, she pointed out that the panel would focus primarily, although not exclusively, on the rule of law at the national level, in the light of the Arab Spring.

Transitions of the Arab Spring: Mediation Perspectives

Marc Weller

Professor Weller provided an overview of some of the recent transitions that have occurred in the context of the Arab Spring. He noted that transitions can refer to a change of status as occurred, for example, in Kosovo and East Timor, or to a change in the system of governance in relation to a particular state. He then suggested a

number of factors distinguishing the transitions taking place during the Arab Spring from others, such as the swift pace of events in the region.

Professor Weller then suggested a typology for the different developments and transitions that have occurred in the region. For example, Professor Weller noted that States such as Bahrain have resorted to “individual concessions” and that others, like Mauritania and possibly Morocco, have seen “regime-led transitions and reforms”, with the incumbent government remaining principally in control of reforms. He noted that states like Yemen have encountered “power-sharing transitions”, with the government and opposition jointly administering the transitional phase. Professor Weller noted that a group, which includes Egypt, have seen “guided civil revolutions”, which are characterised by a mixture of regime-led and civilian-led transitions, with the military retaining a degree of control and remaining present alongside the social process. Finally, he noted that “civil revolution” has occurred in Tunisia, and “civil and military revolution” in Libya.

The outcomes of the various types of transition vary greatly, Professor Weller noted, and can include, for example, government reform processes (e.g., in Morocco and Mauritania), transition agreements between the government and opposition (e.g., in Yemen), and transition plans set out by the opposition (e.g., in Libya).

Professor Weller then outlined some of the challenges that States may face when enduring significant internal transformations. He gave examples of issues that must be grappled with by States in the midst of transition, such as determining the legal basis for transition, implementation and modes of interim governance, legitimate decision-making in the interim, creating opportunities for national dialogue and consultation, transitional justice issues, the constitution-making process and elections. Professor Weller also highlighted some of the challenges of the international mediation process and involvement of other actors.

Professor Weller concluded his remarks by re-asserting that there is not one “Arab Spring” as such and that the transformations associated with the “Arab Spring” are best characterised as a disparate set of transitions, each with different challenges and motivated by a diverse set of issues.

Constitutional Options for Libya: Implications for the Rule of Law

Naina Patel

Naina Patel spoke about constitutional options for Libya and implications for the rule of law. Focusing her remarks on the process of drafting a new constitution in Libya, Ms Patel’s comments illustrated some of the practical obstacles to the successful implementation of the rule of law.

Ms Patel began by outlining the process that has been established for the creation of Libya’s new constitution. She noted that, according to the roadmap, an interim government and constitutional authority were to be created to shepherd the development of the new constitution and that this would be followed by a public referendum on the text. Ms Patel said that progress had been slow and highlighted the absence of a government-led consultation process. In that regard, she noted that the Bingham Centre for the Rule of Law has prepared a series of training materials for a new campaign by the non-governmental organisation, Lawyers for Justice in Libya (LFJL). LFJL is using these manuals to hold discussions and conduct surveys in Libya about the constitution.

Ms Patel then outlined the key elements of a constitutional framework and highlighted the importance of the rule of law in this context. She set out Tom Bingham's eight principles on the rule of law and considered how these principles might be affected in the Libyan constitutional context. Ms Patel summarised these eight principles as follows: legal certainty; legality; equality; non-arbitrariness; human dignity; access to justice; a fair trial; and compliance with international law.

Ms Patel went on to highlight several key options and issues, which she suggested would be particularly live for Libya; issues such as the role of religion and custom, and the implications for legal certainty and equality. As regards a bill of rights and human dignity, she raised the issue of the extent to which economic, social and cultural rights will be protected, and the extent to which there will be protection for Libya's significant minority communities. Ms Patel also noted concerns around the role of the legislature, and the appointment and selection of new judges, as well as the vetting of existing judges.

Ms Patel concluded by reflecting on the extent to which the former constitutional framework might influence the current process. She suggested that the 1951 Constitution does not reflect the modern composition of the country ethnically, does not give sufficient consideration to natural resources, and is not the product of a meaningful consultative process between this state and its citizens. She concluded that it might, however, provide inspiration to those involved in drafting the new Constitution for Libya.

Lawyering in the Arab Spring: Insights on the Bahrain Independent Commission of Inquiry'

Tariq Ali Baloch

Dr Tariq Ali Baloch offered his insights on the establishment of the Bahrain Independent Commission of Inquiry (BICI) to investigate and report on the events that happened in the country in February/March 2011. He noted that the distinguishing feature of BICI was that it represented the first time a state had commissioned international commissioners to investigate and report upon its domestic affairs. He noted that the commissioners appointed comprised some of the world's leading international humanitarian lawyers: (1) Professor Cherif Bassiouni, widely considered the father of international criminal law, was the chair of the commission; the other commissioners were (2) Professor Sir Nigel Rodley KBE, one of the world's leading human rights authorities and previously the United Nations Special Rapporteur on Torture, (3) Judge Philippe Kirsch QC, the first President of the International Criminal Court; (4) Dr Badria Al-Awadhi, a distinguished international lawyer from Kuwait; and (5) Dr Mahnoush Arsanjani, a leading specialist in international criminal law and one of the drafters of the statute for the establishment of the International Criminal Court. Dr Baloch went on to examine BICI through the prism of the rule of law and the fledgling principle of international rule of law, and explained that he subscribes to the conception of the rule of law as set out by Tom Bingham (as already discussed above).

As regards the rationale for establishing BICI, Dr Baloch commented that the Inquiry was regarded as a way of providing an objective, independent account of events and of establishing the truth, without which, he noted, accountability and reforms would not be possible.

Dr Baloch noted that each chapter of BICI's report considers applicable international law and national law. He also noted that BICI was mandated to report on the events in question "on the basis of international human rights norms".

Dr Baloch suggested that the fact that BICI was initiated by Bahrain helped in terms of gaining access to documents and evidence by the Commissioners, who were from other jurisdictions. He suggested that the homegrown nature of BICI gave it credibility amongst the relevant state agencies that were being reviewed.

Dr Baloch commented that establishing the truth is not enough and that accountability is required to enhance and ensure the rule of law. One of the most important parts of BICI's report, he thought, was the recommendation to establish a special unit to investigate and bring legal action against those responsible. Dr Baloch then commented on the process of implementation of BICI's recommendations to date.

Dr Baloch concluded by observing that the experience of BICI should not be seen as an isolated event, but might be used elsewhere. There is great scope, he thought, for the BICI sort of process to be adopted, for example, in Egypt and Syria, once the situations there permit. But, in order to benefit from a homegrown solution, he thought that there is much that one can learn not just from BICI but also other fact-finding mechanisms that have been deployed by the UN. He commented, however, that the process of learning must be made easier and more accessible. In this regard, Dr Baloch noted recommendations made by the BICI Chair, Professor Cherif Bassiouni, at the UN General Assembly High-Level Meeting on the Rule of Law at National and International Levels in September 2012, that the Office of the High Commissioner for Human Rights should identify best practice for fact-finding missions and special procedures, and should develop guidelines for national fact-finding commissions.

Questions and further discussion

Following the presentations, the floor was opened to the audience for questions. In one line of inquiry, the panel discussed transitional justice initiatives and accountability, particularly for past abuses, in the states affected by the "Arab Spring". The panellists commented, for example, on some of the accountability discussions taking place in Yemen, Libya and Bahrain. Another participant sought suggestions for practical ways in which to establish the rule of law in the region. The panel commented that capacity-building efforts and proper resourcing, both in terms of financial support and staffing, were essential to securing the rule of law. In sum, the Rule of Law Panel was a topical and informative introduction to the Annual Conference and highlighted some of the practical obstacles to the successful implementation of the rule of law.

Panel Two: Public International Law

The second panel at the Annual Conference of the BIICL considered the effects of the "Arab Spring" upon Public International Law. The panel was chaired by Alice Lacourt, Legal Counsellor of the Foreign and Commonwealth Office, and the speakers were Professor Shaheen Sardar Ali of the University of Warwick, Professor Dino Kritsiotis from the University of Nottingham, and Professor Nick Grief from the University of Kent.

Islamic Tradition and Universality of Human Rights

Professor Shaheen Sardar Ali

Professor Ali began her presentation by stating that there is no homogenous single Islamic tradition and generalizations are not helpful when approaching a legal discourse on the subject of Islam and human rights. She then outlined her general philosophical position on human rights, recalling personal experiences and the sense of commonality resulting from the not-so-difficult task of identifying a set of core human rights that resonated with all traditions and cultures irrespective of their apparent differences.

Professor Ali then proffered some practical reasons for why the universality of human rights was a diminishing school of thought within Islamic traditions. Firstly, she criticized the methodological weaknesses that coincide with comparative discourse between Islamic and International perspectives on matters of human rights. Further, she stated as normal that difficulties would abound when trying to create a common language based on Western-created terms. For her, instead, the UN and other forums for human rights discourse should not be afraid of using comparable ideas and concepts from other cultures, posing as an example the term *haqq*, which can be understood as meaning both justice and humanity and development of which greatly exceeds that of relatively new Western-based human rights concepts as currently applied in public international law throughout the previous millennium.

Secondly, many groups look to appropriate “universal” human rights as a product of their reason or their particular defining philosophy. In her opinion, this usurpation of universal principles is a case of “exclusion by inclusion” in which, by conforming to the principles enunciated within the document, States, organisations and persons are accepting a particular interpretation of universal rights that accords with an underlying specific philosophical position.

Professor Ali further stated that there is some movement towards a more inclusive approach when adopting agreements and declarations on human rights at an international level. By way of example she cited the UN Convention on the Rights of the Child, which uses the Islamic term *kafalah* as comparable to adoption. However, until the appropriation of rights stopped, latent and overt cynicism surrounding the idea of universal rights would continue to flourish.

She further stated that there is an ongoing Intra-Muslim debate over what is and what is not a universal right. The plurality of Islamic traditions means that finding common ground in the form of universal principles can be extremely difficult; many groups will attempt to appropriate rights for their own use; utilising them or rejecting them to assert a moral high ground.

In this context, Professor Ali argued that the politics of human rights has begun to overshadow the politics for human rights. She believed human rights had stopped being used as a tool of advancement and were increasingly being used as a political tool by international actors; contentious political actions were being underscored by notional objectives such as to the promotion and advancement of human rights. She suggested that the positions taken by the UK and US governments in relation to the invasions of both Iraq and Afghanistan were examples of this.

In conclusion, Professor Ali suggested that like the many varied Islamic traditions, each different Arab Spring should try and revive the Islamic discourse on human rights on the basis of inclusiveness and not exclusivity. Only through strict adherence

to this methodology would the universality of human rights become increasingly visible and therefore, realised.

Massive Violations of Human Rights and the Use of Force

Professor Dino Kritsiotis

Professor Kritsiotis stated that massive violations of human rights to be considered in light of the Arab Spring could provide a counterpoint to the term 'massive violations of international humanitarian law'. Furthermore, there was a danger of conceiving of the response of the international community to use force where massive violations of human rights had taken place as a victory for human rights; in reality, he suggested that it might have only been the amalgamation of expedient political factors.

Professor Kritsiotis said that using the term 'massive violations of human rights' as a distinguishing threshold for actions that infringe international law is in keeping with the body of international law that accepts distinction between 'more and less grave' uses of force (*Military and Paramilitary Activities in and against Nicaragua*), which provided us with some insights on the framework for considering questions of force and intervention.

As to the Arab Spring, Professor Kritsiotis stated that it is difficult to know which massive violations of human rights to consider; is it the use of torture, the issue of refugees, offences against women or the violation of the right to protest? By way of example he referred to the General Assembly of the United Nations (GA) which has condemned Syrian authorities on numerous recent occasions for systematic gross violations of human rights; and he asked the audience to contemplate whether it is right to conclude that the use of force should be employed in relation to each violation of each human right.

Considering the Nicaragua case, Professor Kritsiotis analysed paragraph 268 of the ICJ judgment that stated that a State Party (the US in the case) may form its own appraisal of the situation concerning the violation of human rights but the use of force should not be used to monitor or ensure respect for those human rights. Further, certain actions such as the mining of ports, the destruction of oil installations or the training, arming and equipping of paramilitary groups are deemed contrary to the strictly humanitarian objective of protecting human rights. With this the Court appeared to reject the permissibility of the right of humanitarian intervention. For Professor Kritsiotis ascertaining the true proposition of the law was tainted by the manner in which the legal question was framed; ultimately, that affected the resulting conclusion of the Court. In his opinion, the Court located itself within the corpus of the conventional law of human rights, considered the violations of that law and then the use of force in respect of those violations so it was unlikely to see any other alternative. Perhaps if the ICJ had begun with a consideration of Oppenheim's 'International Law: A Treatise', in which some precedent was brought forward of humanitarian intervention as a right of States under the jus ad bellum, then the outcome may have been different. From the recent action of the Security Council of the United Nations (SC) in relation to the Arab Spring, Professor Kritsiotis believes, firstly, that a use of force underwritten by the SC does not count as a precedent of the "right" of humanitarian intervention in international law. Secondly, he believes that the SC, States and other regional international organisations are becoming increasingly aware that use of force resolutions are and should continue to be as much about

limiting force as they are about legitimising the use of force—of making it lawful, of giving it authority.

Finally, that despite the language of the Responsibility to Protect (R2P) within preambular paragraph 4 of resolution 1973 as a ‘currency of reasoning’, such language is conspicuous by its absence from the Syrian draft resolution tabled in February 2012. Institutional precedent confers greater power than Responsibility to Protect language, which provides for choices and the failure of the draft resolution to employ the language of Responsibility to Protect. Professor Kritsiotis further stated that it is particularly important to take into account that the draft Syrian resolution was considering the use of neither force nor economic sanctions; it merely *threatened* the use of economic sanctions. As such the decision not to use the language of Responsibility to Protect, even where Chapter VII sanctions were not immediately forthcoming may suggest that perhaps Responsibility to Protect has come with greater problems than might have been originally envisaged.

Non-Proliferation of Nuclear Weapons in the Middle East and North Africa Professor Nick Grief

Professor Grief began by addressing the humanitarian imperative of the non-proliferation movement, referring to the *Nuclear Weapons case* in which the ICJ declared that the fundamental rules of international humanitarian law (IHL) are “intransgressible principles” of customary international law. The Court had clearly doubted whether nuclear weapons could ever be used lawfully, observing that in view of their unique characteristics the use of such weapons was “scarcely reconcilable” with respect for IHL. Professor Grief indicated that the President of the ICRC and the Non-Proliferation Treaty Review Conference had reached similar conclusions in 2010. He went on to say that the growing threat from nuclear weapons had revived the idea of their complete elimination, which he saw as the only guarantee against their use.

Professor Grief stated that, in light of the Arab Spring, discussion of the removal of nuclear weapons from the Middle East region had returned to the agenda of the General Assembly (GA). The GA had recently noted that within the Middle East only Israel had not yet become a party to the Non-Proliferation Treaty (NPT). The GA had therefore urged Israel to accede to the treaty and encouraged the creation of a Nuclear Weapons Free Zone (NWFZ) in the Middle East.

Professor Grief then discussed the historical backdrop to a potential NWFZ in the Middle East. The initiative began with a joint resolution tabled at the GA by Egypt and Iran in 1974. Each year from 1980 a consensus resolution had been adopted by the GA calling for the establishment of a NWFZ. That objective had been endorsed by a number of Security Council resolutions, including Resolution 687. Yet despite these pronouncements, there had been little progress since 1995 when the NPT Review Conference decided to extend the NPT indefinitely in return for agreement on a resolution on a Middle East zone free of nuclear weapons and other weapons of mass destruction.

The 2010 NPT Review Conference had reiterated the validity of the 1995 agreement, restating the importance of its objectives and agreeing that a conference should be convened by the UN Secretary-General in 2012 on the establishment of such a zone in the Middle East. In Professor Grief’s opinion this had saved the 2010 Review

Conference from failure. Unfortunately, however, neither Iran's nor Israel's attendance at the 2012 conference had been secured; consequently, the next NPT Review Conference, scheduled for 2015, appears compromised.

Professor Grief explained that BASIC, an influential British/American think tank, was holding a private roundtable event in Istanbul on 24th and 25th October in support of the 2012 conference. The roundtable was being hosted by Finland and attended by representatives from the Foreign and Commonwealth Office and the Russian Foreign Ministry. Most of the participants were from the Middle East, including Iran, but Israel was not represented despite having been invited.

Professor Grief believed that Israel's apparent lack of interest in the 2012 meeting and, more generally, the non-proliferation movement, is because of its perspective on the sequencing of events. Israel considers that peace in the Middle East is a prerequisite to an agreement on arms control. Other international actors believe that the two issues should be "de-linked", the justification being that a non-nuclear Iran and the establishment of a WMD-free zone in the Middle East would increase Israel's security.

As Professor Grief indicated, the 2012 conference would not focus specifically on Iran but would adopt a cross-regional approach, possibly by reasserting existing legal principles. He then discussed such principles with particular reference to the NPT. He recalled that in the *Nuclear Weapons case* the ICJ had emphasised that States Parties to the NPT are under a twofold obligation pursuant to Article VI: they are obliged to achieve a precise result, nuclear disarmament; by adopting a particular course of conduct, the pursuit of negotiations on the matter in good faith. The Court had further noted that although the NPT formally concerns the now 190 States Parties, any realistic search for disarmament necessitates the cooperation of all States.

Professor Grief argued that all States are under that twofold obligation and that it is merely the source of the obligation that differs: for States Parties, the source of the obligation is the NPT; for third States, it is general international law. This accords with President Bedjaoui's observation in the *Nuclear Weapons case* that the twofold obligation in Article VI has acquired a customary character.

Professor Grief then considered whether it was right to conclude that the twofold obligation in Article VI has acquired a customary international law character. He noted that the NPT has been in force for 45 years and contended that Article VI is of a fundamentally norm-creating character. He recalled that in the *North Sea Continental Shelf cases* the ICJ held that a conventional rule can acquire a customary nature even without a significant passage of time, provided that there is very widespread and representative participation in the convention, including that of States whose interests are specifically affected. Since fulfilling the twofold obligation in Article VI is an objective of vital importance to the whole of the international community, he argued that the near universal participation in the NPT satisfied that criterion.

Professor Grief went on to suggest that the ICJ had effectively declared that the obligation in Article VI of the NPT is an obligation *erga omnes* owed to the international community as a whole. Consequently, all States have a legal interest in its timely performance and a legal obligation to help bring that about. This position complemented the *jus cogens* nature of the IHL principles invoked and was supported by the 1970 Declaration on Principles of International Law, which declares

that States have a duty to cooperate in the maintenance of international peace and security.

Finally, Professor Grief indicated where responsibility for non-proliferation and disarmament lies. He believed that the nuclear weapon States must accept their lead responsibility in that regard. He observed that Arab States feel that they were tricked into acceding to the NPT after 1995. Nuclear weapon States should stop claiming that the NPT allows them to possess nuclear weapons. The definition of “a nuclear-weapon State” in Article IX.3 of the NPT is only for the purposes of that treaty and does not legalise the possession of nuclear weapons. To suggest that it does is not “good faith” interpretation of the NPT as required by the Vienna Convention on the Law of Treaties.

As called for by the GA, all nuclear weapon States should follow the thirteen practical steps agreed to at the 2000 NPT Review Conference, including an unequivocal undertaking to accomplish the total elimination of their nuclear arsenals. Israel should accede to the NPT and, pending the establishment of a WMD-free zone in the Middle East, all States in the region should refrain from developing, producing or testing nuclear weapons and from any other activities that run counter to the letter and spirit of the GA consensus resolution. Ultimately, Professor Grief believes that a political choice must be made. Governments must choose non-proliferation and nuclear disarmament for this is the only way of ensuring the physical survival of peoples.

Questions and further discussion

Professor Ali was asked about her position on the notion of a universal rule of law and if a universal rule of law does not require a secular State. Professor Ali replied by questioning the secular foundation for the rule of law; she considered that principles as to the rule of law were set out within the body of human rights law and that, as her argument suggests, if human rights are universal then so too is the rule of law. She went on that understanding the rule of law as necessarily secular is prefaced upon a Western acquisition of universal rights; human rights existed before the Enlightenment and the Western liberal tradition. The secular foundation for the rule of law and indeed, human rights more generally is purely one foundation for human rights; in reality it is the struggle of humanity throughout the ages, leading to conceptions of human rights, admittedly based on different foundations, that makes human rights universal. Professor Grief added that there might well be a notion of a universal rule of law but that we may never all agree on it.

Asked about what happens when normative legal prescriptions for Non-Proliferation or the Use of Force clash with power politics, Professor Kritsiotis stated that events such as those considered under the term “Arab Spring”, have a tendency to encourage States to act through collective bodies rather than unilaterally. This encourages an emphasis upon the rule of law and as such, power politics become exposed. He further contended that international organisations could no longer be seen as the gloves of power politics. States wishing to act through these international organisations were beginning to understand that the perception of the organization’s authority would be undermined if the organisation appeared as a proxy for the politics of powerful States.

Professor Grief believed that, despite the difficulties of real politics, the limits of the law had not yet been surpassed; although he accepted that at the margins, extra-

legal, political choices were being made. Within the non-proliferation context, he considered that whichever view was taken of the international obligation there was still the self-evident humanitarian concern for survival. He hoped that for this reason differences preventing legal agreement would eventually be sunk despite the machinations of power politics.

Professor Grief was asked about the justification for his argument that Article VI of the NPT is an obligation *erga omnes* and what the legal consequences of this are. He explained that his opinion was based on the “gloss” which the ICJ had placed upon Article VI. The Court had stated that the twofold obligation in Article VI is an objective of ‘vital importance to the whole of the international community’. He reiterated that an *erga omnes* obligation means that all States have a legal interest in the performance of that obligation and a duty to help bring it about. In view of the ICJ’s advisory opinion in the *Wall case*, actions of States that conflict with *erga omnes* obligations do not have legal effect, and the activities of other States supporting those actions are not considered legitimate. In short, States must not assist the transgression of *erga omnes* obligations.

Panel Three: International Investment Law

The Third Panel discussed the legal challenges raised by the Arab Spring for foreign investors. The Panel was chaired by N. Jansen Calamita, Director of the Investment Treaty Forum at the British Institute of International and Comparative Law, and included as discussants Dr Charles Gurdon of MENA Associates, Andrew Tobin of Clyde & Co., and Anthony Sinclair of Quinn, Emanuel, Urquhart & Sullivan, LLP.

Mr Calamita opened the discussion by identifying the significant impact the Arab Spring has had on economic and investment levels in and around the Middle East and North Africa (MENA) region – noting, for example, that although global foreign direct investment (FDI) increased by 16% in 2011, FDI in North Africa decreased by 15% during that same period, and decreased by 16% in West Asia to the lowest levels there since 2005.

Arab Spring: The Political, Economic & Investment Implications

Dr Charles Gurdon

Dr Gurdon’s presentation focused on the MENA region in particular, addressing the differing fates of republican and monarchic regimes in the region, the MENA region’s prospects for continuing to attract foreign direct investment, and problems arising from the oil industry’s so-called “herd mentality”.

Dr Gurdon began by analyzing factors that explain why the Arab Spring has played out differently amongst republics and monarchies, including larger populations and perceived “youth bulges” in republics; the failure by republics to address education and employment problems; the use of new social media; and the spread of “political Islam” within monarchies.

Dr Gurdon then examined country-specific factors such as government subsidies on necessities in Egypt and army influence in Egypt and Tunisia. Dr Gurdon characterised the situation in Libya as an “incomplete revolution”: despite a rapid political transition, the country continues to be plagued by security issues and a weak central government. Libya’s incomplete revolution stands in sharp contrast to

monarchies such as Saudi Arabia and Qatar, where any pull towards radical change has been mitigated by social contracts with the population and the distribution of oil wealth.

Dr Gurdon concluded that, despite high hopes, democratic elections have not yet led to hoped-for liberal regimes and, in fact, political instability has served to worsen economic and social problems. Going forward, he noted, investment challenges include dealing with more nationalist and more Islamic governments, the new governments' lack of administrative experience, potential corruption, and the need to think and work "locally" with local stakeholders and potentially inexperienced local partners. Dr Gurdon stressed the need for the MENA region to re-attract investment by fostering political stability and security.

The Arab Spring: Its Impact on the Political Risk Insurance Market

Andrew Tobin

Mr Tobin's presentation placed the Arab Spring in the context of political risk insurance. Mr Tobin charted the development of Political Violence Policies ("PV Policies"), which had grown to cover the void left by "war risk" exclusions in traditional insurance policies. He then examined the array of available risk insurance products and identified investment issues arising from the Arab Spring.

Mr Tobin noted how stand-alone "T3" terrorism insurance had begun to be sold widely throughout the world following the events of 9/11. However, stand-alone terrorism cover is narrow and itself excludes other political violence perils, such as war, civil war, insurrection and rebellion. Such stand alone covers may well not respond to many of the Arab Spring losses because they require the loss to be directly caused by terrorism but not indirectly caused by the exclusions in the T3. Looking to the events of the Arab Spring in particular, Mr Tobin noted possible evidentiary difficulties where events occurred in remote desert areas, and highlighted potential gaps in coverage. He also explained that wider political violence coverage is available to cover the whole spectrum of political perils up to and including war and that these wider coverage may have been more appropriate.

The Feasibility of Re-structuring of Investments in the Region to Maximize Legal Protection under International Investment Treaties

Anthony Sinclair

Mr Sinclair's presentation addressed ownership of operations already in place under newly-governed States in the wake of the Arab Spring. He identified major investor concerns including uncertain returns from large capital outlays, the desire to renegotiate contract terms, and strict *force majeure* clauses. He highlighted the importance of determining who was left in power in the new regimes; the status of contracts in place before the Spring; and whether claims could be brought under investment protection treaties.

Mr Sinclair noted that, generally, contracts signed with previous regimes bind future governments. However, the subtle difference between "regime change" and "state succession" has proved problematic for investors trying to enforce contractual obligations. Likewise, despite the principle of continuity of States – wherein changes in the government or international policy of a State do not change its position in

international law – the distinction between “government” and “State” succession may mean that treaties do not bind successor States. If reliance on treaties is not foreclosed, Mr Sinclair noted that investors may have the potential to bring investment treaty claims against the State for full protection and security, compensation for damage in the event of civil unrest, or expropriation.

Questions and further discussion

The panellists dealt with a wide variety of questions, including the following:

- differences between multinational and private insurance coverage – the former is limited in terms of eligibility, the latter may offer wider coverage and a variety of prices;
- the possibility – though very limited in the political risk market – of recovery under rights of subrogation in the event of a payout by insurer to insured;
- the distinction between regime change and State succession in the case of investment agreements – the correct position of law is that successor States are not bound by international investment treaties concluded by predecessor States, whereas investment agreements between States and private investors are binding irrespective of a regime change;
- whether the large caseload after the establishment of the Iran claims tribunal is indicative of what the world can expect in the wake of countries entering into thousands of bilateral investment treaties – such a consequence would be unknown where claims take time to crystallise, although investors are looking more to monetizing assets or re-entering countries to resume operations rather than bringing claims.

The views expressed in this contribution are those of their authors and do not necessarily reflect the views of the British Institute of International and Comparative Law.

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Charles Clore House, 17 Russell Square, London, WC1B 5JP Tel: +44 (0)20 7862 5151

'The Arab Spring, the Arab Awakening or the Ongoing Arab Revolution?'

Annual Grotius Lecture, presented by

Professor Cherif Bassiouni

The British Institute of International and Comparative Law hosted the Annual Grotius Lecture on 25th October 2012. This year, the Institute welcomed a prominent speaker M. Cherif Bassiouni, Emeritus Professor at DePaul University and the founder of the International Human Rights Institute there. Professor Bassiouni is one of the most eminent and prolific scholars in International Criminal Law and has been awarded the Hague Prize for his 'distinguished contribution in the field of international law'. The event opened with a welcoming address by Professor Robert McCorquodale, Director of the British Institute of International and Comparative Law, who emphasized Professor Bassiouni's unique expertise to discuss this topical issue.

In his lecture, Professor Bassiouni explored the background and the future prospects of the Arab Spring from a historical, socio-political and legal perspective. His approach was premised upon the understanding of the Arab Spring as an ongoing revolutionary process influenced by a variety of factors, some of which are common to the region, whereas others, distinctive for each individual State. In that sense, he distanced himself from an approach, which focuses solely upon sectarianism or external geopolitical factors common to some Western policies that he found unrelated to the Arab World.

Professor Bassiouni gave emphasis to the factors that have resulted in a reversion to Islam. He went through a historic account of the Islamic experience, starting with the rise of the Islamic Empire in the seventh century, the establishment of the Ottoman Empire and subsequent colonialist oppression, to the emergence and decay of Arab nationalism. On this basis, much of what is seen today is a result of this oppression and what Professor Bassiouni described as Arab States 'walking with their backs to the future whilst looking to the past'; or, as Shakespeare aptly phrased it, 'past is prologue' in the Arab World. In amassing all these experiences there remains two strong ideas amongst the downtrodden masses of the Arab World: Rage or Revolution and a failure of ideologies. Islamism then becomes the only vanguard.

However, as Professor Bassiouni explained, Islamism, as an alternative to nationalism, has its own weaknesses in that it has a tendency to fragmentation and a complicated relationship between the established clergy and those at the political helm. In both legal and political terms, Islamisation is a fragmented process. In Egypt, for example, the Islamic clergy deals with constitutional issues that touch on *sharia* law. Nevertheless, their interpretations might often vary depending on their own traditions, schools of thought, religious ideology, political inclination or personal interests. Furthermore, the interpretations of the *hadiths* of the Prophet are also not immune to variations in interpretation. As a result, when referring to Islamic law, the question becomes, 'whose version or interpretation of the *sharia* will prevail?' This has led to the manipulation of legal doctrine by the established clergy, and by those in power, in order to promote their own – sometimes anachronistic – political viewpoints. Professor Bassiouni drew on a notable example of the relationship of Islamic legal tradition with international law. He suggested that a less strict interpretation of the *sharia* is possible to accommodate basic concepts of international law and, particularly, international humanitarian law. Indeed, the Prophet

himself relied on principles such as *pacta sunt servanda* and immunities in order to establish Islam in the region. Thus, international law could be construed as an integral part of the Islamic legal tradition.

Against this common historical background, Professor Bassiouni explained that what is seen in the situation of the Arab Spring are factors that are unique to each individual State, creating different prospects for each. Socio-economical factors, such as unemployment and poverty, cannot be ignored. Geopolitical considerations may also be relevant to different degrees in some States. Western States' involvement also plays an important role, as the US position in Libya or the French influence in Tunisia. Likewise, the possibility of the accumulation of internal and regional dynamics cannot be excluded. Similar situations might arise in States of the Maghreb or the Middle East due to a spill-over effect from neighbouring States, yet each with its own dynamics and prospects. However, the Western approach of taking account of those factors individually doesn't necessarily correspond to the realities in the Arab World. On this basis, he attempted to shed some light on the contextual setting of the Arab Spring, both as a regional phenomenon, and as a series of internal State conflagrations, which will develop separately as each revolution takes its course.

Throughout the presentation Professor Bassiouni emphasised that a shift in perspective of the West is needed in order to understand the various conflicts in the Arab World and to respond and assist appropriately. Such an endeavour would serve to defeat the current reluctance towards Western governments, which is common throughout the Arab World, and to facilitate active engagement in solving these issues.

The views expressed in this contribution are those of their author and do not necessarily reflect the views of the British Institute of International and Comparative Law.

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Charles Clore House, 17 Russell Square, London, WC1B 5JP Tel: +44 (0)20 7862 5151