IBA GLOBAL INSIGHT

February 2012

Shifting sands

The financial crisis pushes the balance of power eastwards

The powerful alliances forming between Middle Eastern states and China

White & Case Chairman Hugh Verrier on the crisis and emerging markets

UK Justice Secretary Ken Clarke on austerity, riots and protecting the vulnerable

Egyptian Presidential elections: Enlightened reformers or Mubarak remnants

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IBA Global Insight

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From the Editor

Wen Jiabao began 2012 by becoming the first Chinese Premier to visit the UAE or Qatar, and the first in 21 years to visit Saudi Arabia. In so doing he provided the strongest indication yet as to how the financial crisis has altered the dynamics of the global economy, and what the implications might be (see **Comment & analysis: Middle East**, page 21). As the cover of this edition conveys, it appears to be clearer than ever that the locus of power is moving ineluctably eastwards.

America and European states continue to struggle with crippling debt. As the Chairman of White & Case, Hugh Verrier, puts it on a recent live webcast interview with the IBA (see feature **Global leaders**, page 23), 'If there's a double dip, I missed the upward part of the "W"…we're in year four of a protracted recession and it's going to be a long climb back to a vibrant economy.' The UK's former Chancellor of the Exchequer, Ken Clarke, is another key decision maker wrestling with the consequences. As he told *IBA Global Insight* in an exclusive interview, 'Recovery and growth is getting very, very difficult to start off, because of a huge burden of debt that has to be resolved…The whole point of reducing public spending on a scale which no democratic government has attempted in modern times in most Western countries, certainly not in Britain, is to do so in such a way so that you don't damage the vulnerable.' Clarke's final point being the major bone of contention (see feature **Access denied**, page 29).

Meanwhile, the wealthiest Middle Eastern and Asian economies are accumulating ever more influential sovereign wealth (see feature **Shifting sands**, page 14) and it is in their shared interests to develop increasingly sophisticated trade and investment ties. Saudi Arabia is already China's biggest source of imported oil, but China's growing ties with Middle Eastern states aim to guarantee the uninterrupted supply of energy essential for continuing its impressive growth. Bilateral trade between China and Saudi Arabia alone was approximately $58.5bn in the first 11 months of 2011. This is set to soar as the locus of power shifts eastwards.

James Lewis

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News

City of London buys into Year of the Dragon

City lawyers in London have welcomed a deal struck with Beijing to transform the UK into an offshore trading hub for China's renminbi (RMB), but stress it is only the first step in a long-term process.

Linklaters partner and capital finance specialist Nigel Pridmore calls the deal 'one of the most significant developments in the international financial markets this century'.

George Osborne, UK Chancellor of the Exchequer, signed the agreement with the Hong Kong Monetary Authority on 16 January. The aim is to put London on a level playing field with Hong Kong, currently the main offshore region permitted to exchange the currency.

Since China opened itself up to international trade in the 1980s, it has kept tight control over the RMB to protect it from unpredictable market fluctuations and help boost the country's domestic export sector.

'It is important to see this as part of a longer process, starting with the liberalisations of 2010,' Linklaters' Pridmore tells IBA Global Insight.

'London's participation will enhance the access to renminbi of UK and European corporates and accelerate internationalisation of the currency through its use in trade settlements, as well as deepening liquidity in the foreign exchange market.'

As part of the deal, Hong Kong has agreed with London to set up a forum of key private players to meet twice a year to explore ways the two financial centres can join up to develop an offshore RMB business in the UK.

Banks and businesses have heralded the move, which will cement London's reputation as a leading centre for currency exchange, while giving China access to more sophisticated foreign exchange and bond markets.

Figures from the Society for Worldwide Interbank Financial Telecommunication (SWIFT) reveal London's growing influence. The UK saw its share of RMB payments increase from 22.1 per cent in the first quarter of 2011 to 30 per cent in the fourth quarter.

Conversely, Singapore's share dropped from 52.9 per cent to 30.6 per cent over the same period.

'This deal will help the establishment of London as the main gateway for Asia into the European Union – China's largest trade partner – for the development of RMB denominated financial products and trade finance,' says Pridmore.

Read the full article at: **tinyurl.com/riseofchina**.

Colombian Government seeks expert assistance from IBA on Legal Profession Bill

The Bar Issues Commission is working in consultation with the Colombian Government on its new Legal Profession Bill for which a new draft law will be presented on 16 March 2012. The government, which noted the *IBA's International Principles on Conduct for the Legal Profession*, approached the IBA Legal Projects Team in London, seeking expert advice on the development of this bill. A Taskforce has been organised, involving members of the BIC Policy Committee and Professional Ethics Committee, to provide the high-level expert assistance the government seeks. The Colombian Minister for Justice, Juan Carlos Esguerra Portocarrero, said:

'The outstanding qualifications and experience of the lawyers appointed by the IBA will guarantee that the bill to be presented by the Government before the Colombian Congress meets international standards. By enriching our country's debate on legal ethics, we expect to pass a modern law suited to a globalised world.'

When the final version of the bill is ready, bilateral meetings will be organised to discuss the project with members of the Ministry of Justice and the Congress in conjunction with the biannual conference of the IBA's Latin American Regional Forum in March.

To read the *IBA's International Principles on Conduct for the Legal Profession*, see **tinyurl.com/IBAPrinciplesOnConduct**.

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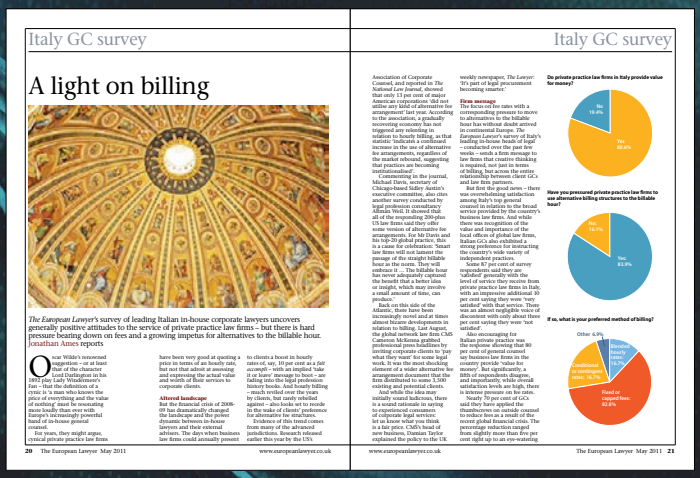

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South Korea: controversy over free trade agreement

Phil Taylor

Fierce arguments over dispute resolution clauses in the recently ratified South Korea-US free trade agreement threaten to weaken South Korea's image as a country under the rule of law, say lawyers.

At issue are the agreement's investor-state dispute (ISD) clauses which essentially allow for disputes to be heard, in closed session, by a panel of arbitrators in a third country.

Such clauses are by no means unusual: they date back to the time of the North American Free Trade Agreement and are found in countless other global free-trade agreements (FTAs) and bilateral investment treaties (BITs) worldwide.

They can be used by a disgruntled private investor from one of the states which is party to the agreement to seek damages for actions by the other state which are inconsistent with the terms of the agreement.

Opponents in Korea have claimed that the clauses will violate the country's legitimate sovereign rights, with one left-wing lawmaker going as far as setting off tear gas during the vote over FTA ratification.

'I think what happened is that opposition politicians seized on this as something they could manipulate – something they could characterise in the way that they wanted because the general public didn't know much about it – and it seems to have worked,' said Benjamin Hughes, senior foreign attorney and co-chair of the international dispute resolution practice group at Shin & Kim.

'The image of tear gas being let off in the National Assembly does not reassure investors that they are going to get a fair shake in Korea,' he continued. 'Protesters who break the law to make their point are really undermining their own argument that Korea is a place with the rule of law.'

Read the full article at **tinyurl.com/IBAnews-southkorea**.

Human Rights News

Combating Torture in Brazil: training judges, prosecutors, public defenders and lawyers

At the end of October 2011 the IBAHRI, in partnership with the Brazilian Bar Association (*Ordem dos Advogados do Brasil*), the National Justice Council (*Conselho Nacional de Justiça*), the Ministry of Justice Secretariat for Human Rights and the Association of Public Defenders, launched a training manual for judges, prosecutors, public defenders and lawyers on combating torture in Brazil.

The manual, *Protegendo os brasileiros contra a tortura*, follows the 2010 IBAHRI fact-finding mission report 'One in Five', which identified significant challenges in the Brazilian criminal justice system, including pre-trial detention and torture.

The manual is part of a major project implementing training in six different states in Brazil and the development of legal education curricula for use by justice institutions. Training has recently taken place in Brasília (26–27 October), São Paulo, Fortaleza, Rio de Janeiro (30 November–1 December) and in Porto Alegre and Porto Velho (5–6 December).

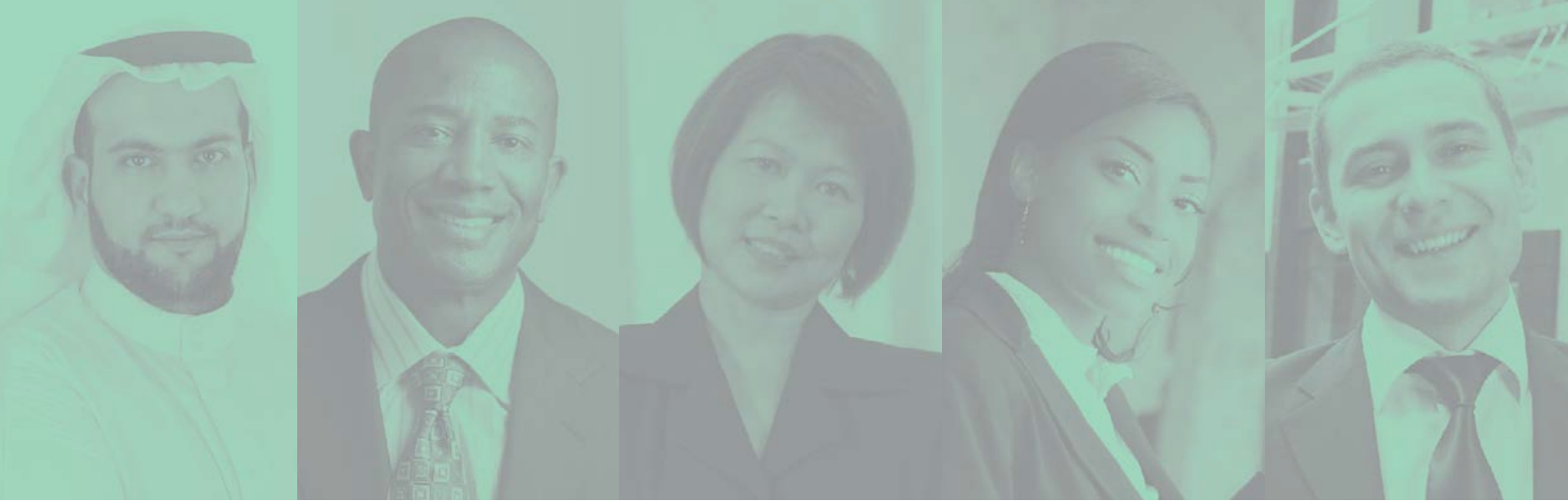
The training manual can be downloaded from the IBA website at **tinyurl.com/IBAHRICombattingTortureBrazil**.

Afghan Independent Bar Association holds its second General Assembly

The Afghan Independent Bar Association (AIBA) held its second General Assembly (GA), on 13–16 October 2011. Members debated, voted and passed amendments to the AIBA By-Laws and elected a new Executive and Leadership Council.

The Assembly was run with assistance from the IBAHRI and donors, but largely by the AIBA itself, indicating that it is starting to function for itself without external support. At the first GA there were 400 lawyers registered in Afghanistan; there are now over 1,200 and the AIBA has set up committees dealing with continuing legal education, women and children's rights, and corporate law. The AIBA is one of the few bar associations in the world that stipulates a minimum percentage of women lawyers to be on its Leadership Council, and which requires all lawyers to perform three cases per year pro bono as a requirement for annual registration.

To see images on the Afghan Independent Bar Association General Assembly 2011 photo gallery, go to **tinyurl.com/AfghanBar2011**.



IBA Human Rights Award 2012

How to Nominate

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The IBA presents an annual award to an outstanding lawyer in the world of human rights law. We are seeking high-calibre nominations for 2012. The deadline for applications is **1 May** .

Previous Winners

Ivan Velasquez Gomez *Colombia*
Presented with the Award for his commitment to human rights and justice and his courage working on parliamentary transparency and organised crime.

Clive Stafford Smith *United Kingdom*
Presented with the Award for his commitment to bringing legal rights to the most vulnerable and to those who cannot afford representation. In addition, for his work defending individuals on death row, ensuring due process and justice for those wrongly convicted.

George Bizos *South Africa*
Presented with the Award for his outstanding contribution to human rights law in South Africa. Nelson Mandela, one of the many who nominated Mr Bizos said, 'I know of no person more worthy for this honour'.

Asma Jahangir *Pakistan*
Presented with the Award for her work to promote and protect human rights in Pakistan.

Criteria for Candidature

To qualify for nomination the following criteria must be met by candidates:

- The award will be made to a legal practitioner (whether in private practice, employment as a legal adviser, academia, bar leadership or other regulation of the profession, or similar) who, through personal endeavour in the course of such practice, is adjudged to have made an outstanding contribution to the promotion, protection and advancement of the human rights of all, or any group of, people, particularly with respect to their right to live in a fair and just society under the rule of law.
- It will be relevant, but not essential, that such endeavour will have had an international influence.
- It is not a requirement that the recipient of the award be a member of the IBA.

Application process

To nominate a lawyer for this prestigious award please send, via email (**hri@int-bar.org**):

- A detailed cover letter (two A4 sides maximum), detailing why the nominee is a worthy candidate, highlighting their practical human rights work and achievements.
- A full Curriculum Vitae/Resume.
- The full contact details of both the nominator and the nominee.

The IBA Selection Committee will review in detail all full applications submitted to the IBA. Submissions that do not include all documents listed above will not be considered.

The deadline for applications is **1 May**. The winner will be notified in July to allow time for the IBA to make arrangements for the winner to attend, as a guest of the IBA, the 2012 Annual Conference in Dublin.

Gaddafi trial: international or Libyan law?

Rebecca Lowe

Libyans and lawyers alike are clear on one thing: justice must be done regarding the trial of Saif al-Islam Gaddafi, son of the late dictator Muammar Gaddafi. Yet the location of his trial remains a source of some controversy.

Both Gaddafi, 39, and former intelligence chief Abdullah al-Senussi, 62, have been charged by the International Criminal Court (ICC) with crimes against humanity allegedly committed since the beginning of the Libyan uprising in February 2011.

Gaddafi is currently being held in the town of Zintan, 100 miles south of Tripoli. Libya's National Transitional Council (NTC) also claims that it captured al-Senussi last November, though it is yet to produce any evidence.

The NTC wrote to the ICC on Friday, 20 January, to inform the Court that it wished to try both men on native soil. Under the Rome Statute, which brought the Court into being, the ICC can only try cases when national jurisdictions are unable or unwilling to do so themselves.

ICC judges are yet to rule on whether the men should be tried in Libya or The Hague, and the decision is likely to hinge on whether they believe the domestic trials will be fair. According to a Human Rights Watch report, Gaddafi has not seen a lawyer since his arrest.

If tried in Libya, the charges could be broadened to include other crimes, such as corruption, and they could be extended to cover a longer period of time. Under Libyan law, unlike international law, defendants can face the death penalty.

ICC chief prosecutor Luis Moreno-Ocampo has publicly proposed various options, including the ICC conducting a trial in Libya, or the Libyan courts conducting their own separate trials following a hearing at The Hague. Yet international lawyers stress that the ultimate decision lies not with him or the NTC, but with the ICC judges.

For Hans Corell, former Under-Secretary-General for legal affairs and Legal Counsel of the United nations, two consecutive trials could be the best solution, to avoid overloading the Libyan judicial system. Speaking to *IBA Global Insight*, he said: 'I think it is extremely important that Saif Gaddafi is tried before the ICC. Libya has so many urgent matters to attend to at present, and trying him now will be extremely burdening.'

Read the full article on the IBA website at **tinyurl.com/IBAnews-saifgaddafi**.

IBAHRI undertakes parliamentary strengthening in Ukraine

In January, the IBAHRI participated in a two-day training workshop for parliamentary staff in Ukraine as part of its ongoing support to The Westminster Consortium (TWC) parliamentary strengthening programme. The workshop was entitled *Monitoring Human Rights related Legislation by the Parliamentary Committees in Ukraine* and followed the launch of a localised Ukrainian version of the IBAHRI/TWC publication: *Human Rights and Parliaments: a Handbook for Members and Staff* in Kiev in December 2011.

As well as examining the tools available for parliamentary committees to monitor implementation of human rights related legislation and Ombudsman reports, the training considered ways in which existing oversight procedures could be used to respond to concerns about human rights in prisons, using examples of best practice and case studies from the UK.

The *Human Rights and Parliaments* handbook can be downloaded from the IBA website at **tinyurl.com/IBAHumanRightsAndParliaments**.

IBAHRI urges new Egyptian Parliament to reform freedom of association laws without delay

The IBAHRI is urging the new Egyptian Parliament to protect by law, and respect in practice, the right of freedom of association of Egypt's citizens. The call comes following recent raids on several NGOs operating in Cairo, including at least one organisation working to defend the independence of the judiciary and the legal profession in the Arab regions. In particular, the IBAHRI is concerned over Egypt's Law on Non-Governmental Associations (Law No 84 of 2002), which impedes the ability of non-governmental organisations (NGOs) to recruit staff, to elect their leadership, hold meetings and receive foreign funding. While such restrictions are widely viewed as obstructing the functioning of independent civil society groups, failure to respect the Law is deemed a criminal offence.

In November 2011, the IBAHRI launched a fact-finding report on the rule of law and the legal profession in the months immediately following Egypt's revolution. The report was launched with a high-level panel discussion at the House of Commons, London.

The report and a recording of the discussion are available to download from the IBA website at **tinyurl.com/IBAHRI-Egypt**.

See feature on pages 35-41 of this edition.

IBAHRI undertake fact-finding visit to Malawi

The IBAHRI undertook a fact-finding mission to Malawi in January 2012 to assess the state of the rule of law in the country, with a focus on independence of the judiciary and the legal profession. A report detailing the findings, conclusions and recommendations of the mission will be issued in the first quarter of 2012.

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Ivan Velasquez: Ex-IBA President Fernando Pelaez-Pier interviews Ivan Velasquez, auxiliary judge of the criminal chamber of the Supreme Court, Colombia. The interview focuses on Mr Velasquez' investigations into links between terrorist groups and members of Congress Auxiliary Supreme Court Judge.

Ken Clarke QC: austerity, riots and spiralling prison numbers have led to major legislative responses from the UK Government, which have been heavily criticised by leading lawyers, NGOs and the House of Lords. The IBA met with Justice Secretary Ken Clarke and put their concerns to him.

Balthasar Garzon addressed the IBA Annual Conference 2009. The former investigating magistrate of the Spanish Central Court of Criminal Proceedings was indicted in 2010 for allegedly exceeding judicial authority in investigations of crimes committed by Franco regime in Spain.

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You could'a been a contender

Extreme foreign policy positions are commonplace during US electioneering. Though generally dropped like hot potatoes, they nevertheless change perceptions of the values defining America.

SKIP KALTENHEUSER

As if reading Agatha Christie's mystery *And Then There Were None*, we watch to see who'll be the next Republican contender for Presidential nomination knocked off. For many, betting on the last man standing is a guilty pleasure, but with so much riding on the tracks leading to the last arena, where President Obama waits, much of Washington is perplexed. We've lost count on how often conventional wisdom – insider wisdom, all wisdom – took flight out the window. Several days before the South Carolina primary, Nate Silver, a skilled interpreter of polling data, gave former Massachusetts governor Mitt Romney a 90 per cent chance of winning. Former US Speaker of the House Newt Gingrich didn't just win, he trounced Romney. Democrats popped corks. The White House still assumes Romney, riding his well-fuelled campaign machine, will prevail. But as the rumble moves to Florida, it is a blood sport.

But, if the world tuning in focuses less on the bloodletting, and more on foreign policy pronouncements, should it worry about the world views leading contenders espouse? Yes.

There are those who say nay, because candidates seeking the nomination are notorious for appealing to voters by laying down foreign policy positions they walk past if elected. Moving the capital of Israel and/or the US embassy from Tel Aviv to Jerusalem, for example, has been frequently pledged by candidates of both parties, but is dropped like a hot potato once certain realities set in. It's one thing to campaign with positions appealing to supporters, it's another to govern and to function in a complex, diverse world.

Extreme foreign policy positions

But this primary season raises the bar on extreme positions that the winner will have to pay homage to in order to maintain the base. Recall that former Utah Governor Jon Huntsman, Obama's former ambassador to China, was once the contender Democrats feared most, as he was worldly and often reasonable. Too worldly and reasonable to have a prayer in Republican primaries, it turned out.

Where does one start? Rick Perry claimed Turkey is run by Islamic terrorists, and perhaps should be kicked out of NATO. Most contenders seek to greatly scale back foreign aid, never mind humanitarian help and US influence scaling back as well. Mitt Romney criticises Obama's nuclear arms reduction treaty with Russia, rejects all negotiations with the Taliban, criticises Obama's engagement with Tehran, pledges to support Iranian insurgents to stop progress toward a nuclear bomb and says if 'crippling sanctions' fail, he'll use military action.

Candidate Rick Santorum is so gung-ho to help Israel bomb Iran's nuclear facilities, one can imagine him astride a bomb like the Will Pickens character in the film Dr Strangelove. Gingrich says he'll 'green light' any decision by Israel to preemptively attack Iran's nuclear

facilities, and would consider a strike on an oil refinery. Most contenders indicated approval of waterboarding.

Perhaps most telling, with no thought of US or international law, some contenders called out to assassinate another country's scientists. Santorum called Iranian nuclear scientists, and scientists from other countries who work with them, 'enemy combatants'. 'Taking out their scientists…, all of it covertly, all of it deniable,' Gingrich urged… on television.

Not long after this cry for the moral high ground of Murder, Inc, the roster of Iranian scientists killed or wounded added a young nuclear expert, Mostafa Ahmadi Roshan, blown up in traffic.

'The super-rich now call their tunes through Super PACs [political action committees] enabled by the Supreme Court's dismal Citizens United decision. Super PACs are outspending campaigns. Most contributors haven't been disclosed since last summer.'

A host of experts view such actions as counterproductive. William Tobey, a senior fellow at Harvard's Belfer Center for Science and International Affairs, says, 'The payoffs are small, the risks involved are very large, and it looks like an act of desperation. It's not likely to be effective; it's difficult to imagine a state that strong could be crippled by killings.'

It's extremely unlikely the US was involved, but the contenders' easy advocacy enables accusations. Beyond increasing the danger for a US marine sentenced to death in Iran on trumped up spying charges, the assassination took place just as the US was winning hearts and minds after rescuing Iranian fishermen held captive by Somali pirates, and saving two other groups of Iranian fishermen in peril at sea. For those seeking to derail engagement with Iran in favour of 'Death to America' funeral chants, the killing was a wish come true.

Then there's Gingrich's bold assertion that, apparently unlike Americans, Palestinians are an 'invented people'. There's method to such madness. It's not just appealing to the Tea Party or the dwindling number of American Jews who firmly buy the Likud line, or even the much larger groups of evangelical and born-again Christians, some of whom believe Israel is ground zero for the Battle of Armageddon warming up the rapture.

Keep the backers happy

For Gingrich, with more comebacks than Lazarus, that comment pleased his old pal and backer, billionaire casino king Sheldon Adelson. An ally of Benjamin Netanyahu, Adelson kicked millions into a Super PAC that supports Gingrich. Thrashed with advertising by Romney's Super PAC in Iowa, Gingrich wasn't going naked in South Carolina. Adelson, whom others also pandered to, enabled Gingrich's revenge.

The super rich now call their tunes through Super PACs enabled by the Supreme Court's dismal Citizens United decision. Super PACs are outspending campaigns. Most contributors haven't been disclosed since last summer. But, they're totally independent of candidates. Right. And vice versa.

Daniel Serwer, a senior fellow at Johns Hopkins School of International Studies, says the 'invented people' comment 'undermines perception of commitment to a two-state solution. As with proposals on China that could cause unintended consequences, indelicate comments risk real harm, and ignorance never shows well.'

Osman Siddique, a former US Ambassador with a portfolio of several nations including Fiji, was the first American Muslim ambassador, and the first of South Asian descent. He was taken aback when former contender Herman Cain pledged no Muslims in his cabinet. Siddique travels extensively on business in the Middle East, where people ask him how such positions gain traction.

'This isn't the America they know or want to live with,' says Siddique. 'When important people make comments like this, they go viral on the internet and change the perception of what's going on in American thinking. People like our products, but it's values that define America.'

As to impacts in the general election, John Tirman, executive director of MIT's Center for International Studies, has doubts. 'Foreign policy only works for a challenger when there's a genuine crisis, as with the hostages in Tehran in 1980, or the Vietnam War in 1968. There's no crisis like those this year.'

Hold that thought.

Skip Kaltenheuser is a freelance journalist and writer. He can be contacted at **skip.kaltenheuser@verizon.net**.

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Shifting sands

The shifting dynamics of the global economy are giving rise to difficult questions. Although sovereign wealth funds tend to be passive investors, worries remain that their approach conceals aggressive intent.

JONATHAN WATSON

In January 2012, UK Chancellor George Osborne went on a trip to China. Unlike many other visitors to the country, he made no plans to walk along the Great Wall, marvel at the Forbidden City or take a leisurely cruise down the Yangtze River. His main aim was to persuade Chinese investors to put money into transport, energy and utility projects in cash-strapped Britain.

One of those he sought to persuade was Lou Jiwei, chairman of China Investment Corporation (CIC). He had good reason to be hopeful of success. In November last year, Mr Lou wrote an opinion piece in the *Financial Times* newspaper in which he said CIC was 'keen to team up with fund managers or participate through a public-private partnership in the UK infrastructure sector as an equity investor'.

The planned High Speed two rail link from London to Birmingham and the north of England is among the projects that could attract interest from China, along with big industrial developments such as the so-called 'Atlantic Gateway' in the north-west of England. Other projects under discussion included updates of the UK's energy infrastructure, broadband investment and road schemes.

'Now infrastructure in Europe and the US badly needs more investment,' Mr Lou added. 'Traditionally, Chinese involvement in overseas infrastructure projects has just been as contractors. Now Chinese investors also see a need to invest in, develop and operate projects.'

Lou who?

CIC is a sovereign wealth fund (SWF), one of a growing number of investment vehicles established and controlled by government entities with funds separate from official reserves. They manage billions of dollars of public money. Their funding comes from balance of payments surpluses, official foreign currency operations, the proceeds of privatisations, governmental transfer payments, fiscal surpluses and/or the revenues generated by exports of resources, such as oil.

The origins of SWFs can be traced back to 1953, when Kuwait established what was then called the Kuwait Investment Board. In the early 1950s, Kuwait experienced a surge in oil revenues and decided to plan for the day when its oil supplies would run out. The idea was that proceeds in excess of what was needed for its government to function should be transferred into a separate 'fund for the future' for investment in less volatile areas. The Board, which was controlled by the Kuwaiti Government, would then invest these surpluses accordingly.

Fast-forward to today and you will find that the world's largest SWFs are still those from oil-rich countries. At the top of the league is the United Arab Emirates' Abu Dhabi Investment Authority (ADIA), which has assets valued at US$627 billion, according to the Sovereign Wealth Fund Institute (see table). Oil aside, some SWFs, such as CIC (worth US$410 billion, with the Chinese Government widely expected to be on the verge of adding another US$50 billion) and the Government of Singapore Investment Corporation (GIC), invest wealth from fiscal surpluses or foreign currency reserves.

Saviours or predators?

Although many of them have been operating for many years, SWFs now get much more attention than they used to. The scale of

Largest ten Sovereign Wealth Funds by assets under management

Country	Fund name	Assets (US$ billion)	Inception	Origin
UAE – Abu Dhabi	Abu Dhabi Investment Authority	$627	1976	Oil
China	SAFE Investment Company	$567.9*	1997	Non-commodity
Norway	Government Pension Fund – Global	$560	1990	Oil
Saudi Arabia	SAMA Foreign Holdings	$472.5	n/a	Oil
China	China Investment Corporation	$409.6	2007	Non-commodity
Kuwait	Kuwait Investment Authority	$296	1953	Oil
China – Hong Kong	Hong Kong Monetary Authority Investment Portfolio	$293.3	1993	Non-commodity
Singapore	Government of Singapore Investment Corporation	$247.5	1981	Non-commodity
Singapore	Temasek Holdings	$157.2	1974	Non-commodity
China	National Social Security Fund	$134.5	2000	Non-commodity

*best guess estimate

Source: Sovereign Wealth Fund Institute

their investments is impossible to ignore. The Qatar Investment Authority (QIA), for example, which is not even among the ten largest funds, made headlines in Europe last year by purchasing French football club Paris Saint-Germain. The group also bought a 15 per cent stake in the UK's Barclays Bank in the wake of the financial crisis. In recent years, the Qataris have also added stakes in supermarket chain J Sainsbury, Canary Wharf owner Songbird Estates and the London Stock Exchange.

> *'Carefully structured, SWF investments will not raise a huge amount of political attention'*
>
> Rodgin Cohen
> *Sullivan & Cromwell; member of the IBA Task Force on the Financial Crisis*

CIC's recent deals include paying €2.3 billion (US$3.2 billion) for a 30 per cent stake in the gas and oil exploration and production business of GDF Suez in August last year. It also bought the French-based utility's ten per cent share of a natural gas liquefaction plant in Trinidad and Tobago for €600m (US$768 million). And in May 2010, it paid US$1.2 billion for a five per cent stake in Canada's Penn West Energy Trust and US$805 million for a 45 per cent stake in a planned oil sands project.

All this activity, coupled with the increasing willingness of SWFs to take on riskier investments, has left some feeling rather rattled. 'Of all the questions raised by sovereign wealth funds, the leading one is whether there are sinister motives lurking behind their investments,' wrote John Walker and Mark Chorazak of Simpson Thacher & Bartlett in a working paper published by the Washington Legal Foundation. 'The fear is that these funds could be modern-day Trojan horses, with political, not economic or commercial, considerations being the basis for investment decisions and, in turn, jeopardising national security.'

Foreign investment will always have the potential to cause controversy. In 2005, there was considerable opposition in the US to an all-cash US$18.5 billion offer to buy US oil company Unocal Corporation from CNOOC, a Chinese state-backed offshore oil and gas producer. US politicians argued that with US$13 billion of CNOOC's bid for Unocal coming from the Chinese Government, the offer did not represent a free market transaction and had questionable motives. It was also argued that the foreign – particularly communist – ownership of oil assets could represent a regional and economic security risk.

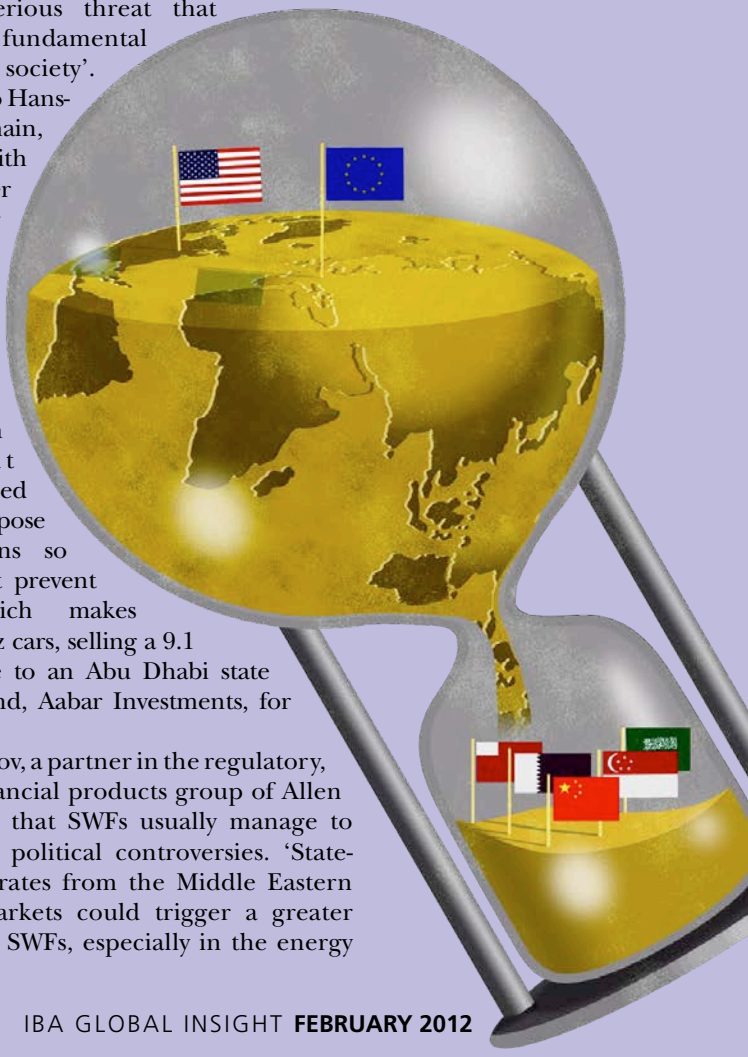
And in the following year, the US$6.8 billion sale of UK-based ports and shipping group P&O to government-backed venture Dubai Ports World caused further anxiety. US politicians claimed the deal meant the security of some US ports would not be entirely in US hands and it proved very unpopular with the US public.

One could also mention the 2006 purchase by the former Soviet trade bank Vneshtorgbank of a five per cent stake in European Aeronautic Defence and Space (EADS), which was also believed to have security implications, and the increasing investment by the China Development Bank and China Eximbank in Africa and Latin America, particularly in extractive industries, which has generated concerns about the extent of China's control of the world's natural resources.

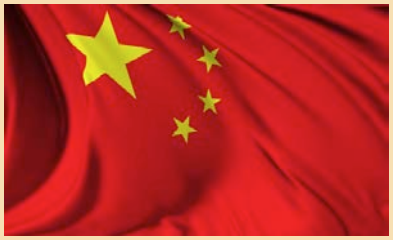
In 2009, the German Foreign Investment Act was amended to enable Berlin to restrict or prohibit acquisitions by investors from outside the European Union and EFTA if the acquisition 'jeopardises the public order or security' and represents an 'actual and sufficiently serious threat that affects a fundamental interest of the society'.

According to Hans-Jörg Ziegenhain, a partner with IBA member firm Hengeler Mueller, this law was 'directed against the SWFs'. However, the German Government has not used the law to impose any restrictions so far. It did not prevent Daimler, which makes Mercedes Benz cars, selling a 9.1 per cent stake to an Abu Dhabi state investment fund, Aabar Investments, for €1.95 billion.

Pavel Shevtsov, a partner in the regulatory, funds and financial products group of Allen & Overy, says that SWFs usually manage to steer clear of political controversies. 'State-backed corporates from the Middle Eastern and Asian markets could trigger a greater backlash than SWFs, especially in the energy



CASE STUDY 1
China Investment Corporation



China Investment Corporation (CIC) was set up in 2007 to invest some of the country's foreign exchange reserves. These were estimated to be about US$3.2 trillion in October 2011. Most of China's reserves are invested by other funds in safer investments such as US Treasury bonds – CIC was given the task of making riskier offshore investments and earning higher returns.

Initially, most of its offshore investments were in the financial sector, but more recently the fund has invested in companies that exploit natural resources – such as the gas and oil exploration and production businesses of GDF Suez – and has even become involved in real estate.

Established with about US$200 billion in assets under management, its assets had grown to US$410 billion by the end of 2010. Its capital is funded through the issue of special treasury bonds. The fund made a return of 11.7 per cent on its portfolio in 2010.

CIC said in its annual report for 2010 that 27 per cent of its investments were in bonds and other fixed-income assets, while four per cent was held in cash and 21 per cent in alternative investments, such as private equity and hedge funds.

CIC established a subsidiary in Hong Kong in 2010 and set up its first foreign office in Toronto in 2011.

sector, for example, because they tend to invest for strategic reasons,' he says. 'They might want to secure the marketplace for a particular commodity.'

By contrast, he argues, most SWFs tend to be passive investors interested in investment returns rather than securing something for strategic reasons. 'Most investments tend to be fairly routine, rather than headline-grabbing takeovers,' he says. 'An acquisition by a big foreign state-backed oil company would probably generate a bigger reaction than an acquisition by an SWF.'

Nevertheless, ever since SWFs started investing in some of the US's most preeminent banking institutions in the latter half of 2007, they have inevitably started attracting more attention. ADIA acquired a 4.9 per cent stake in Citigroup for US$7.5 billion in November 2007; CIC acquired a 9.9 per cent stake in Morgan Stanley for US$5 billion the following month; and Singapore acquired a 9.46 per cent stake in Merrill Lynch in January 2008 through its investment arm Temasek for US$4.4 billion.

Away from traditional financial institutions, the influence of SWFs also extends to private equity, with notable investments being CIC's purchase of a 9.3 per cent stake in The Blackstone Group for US$3 billion and the Abu Dhabi-based Mubadala Development Company's purchase of a 7.5 per cent stake in The Carlyle Group for US$1.35 billion. 'These investments represented a marked departure from sovereign wealth funds' traditional focus,' Walker and Chorazak said. This led to them experiencing newfound scrutiny and, 'fairly or not, being characterised by many as either the saviours of Wall Street or its invaders'.

Fears of an 'invasion' proved to be unfounded. 'In 2007, there was a big increase in the amount of money being spent by SWFs as they competed with private equity firms for trophy assets,' says Richard Good, a senior corporate partner at Linklaters. 'Some of the SWFs got very badly bitten and are now very shy of the banking sector as a result. Although some of them could afford it, others couldn't.'

Since then, some SWFs have chosen to focus on investments closer to home. Edward Greene, senior counsel at Cleary Gottlieb in New York and a member of the IBA's Financial Crisis Task Force, argues that 'because a lot of the cross-border investments led to huge losses in connection with investment in financial institutions, and because of the high level of scrutiny under CFIUS [The Committee on Foreign Investment in The United States] and other regimes, more and more of the investment is becoming regional, especially in the Middle East and Asia'. He suspects this trend will continue.

Legendary banking lawyer Rodgin Cohen, senior chairman at Sullivan & Cromwell and another member of the IBA's Financial Crisis Task Force, is well placed to understand the workings of SWFs. He was involved with many of the SWF investments into US banks, including ADIA's acquisition of its stake in Citigroup. Cohen represented UBS (in the US) in December 2007 when Singapore's GIC invested US$11.5 billion; CIC when it acquired a stake in Morgan Stanley; Merrill Lynch when it received its infusion from Temasek and three other funds; then Citigroup again in its blockbuster US$18.4 billion recapitalisation by six different investors in January 2008.

Cohen believes that the need for money can override sensitivities about political influence. 'When money is needed and there are not readily available optional sources, some of the constraints which might otherwise apply may be liberalised,' he says. 'It depends a lot on the specific type of industry and on the level of control that the SWF exercises. It's a combination of those two factors that determine attitudes to SWF investments. Carefully structured, SWF investments will not raise a huge amount of political attention.'

Cohen says the 'intrinsic nervousness' many people feel about SWF investments is not grounded in reality. 'What is an investor going to do? Threaten to sell their position?

CASE STUDY 2
Government Pension Fund of Norway

The Government Pension Fund of Norway is divided into two separate SWFs owned by the Norwegian Government. One of them (The Government Pension Fund – Global) makes international investments, while the other (The Government Pension Fund – Norway) concentrates on investments in Norway.

The global fund, which changed its name from 'The Petroleum Fund of Norway' in 2006 and is now generally referred to as 'The Oil Fund', was set up in 1990. Its aim is to distribute the country's oil gains across generations and ensure the sustainability of certain social welfare expenditures.

The fund is administered by Norges Bank Investment Management (NBIM), a division of the Norwegian Central Bank.

As of June 2011, it was the largest pension fund in the world, although one might argue it is not actually a pension fund as it derives its financial backing from oil profits rather than pension contributions. Its total value was US$525 billion at the end of 2010 and has now reached US$560 billion. With 1.78 per cent of European stocks, it is said to be the largest stock owner in Europe.

Investments made by the fund have to follow ethical guidelines based on sector and company behaviour. The guidelines restrict investment where there is a risk that a company is involved in activities that can contribute to violation of human rights, corruption, environmental damage or 'other particularly serious violations of fundamental ethical norms'.

The fund has a Council of Ethics that keeps a close eye on the companies the fund invests in and has excluded a number of companies for activities that breach its guidelines. For example, it does not invest in tobacco companies, firms that help any country's armed forces maintain nuclear missiles or companies that produce components that can be used in cluster bombs.

It wouldn't be much of a threat. I'm not sure there are political strings attached. That would be very difficult for a passive investor to achieve.'

It also seems to be the case that few countries have had problems with SWFs so far. 'SWFs are well established in Germany now,' says Ziegenhain. 'They have been investing in German entities for the last 40 years, so this is nothing new for us. Kuwait Petroleum held a stake in pharmaceuticals firm Aventis, and now we have Aabar investing in Daimler… the German experience of SWFs has not been bad at all.'

As the banking crisis of 2007/8 mutated into a sovereign debt crisis, expectations have again arisen that SWFs are set to save / invade (delete as appropriate) the world economy, especially the struggling eurozone. However, Richard Good does not expect that to happen. 'Until there is clarity on what is going to happen in the eurozone, I would be surprised if there were large amounts of funds flowing in from the Middle East, Asia, Canada or wherever,' he says. 'I don't see the SWFs pumping in lots of money that might evaporate in a financial crisis.'

That said, it is likely that levels of SWF investment across the globe will continue to increase. 'It's much more likely to be evolutionary than revolutionary,' says Cohen. 'I would expect more in the way of investment because there is so much need for additional capital at this time. But this will be a gradual increase. It's not going to be a revolution.'

Hidden agenda?

SWFs might be able to reduce any anxiety felt about their growing influence by being a bit more upfront about their activities. There is little information available about how some of them invest and they regularly face calls for more transparency.

> *'Most investments tend to be fairly routine, rather than headline-grabbing takeovers'*
>
> Pavel Shevtsov
> *Allen & Overy*

The lack of transparency that characterises some SWFs is not going to change for the time being, says Ziegenhain. 'In the Arab region in particular, it is their strategy to hold their cards very close to their chest,' he says. 'As long as no one can force greater transparency on them, there is no real reason for them to change that.'

According to Shevtsov, an SWF's willingness to disclose information about its activities depends on the country it comes from.

CASE STUDY 3
Abu Dhabi Investment Authority

The Abu Dhabi Investment Authority (ADIA), set up in 1976, is responsible for managing the Emirate's surplus oil revenues. ADIA replaced the Financial Investments Board, created in 1967 as part of the then Abu Dhabi Ministry of Finance.

ADIA is the world's largest SWF. It is wholly owned and overseen by the Government of Abu Dhabi. The fund is an independent legal identity with 'full capacity to act in fulfilling its statutory mandate and objectives'. As much as 80 per cent of its assets are administered by external managers, which includes around 60 per cent that is passively managed through tracking indexed funds.

ADIA's funding derives from oil, specifically from the Abu Dhabi National Oil Company (ADNOC) and its subsidiaries, which pay a dividend to help fund ADIA and its sister fund the Abu Dhabi Investment Council (ADIC). These payments are on a periodic basis if the government runs a surplus to its budgetary requirements and other funding commitments. About 70 per cent of any budget surplus is sent to ADIA, while the other 30 per cent goes to ADIC.

ADIA invests in all the international markets – equities, fixed income and treasury, infrastructure, real estate, private equity and alternatives (hedge funds and commodity trading advisers).

In 2008, ADIA co-chaired the International Working Group of 26 SWFs that produced the 'Generally Accepted Principles and Practices of sovereign wealth funds' (known as the Santiago Principles).

'They're a very diverse group, all rooted in their local political and general cultures,' he says. 'If you have a more transparent country, then a SWF based there will be more transparent as well.'

One example is Norway's SWF, which is seen as a model of transparency.

The fund files financial reports every quarter, publishes information on its corporate governance structure, provides disclosure of every asset held by the fund in a given year and helps the Norwegian ministry of finance in publishing an annual report to the Norwegian Parliament detailing, among other things, its investment strategy and information on investment returns.

The Norwegian fund has also adopted a strategy of responsible investment. In December 2011, for example, Norway's finance ministry said the SWF would no longer invest in chemical and engineering conglomerate FMC Corporation or fertiliser-maker Potash Corporation due to ethical concerns. In addition, the fund recently put French energy company Alstom 'under observation' for four years due to what the finance ministry said was 'the risk of gross corruption in the company's operations'. If it is not satisfied with the way Alstom deals with the alleged situation during that period, the fund will no longer invest in the company.

In an attempt to address transparency concerns, a set of 24 voluntary guidelines was proposed in 2008 through the joint efforts of the International Monetary Fund and the International Working Group of Sovereign Wealth Funds (since replaced by the International Forum of Sovereign Wealth Funds). Dubbed the 'Santiago Principles', they are intended to assure countries that SWFs will have transparent structures and act on the basis of financial returns rather than on behalf of their governments. So far, 25 nations have signed up.

According to Shevtsov, the funds are raising their game. 'We can see them being run more and more professionally,' he says. 'They are becoming more sophisticated users of legal services and investment consulting services and do proper due diligence on investments now. Hopefully transparency will follow, because that too is part of being a well-run institution.'

Good expects SWFs to be far more careful about their investments in the medium term, and more careful about what they pay for them. 'CIC, for example, is inputting a large amount of money into other funds to do its business on its behalf,' he says. 'They are looking at assets, but they are being very careful not to jump in where angels fear to tread. There is a lot of money that will wait to find a home until the euro crisis is sorted out.'

In which case, George Osborne may have to wait a while before he gets that all-important call from Beijing. But if it does come, it will have been worth the wait. There has already been one encouraging sign: at the end of January, CIC took a minority stake in London water supplier Thames Water. It is tempting to assume that more investment will follow.

Jonathan Watson is a journalist specialising in European business, legal and regulatory developments. He can be contacted by e-mail at **watsonjonathan@yahoo.co.uk**.

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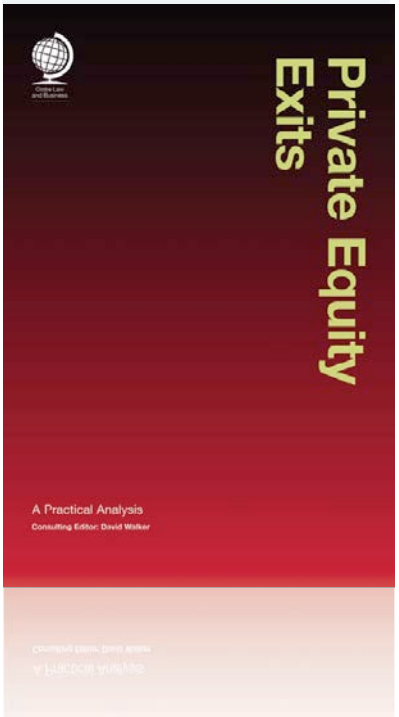

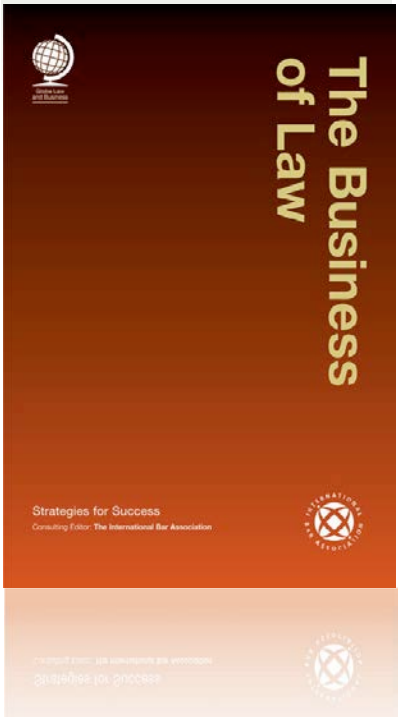

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Year of the Dragon for Gulf oil and gas producers

Just as the eurozone crisis is deepening and European states are turning to the world's richest countries for assistance, the Middle East region's oil-rich states are increasingly forming alliances with China.

ANDREW WHITE

It has been four long years since Saudi Arabia's King Abdullah urged US General David Petraeus to 'cut the head off the snake', and destroy Iran's then-nascent nuclear programme. And while the executioner's axe still hovers amid escalating tensions over the pariah state's nuclear ambitions, Saudi and its five GCC partners – the UAE, Qatar, Kuwait, Bahrain and Oman – have spent the intervening years working busily to help bring Iran to its knees.

Iranian banks have been shuttered, Iranian businessmen blacklisted and Iranian traders turned away at Gulf ports. And if that wasn't enough to worry the accountants in Tehran, the Gulf is now moving in on the one income stream Iran and its leaders simply cannot do without: oil. China, the world's second largest economy, continues to import large quantities of oil from Iran, even as warships stalk the Strait of Hormuz. But over the course of six days in January, observers were left in no doubt as to the priorities of Chinese Premier Wen Jiabao and his counterparts in the Gulf. Jiabao signed more than a dozen agreements across a broad range of sectors including energy, trade, infrastructure and finance, with the Saudi, UAE and Qatari governments, in a whirlwind tour, which confirmed that 2012 really is the Year of the Dragon for Gulf oil and gas producers.

Sino-Saudi wealth and power

China is the world's second-largest importer of oil after the US, and at the moment 51per cent of these imports come from the Middle East, according to Chinese customs data. China is also Iran's biggest oil customer; around 11 per cent of the country's total oil imports come from Iran, and China is expected to be the biggest beneficiary of US and European sanctions on Iran's oil sales, as it will be able to demand discounts and better terms on Iranian crude. Nevertheless, Beijing is looking for a buffer against the potential interruption of Iranian supplies, as well as long-term access to crude from other Middle East sources. It's a strategy Gulf policy-makers are happy to support, and one that will alarm Iran as well as

remind Washington that Middle East oil is not the exclusive preserve of the West.

Saudi is already China's biggest source of imported oil, followed by Angola and then Iran, and barely had Jiabao set foot on Saudi soil before it was announced that oil giant Saudi Aramco had finalised an agreement with Chinese companies to develop a 400,000 barrel per day (bpd) refinery in Yanbu, on the kingdom's Red Sea coast. The Premier then spent much of his remaining time in Riyadh pressing Saudi leaders to open the kingdom's huge oil and gas resources to expanded Chinese investment, which if granted would guarantee China an uninterrupted supply of oil from the Middle East. According to the Chinese, bilateral trade between the two countries amounted to US$58.5bn in the first 11 months of 2011 – a figure that would soar were China granted access to the Saudi energy sector.

On the second leg of his Middle East mission, Jiabao was sealing deals in the UAE, a country with which China is developing ever more sophisticated trade and investment ties. On the face of it, the strategic pact between Abu Dhabi National Oil Company (ADNOC) and China National Petroleum Corporation (CNPC) will see the two state-owned firms collaborating on technical studies in underdeveloped areas of the UAE. But the ADNOC-CNPC deal could mean so much more: for the UAE it represents a reaffirmation of its long-term strategic partnership with the largest of the fast-rising Asian economic powers, while China is about to be invited into an exclusive club that will guarantee it gets the oil it needs to fuel future growth.

The UAE's oil sector is unusual by international standards, in that it allows producers to acquire equity stakes in return for providing much of the required investment, and accepting relatively tight profit margins. In the past, Western oil giants including Shell, Total, BP and ExxonMobil have ploughed billions of dollars into UAE oilfields, piping away trillions of dollars worth of the black stuff by way of reward. But the days of the all-Western cabals are numbered: Abu Dhabi has said it aims to invest US$60bn over the next few years in a bid to boost the country's oil production capacity from 2.7m to 3.5m bpd, and now UAE policy-makers are looking to the East to stump up cash that is thin on the ground in the US and particularly the eurozone.

Shifting sands

In January, the UAE's Supreme Petroleum Council, the country's highest authority on energy policy, said that it would put concessions for onshore oilfields up for tender when they come up for renewal in 2014. The rights are currently in the pocket of a consortium comprising five Western oil majors, but Beijing will no doubt hope that its ADNOC link puts it in an advantageous position when the old concession is carved up and the bidding begins anew. 'China isn't coming to the UAE just to help out,' says one seasoned observer with close ties to ADNOC, and first-hand experience of petroleum politics in the UAE. 'All the usual foreign players are lining up to tender for the new concessions, but now China is making sure to position itself near the front of the queue.'

'Abu Dhabi aims to invest US$60bn over the next few years in a bid to boost the country's oil production capacity from 2.7m to 3.5m barrels per day, and now UAE policy-makers are looking to the East to stump up cash that is thin on the ground in the US and particularly the eurozone.'

Finally, Jiabao made his way to Doha where he talked natural gas with Qatari leaders. He offered the services of Chinese firms in the field of downstream oil product processing, a sector into which Qatar is looking to invest serious money and one which could elevate China into the position of invaluable infrastructure partner. The two countries have already agreed to build a refinery in China's eastern Zhejiang Province, and have signed a deal under which Qatar will deliver three million tonnes of Liquefied Natural Gas to China per annum, for the next 25 years.

As he left Middle East soil having become the first Chinese premier to visit Saudi Arabia in 21 years, and the first ever to visit the UAE or Qatar, Jiabao will have reflected on a job well done. And the warm reception that will have prompted palpitations in Iran, suggests too that the oilmen of the Gulf are at least as interested in courting Eastern advances, as they are those of their old Western allies.

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Photograph courtesy of White & Case

GLOBAL LEADERS: Hugh Verrier

Hugh Verrier is chairman of White & Case, a global firm with over 2,000 lawyers in 26 countries and 38 offices, generating an annual revenue of US$1.3 billion. In a wide-ranging interview with the award-winning former CNN news anchor, Todd Benjamin, he analysed the financial crisis, emerging markets and the current challenges for the globalised legal profession.

Todd Benjamin: I want to begin with where we're at right now, because we're in a very fluid situation in terms of the global economy. You have a lot of Fortune 500 clients; you represent about half of the Fortune 500, you represent two-thirds of the Fortune 100. What's your sense among your clients in terms of the possibility of a double dip recession, their nervousness?

Hugh Verrier: Well, if there's a double dip, I missed the upward part of the W. I think there's general nervousness and concern; we're in year four of a protracted recession and it's going to be a long climb back to a vibrant economy in which transactions will prosper.

TB: In fact, some academics think it could be up to ten years before we see recovery in employment, housing and so on and so forth, as the deleveraging continues.

HV: Yes, I mean, there's a business cycle that we know and we live through many generations of that cycle in the course of a career. This is one. It's a long one. It has its unique features.

TB: You, of course, are in a leadership position, as are many of the CEOs that you represent, and it seems to me one of the real problems right now is there is a crisis of leadership on both sides of the Atlantic. You saw it, you know, this summer with a standoff in the US over the debt crisis and the continuing acrimonious relations on Capitol Hill. You see it in Europe, where there's a lack of confidence among European leaders to solve the eurozone crisis. Would you agree with that analysis, or do you think it goes deeper?

HV: I think these are complex, chaotic times and leadership becomes all the more confused

and it's a natural criticism. But, in fairness, we all need to find and… try to find our ways as leaders in difficult times.

TB: Do you think leading a law firm is different than, let's say, leading a company, or do you think many of the same principles apply?

HV: I think the principle of inspiring and empowering others within the organisation is universal. I think partnership has its own unique qualities where they are fellow owners of the business and not … directed by a managing partner or chairman. And that requires its own set of skills that's unique to law firms and the partnership model.

TB: You became chairman of White & Case in 2007 and then, all of a sudden, you found yourself in a hugely challenging situation, of course, a financial crisis, which really started to build strongly in the second half of 2007 and then the rug was pulled under completely in 2008; obviously, a hugely challenging time. What did you learn from that experience?

HV: I think I had learned the lessons when I was in Russia in 1998, where the collapse was far more severe than what we saw in 2007 and 2008, which is the need to protect our people, to focus on the basics, to do what we can, to have the confidence that we would get through the difficulties, that they were part of a normal business cycle and not to let the sense of collapse lose our sight or lose morale. I think those were the most important take aways from that experience, both in Russia and again globally in 2007 and 2008.

TB: Nevertheless, you did bring in an outside adviser; you brought in McKinsey to advise you how to restructure. Why did you bring in someone from the outside? Was it a lack of confidence on your part? Was it a way of rationalising what you needed to do? Because it was quite painful, actually; you laid off 10–15 per cent of your workforce, partners were cut – a very acrimonious and difficult time.

'If there's a double dip, I missed the upward part of the W. I think there's general nervousness and concern; we're in year four of a protracted recession and it's going to be a long climb back to a vibrant economy.'

HV: A few things on that. First, I'd love to blame McKinsey for cuts, but they had nothing to do with them. We had been on a journey to get… to become increasingly global and globally integrated as a firm. We began that journey over the course of many decades, establishing offices with their own life, their own P and L, and what we came to see as the firm grew so much as it did in the last decade was that we needed to find a way to integrate those offices to work together to deliver client services. That really was what we observed that our clients expect: cross-border work, globally oriented service. So, I believed in coming into the chairmanship that we needed to reorganise our firm to create those synergies and commonalities that we didn't have in an office-centric type of environment.

Now, when we re-engineer an organisation… a multi-billion dollar organisation, I think it would be an act of hubris to believe that we could reorganise it without counsel and without a reference to the external market. And, so, we took the vision we had as to how we wanted to create a more regional structure to bring together the parts in more manageable units, but we thought that McKinsey could look at it and might have some thoughts that we could benefit from. And I'm not too proud to accept help and guidance from anyone, including McKinsey, and their work therefore helped

us as thought partners working through the reorganisation that we created. And they helped us adjust it in ways that I think added value to us.

TB: Is it a work in progress still?

HV: The reorganisation has been successful; it's taken well. We believe it's delivering on the promises that we wanted to address. It's always a work in progress, but we feel that the reorganisation is complete and now the task is to use that reorganisation to achieve strategic goals.

TB: Now, the result of the restructuring was 16 global practice groups, obviously reflecting a globalised marketplace.

HV: Right, indeed. I mean, there were many components of it. We created global practices reflecting the cross-border work; the need for practices to straddle individual markets in ways that reflect that goal that we wanted to achieve and to connect lawyers who had never been fully connected. So, for example, white collar [government investigations and enforcement matters]… we have a global white collar practice, but it was only when we really established it as global practice, identified it as such, and brought the lawyers together who practise all around the world with their individual strengths… And that became a very empowering experience for the practice on a human level and on a professional level and in terms of the client service we're able to provide.

TB: For other firms and lawyers who may be listening to this, what did you learn from this experience that you could bring to them – and I realise every office is unique – in terms of when you undertake a restructuring, what's most important?

HV: The reorganisation – I call it a reorganisation rather than a restructuring – but organisational design in a law firm is extremely difficult for a host of reasons, but above all was the willpower of the partners to implement the change. That willpower came in part from the economic uncertainties and pressures that we felt at the time. So, we thought 'the economy's going in a southward direction, but how do we pull ourselves together to work through that?' And our partners came together with really a high degree of unanimity.

So, I think the… again, back to your question of the partnership model, building the consensus among the partners, having a clear sense of what we want to achieve, I think those were the principal take aways. But in law firms, of course, there's always sensitivity about titles and about how in the course of reorganisation individuals may be affected. So, there needs to be the overriding sense of purpose for a reorganisation to be effective.

TB: You said in 2008, you know, quote, 'the day of the brick and mortar approach to building a global law firm is over.' What did you mean by that?

HV: Take India, for example. We had an office in India for a time and now international law firms are not able to have offices. And then the question is, well, does that mean we're excluded from the market or we're able to function within the market? And we had lots of lawyers around the world who have different interests in India or act for Indian clients outside of India. So, we thought, how can we corral and channel those… that expertise and knowledge in a way to benefit our clients?

So, we came up with the idea of a virtual practice, which is that we don't have to have an office somewhere. And, in many ways, having a group of partners around the world who come together to focus on India can be very empowering for those partners, whereas, if you have an office in a place it may be a little bit of a tendency to… well, the guys on the ground are dealing with India.

So, it created synergies that were powerful and important. And we've replicated this in a number of countries where we don't have offices, where we have active practices, either in or to do with a country.

TB: Are clients' demands different in a globalised marketplace?

HV: They demand above all consistency of quality. So, I think that's certainly one unique feature. I would say in the past, clients would go to an individual market and they would satisfy themselves with the level of skill in that market. That's no longer the case now; the work that we do, wherever it may be, has repercussions within the client throughout the globe. So, therefore, again, back to aligning the firm with global clients, this is a unique challenge to our time.

TB: You were talking about India just a moment ago and… you know, why the ties with Jindal Global University in India? What does that bring you and what could that bring you in the future?

HV: Well, I think the role of the global law firm in supporting legal education and supporting the creation of the finest international lawyers in the world is at the core of the mission of a global firm. Jindal offers that opportunity; a highly unusual university, very much a private model, which offers some alternatives to the traditional law schools in India, with a very international focus, I might say. So, we hope that by supporting that school we will be helping to develop international lawyers for India and for the rest of the world. We have agreed to internships of Jindal graduates to work with our firm and visiting teaching arrangements, scholarship and other sorts of support for the university.

TB: Of course, India's been a very challenging market for anyone who wants to get any foreign firm. What opportunities do you see for firms in the coming years in India?

HV: This is one of the major economies of the world and as their corporates grow larger and stronger and they have global ambitions, they will reach out for services in other countries, which global law firms like ourselves are well-situated to support. So, for us, the attraction of the India market is the outbound work of major Indian corporates as they find their place in a global economy.

TB: Should Western firms be allowed to open up in India?

HV: We can operate in India or outside India, as I described. We believe, though, that India would be best served by being open to international or other law firms.

TB: Is that slow process of liberalisation, be it India or in some other markets… it has to be a source of frustration for you. Because, you know, as a chairman – of course, you meet with government officials – you were somewhat diplomatic in your response to me just a moment ago, so you can operate within or without, but it would be your preference to be able to operate within. How are you trying to work with various government entities to realise that your presence there would not be threat? Or, in fact, is it a threat, be it India or elsewhere?

HV: Well, yes, take another example; take South Korea. South Korea has for many years indicated that international law firms would be able to establish themselves and recently have entered into arrangements with UK-based firms by virtue of a treaty with the EU that allows UK firms to enter that market ahead of, for example, what they consider to be US-based firms. We can disagree what's a UK and a US-based firm today, but certainly letting some in and not others may be one of the most awkward or frustrating, to use your word, experiences.

'I think I had learned the lessons when I was in Russia in 1998, where the collapse was far more severe than what we saw in 2007 and 2008, which is the need to protect our people, to focus on the basics, to do what we can, to have the confidence that we would get through the difficulties.'

But to come to your question, what I've done several times is I visit Korea, I visit the head of the bar, I visit our clients, and we make the case for the constructive role that we're able to play in that country, including, in addition to representing Korean clients as they globalise and therefore strengthening the role of Korean corporates within the global economy, but also offering opportunities to young Korean lawyers.

Young Korean lawyers are desperate, as we see with young lawyers all around the world, to be

'South Korea is an important market and I think that would be at the top of the list or one in the top of the list. Indonesia is also a very important market where we've been active historically.'

part of something larger, to have opportunities beyond the confines of their own country. And why shouldn't they? Why shouldn't they occupy leadership roles in all aspects of the profession beyond their own country?

So, opening the doors to the participation of firms outside a host country has corresponding benefits that I think are important. Of course, the decision has to be taken in its way, in its own time that's appropriate for that country's development. As I say, we will be successful in Korea with or without an office. And it's not the presence of the brick and mortar in Korea that determines our success.

TB: Where do you see the greatest potential in markets that you're not in right now, that you would like to be in, or that you may be going in, let's say within the next five years?

HV: South Korea is an important market and I think that would be at the top of the list or one in the top of the list. Indonesia is also a very important market where we've been active historically and I could foresee our being involved again on the ground in Indonesia.

Australia is going through a real transformation below the surface right now, as Australian firms look at arrangements of one type or another with other firms around the world. So, I could quite well anticipate a breaking in that market where international law firms, including our own, physically become either present or develop very strong links.

A similar journey seems to be going on in Canada as another market which traditionally felt, where I'm from… where it's traditionally felt itself closed to international law firms, now all of a sudden looks at the world from a different point of view of concern as to whether or not international mergers would be an appropriate path. So, that too may be a market that breaks open in the next few years.

TB: Of course, White & Case opened its first office outside the US in 1926 in Paris. And, of course, it was accelerated by the fall of the Berlin Wall; that opened up a lot of opportunities in Eastern Europe and so forth. And now, of course, we have a lot more globalisation: you know, China is very strong, a lot of different places in Asia, Brazil, other places in Latin America; a lot of opportunities.

It's interesting that the majority of your partnership is outside the US. That really has been by design – or is that a result of globalisation, or a combination of both? Because I know that you are a very, very strong believer in international experience.

HV: Yes, our global model is based on pursuing opportunity with global clients, or clients who want to be global. And an element of that as well is having the leading lawyers in the important markets where we choose to operate. That leads to a growth outside of the United States.

We do not believe that we can be a global firm with 80 per cent of our lawyers based in the United States. So, our model is based on being where our clients want us to be and being the finest lawyers in those markets, but not in a disenfranchised or disconnected or federation, but rather in an integrated way.

This is an edited version of a longer interview. To view the filmed version in full go to: **www.ibanet.org**.

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Austerity, riots, spiralling prison numbers and terrorist threats have led to major responses from the UK Government. The Legal Aid, Sentencing and Punishing of Offenders Bill was heavily criticised in the House of Lords, while the Justice and Security green paper prompted hostility from leading lawyers and NGOs. The IBA met with Justice Secretary Ken Clarke and put their concerns to him.

TOM BANGAY AND JAMES LEWIS

Currently standing at £2.1bn, the UK's legal aid bill dwarfs most others. The Legal Aid, Sentencing and Punishment of Offenders Bill (LASPO) addresses the UK Coalition Government's commitment to cut costs fast, seeking to save £350m, and reducing the availability of legal aid. 'If I manage to get all my changes through the House of Lords, we will still have by far the most expensive legal system of legal aid in the world', Clarke emphasises, adding that 'no other Western democracy would make taxpayers' money so widely available for so much litigation and legal advice… what we mustn't do is just leave untouched a system that has grown astonishingly, making the poor extremely litigious'.

Critics have attacked the bill for removing legal funding from vulnerable and poor claimants. Indeed, the Ministry of Justice's own Civil Justice Council (CJC) found that the cuts would 'have a disproportionately adverse effect on the most vulnerable in our society'. Clarke was quick to point out that his reforms intend no such thing and was sanguine about the findings of the CJC: 'It doesn't speak on my behalf, it's there to give me opinions, but I don't have to agree with it', he explains. 'The whole point of reducing public spending on a scale, which no democratic government has attempted in modern times in most Western countries, certainly not in Britain, is to do so in such a way so that you don't damage the vulnerable', Clarke says. And he later adds: 'I want to identify vulnerable litigants, not vulnerable law practices. That's the line I'm trying to draw'.

However, worries persist that restrictions to legal aid in family and welfare cases would directly affect claimants in dire need of help. Shadow Justice Secretary Andy Slaughter MP cited the proposals' impact on domestic

'What we mustn't do is just leave untouched a system that has grown astonishingly, making the poor extremely litigious'

Ken Clarke

violence cases as an example: 'The Liverpool Law Society gave me the example of one of their firms, which said they looked at the government's revised definition [of domestic violence], and against 278 current cases they are pursuing which have legal aid, they reckon only five would qualify under the revised definition.' Which begs the question: what would the other 273 claimants do?

A major concern is that legal aid savings have not been properly costed, actually representing a false economy as costs will simply be passed around to different state departments. A party to a housing dispute without recourse to legal redress, for example, may find themselves under such stress that they are forced to turn to the NHS, or end up placing greater pressure on the benefits system, through housing benefit claims, or similar. Andy Slaughter explains: 'If you take someone's welfare benefits away wrongly, they still have to live, then they may get into debt, rent arrears, facing eviction, or mortgage arrears. If people who are already on low incomes seek debt or welfare benefit advice, and don't get it, and as a consequence the problem gets worse, sooner or later the state will have to pick up that bill'. If a housing claim appeal is no longer entitled to legal aid, for instance, it may ultimately end up in an eviction, which on average costs the state around £50,000.

Clarke dismisses the idea that costs would be simply shifted around the system as 'campaigning nonsense', suggesting that many objections are fuelled by 'an army of lawyers advancing behind a line of women and children'. The latest research from King's College London suggests otherwise. Dr Graham Cookson's report, *Unintended Consequences: the Cost of the Government's Legal Aid Reforms*, identified knock-on costs to the public purse of some £139m per annum, wiping off more than half of the MoJ's purported savings.

Leading human rights lawyer Sir Geoffrey Bindman responds to Clarke's dismissal of costing concerns (which were also raised vehemently by peers during the bill's passage through the House of Lords). 'Ken Clarke made no attempt to dispute the obvious consequence of legal aid cuts: that many people will be denied justice because they will be denied necessary advice and representation. Nor does he respond to the claim made by judges, lawyers and others directly engaged in the legal system that the cuts will cause additional cost to the public purse in lengthier hearings, and even more in the cost to health and social services of unresolved disputes, and the anguish and ill-health produced by them. Nor does he recognise that simplifying and streamlining processes is a better way to save costs than inflicting savings on the most vulnerable people in our society. He has received specific proposals for doing this which he has ignored or rejected.'

Riots and a rush of prosecutions

Riots in cities throughout England last summer presented a formidable challenge to the justice system. An outraged public demanded that justice be swift, strong and unforgiving. Politicians condemned the rioters in the strongest terms, with David Cameron warning that anyone involved in rioting should expect to go to prison. 'What happened on our streets was absolutely appalling behaviour, and to send a very clear message that it's wrong and won't be tolerated is what the criminal justice system should be doing', said the Prime Minister. Theresa May described the rioting as 'sheer criminality', and told the House of Commons that 'the perpetrators of this violence must pay for their actions, and the

courts should hand down custodial sentences for any violent crimes'. The political pressure moved justice minister Lord McNally to warn that 'it's dangerous when politicians try to do the sentencing'.

Clarke defended the impartiality of the judiciary. 'I don't think that political pressure played any improper part… the tabloid press are always going to be saying, "hang them all from the lampposts" and this kind of thing', he says, but adds, 'no directions were given to the courts in any way'. Instead Clarke highlighted the agility of the judicial system in achieving a through-the-night response to the sudden rush of prosecutions. 'There were good public interest reasons for having the all-night courts we had, because it did quieten the turmoil that it was dealt with so quickly and promptly. It was dealt with justly as well, I think'.

In sentencing rioters and looters, judges were influenced by the comments of Manchester recorder His Hon Judge Gilbart QC, who suggested guidelines to the wider judiciary. Chairman of the sentencing council, Lord Justice Leveson, lamented that Gilbart 'started to give sentence ranges… for offences with which he was not concerned. That's not even something [the Court of Appeal] does'.

'Ken Clarke made no attempt to dispute the obvious consequence of legal aid cuts: that many people will be denied justice,'

Sir Geoffrey Bindman

Ultimately the Lord Chief Justice, Lord Judge, sitting in the Court of Appeal, supported the view that the widespread and aggravated nature of the rioting and looting merited harsh sentences. Clarke agreed. 'By and large', he explains, 'I think it was legitimate for the courts to take into account the background of public disorder when imposing the sentences. The circumstances did, I think, justify taking a pretty severe view'.

The spike in custodial sentences following the summer's civil unrest will unavoidably lead to a rise in the UK's already troubling prison population figures. The current number of inmates hovers around 87,750, approaching what is said to be a system capacity of 89,000. Clarke called the figures 'extraordinary', adding, 'I think the prison population has exploded for no very serious reason and it hasn't actually satisfied anyone that we now lock up double the numbers we did when I was last doing this job'. He emphasises the value of 'tackling drug abuse, doing some rehabilitative work in the prisons, making them more successful at reforming prisoners, to use the old-fashioned word. That's the downward pressure that I want to apply'. His proposals – currently on hold – include sentencing discounts for early pleas and changes to judicial discretion in imposing indeterminate sentences for public protection. In addition he plans to increase private-sector involvement in prisons, with the first private prison now open in Birmingham and tenders out for nine more.

'My personal belief is that facing up to competition – actually trying to outperform other people, with fresh ideas, about how you manage prisons – is of as much benefit to the public sector-managed ones as it is to the private sector ones', Clarke explains. Concerns have arisen regarding a lack of research into the private sector approach, with Cambridge Professor Alison Liebling, author of a 30-month study of five private and two public prisons, telling *the Guardian* that 'experimenting with private sector operators is quite high risk. They do sometimes bring innovation and some establishments are doing really interesting things. But when they go wrong, it's in fairly major and predictable ways'.

For his part, Clarke is seeking to instil 'a much more competitive environment on both quality and price whereby I think you not only save money, you stimulate innovation'. Critics point out that private companies managing prisons seem to have a financial interest in reoffending, which keeps prison populations high; Clarke wants to avoid this approach by negotiating contracts with providers in a more constructive manner. 'Part of the contract has to be based on demonstrating you can reduce the reoffending level for this cohort of prisoners', he insisted. He also wants to explore and expand the ability of inmates to undertake paid work, with a percentage of any proceeds going to a Victim's Fund.

Tackling terrorism

The MoJ's other major legislative initiative is the Justice and Security Green Paper, which seeks to address difficult issues regarding the trial of terrorist suspects involving evidence gathered from sensitive intelligence. The settlement of the cases of Binyam Mohamed and other former Guantánamo Bay detainees proved costly, both in terms of finance and credibility, to the UK Government, with its ministers alleging procedural difficulties relating to the use of sensitive intelligence in judicial proceedings. The cherished intelligence-sharing relationship with the US is often described as paramount to the UK's national

security, and successive governments have cried foul at judicial attempts to bring such intelligence into the public domain. 'What we're trying to do', Clarke explained, 'is get the balance right between seeing justice done on the one hand and not compromising genuine national security interests on the other'.

The bill proposes to extend the use of Closed Material Proceedings (CMPs) – in which suspects are represented by security-cleared Special Advocates (SAs) – to the wide spectrum of civil cases. However the SA/CMP system, even with its current, limited application, is not without considerable controversy. Evidence relating to sensitive intelligence is revealed only to the SA who is then prohibited from contact with the client and his or her lawyers. Campaigning groups such as Reprieve have questioned the fairness of a trial in which a defendant can neither know the nature of evidence against him or her, nor instruct or even talk to his or her advocate: 'The SA could see [the evidence], but would be unable to discuss it with the claimant at all. The outcome would be to tip the balance in favour of the state and against the individual, by the introduction of more government evidence which cannot be seen, challenged or questioned by the individual or their lawyer'. Reprieve concludes that 'a trial where only one side can see the evidence is not really a trial at all in any meaningful sense'.

Clarke defends the proposals, pointing out that the reform would at least allow all the evidence to be heard by the judge. 'What we're proposing is better than we have now, because it will allow the cases to be tried… the difference from now is that the judge, for the first time, will be able to reach a conclusion. Unfortunately, only he will have heard all the evidence – the client will only get the gist of it'.

A trial in which only one party and the judge are allowed to see all evidence raises obvious problems for the principle of equality of arms. Public Interest Lawyers (PIL), the firm led by Phil Shiner, who advised the family of Baha Mousa in action against the British Government, contributed to the consultation regarding the green paper. Their briefing described the procedure as 'like fielding a football team, the defensive half of which can't cross the halfway line or even see where the attacking half are, and the attacking half can't talk back to their team mates or the manager. Of course, the government side, being security cleared, have no such disadvantage'.

Of further discomfort to the legal profession is the government's suggestion that it should be for the Secretary of State to decide when to invoke CMPs. As Shiner explains, 'the unfairness caused by a party to proceedings deciding when to adopt certain legal measures to ensure a fair trial should be self-evident'. Reprieve is concerned that the real aim behind the government's extension of CMPs is to avoid humiliating payouts to former detainees and revelations of British complicity in torture: 'The stated justification may be national security, but the real reason is political embarrassment'. The settlements paid to the Guantánamo detainees led the influential UK newspaper *The Daily Mail* to dub the government's approach a 'terrorist cashpoint'.

Nevertheless, if the state can decide which evidence of alleged wrongdoing to obscure from public scrutiny, this presents a dangerous threat to open justice. It is a threat that Clarke is aware of himself. 'I'm worried about how the special advocate takes

instructions, he's got to know roughly what he's going to face; how does the Special Advocate give the gist of the case to the defendant; is the special advocate really in a position to challenge what's going on; all those are important questions'.

These are questions to which the Special Advocates responded themselves, sending in a lengthy briefing to contribute to the MoJ's consultation. Leading Special Advocates took part, including QCs Angus McCullough, Hugo Keith, Helen Mountfield and Mark Shaw. Their findings make for alarming reading. 'CMPs are inherently unfair; they do not "work effectively", nor do they deliver real procedural fairness', they reported [emphasis in original]. On the question of the Secretary of State having the power to decide when to use CMPs, they were similarly blunt. 'It is difficult to see how the proposal that the decision whether to use a CMP should be made not by the Court, but by the Secretary of State, who is likely himself to be a party to the action, is compatible with any notion of equality of arms and natural justice'. If one party to a dispute can decide the terms upon which it will be decided, the notion of adversarial justice recedes even further into the distance.

'A trial where only one side can see the evidence is not really a trial at all in any meaningful sense,'

Reprieve briefing on Justice and Security green paper

The SAs also lamented that the MoJ had been curiously selective in its research into the matter, particularly in looking for examples abroad. 'An absolute prohibition on direct communication [between advocates and clients] is not a feature of procedures used to deal with closed evidence anywhere else in the world', they said. The green paper had looked at examples in the Netherlands, Australia, Canada and Denmark but, strangely, had not considered the system in the US, where the client's lawyers are themselves security-cleared but made subject to 'Protective Orders'. The SAs 'find it striking that in the US, where the threat from terrorism is at least as great as that in the UK, and relevant material must be at least as sensitive, lawyers acting for terrorist suspects are afforded a substantially greater measure of trust and confidence than is given to SAs in existing CMPs' in the UK.

The SAs also raised a number of practical difficulties in the idea of rolling out CMPs across the entire civil justice system. Problems highlighted include: 'the lack of any practical ability to call evidence'; 'a systemic problem with prejudicially late disclosure by the government'; and the HR nightmare that would result from an attempt dramatically to increase the number of security-cleared staff in the judicial system. CMPs are used occasionally in employment tribunals at the moment, and SAs report that 'there is an acute shortage of security-cleared employment judges, lay members, and employment tribunal staff… [f]or several months decisions were not being sent out because London Central Employment Tribunal did not have a security-cleared typist'. One can only imagine the delays that would ensue from a system-wide adoption of CMPs. The SAs concluded that 'the proposal to extend CMPs to become available in civil litigation is insupportable'.

So what now for the embattled proposals? LASPO has endured a torrid time in the Lords committee stage, with various amendments tabled to soften its impact; however it still rumbles inexorably towards Royal Assent. Last year, Clarke described the Justice and Security Green Paper as 'very green', but all three main political parties have thrown their weight behind it, with Conservative MP David Davis the sole dissenting voice. He called the proposals 'a disgraceful assault on the principles of open justice'. The paper's consultation period ended in January; lawyers and defendants will watch its progress warily. With the cost of legal aid and procedural fairness high on the MoJ's agenda, Ken Clarke has a difficult balancing act in delivering justice. It is hard to see how it could be delivered in areas where MoJ proposals appear to ensure instead that access is denied.

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To discuss this article go to: **www.ibanet.org/have_your_say.aspx**

To view the interview with Ken Clarke QC in full, go to: **www.ibanet.org**.

Arabian fights

Egypt recently completed its first free elections for six decades. Yet behind this celebration of democracy lies a murkier reality, with the army, Islamists, liberals and old guard vying for power. *IBA Global Insight* meets those involved in Egypt's transition to democratic rule, including leading presidential candidate Amr Moussa, former Secretary-General of the Arab League.

REBECCA LOWE

I'm lost on my way to meet Amr Moussa. This is not at all unusual for me, but probably inevitable in Cairo, where 11 million people compete for space and roads weave and tangle like clumps of vermicelli noodles. Luckily on this particular detour I am rescued by a young man who knows exactly where I'm meant to be: Tahran Square, just down the road.

The man, Abdullah, is a 32-year-old taxi driver from Alexandria who has lived in Cairo for 11 years. Since October he has spent much of his time protesting against Egypt's military rule, first in Tahrir Square and later outside the parliamentary buildings in Magles El Shaab St, where the bulk of the demonstrators have relocated. He tells me why the cause is so important to him. 'We want to change the army and the big boss Ganzouri,' he says, speaking of the prime minister appointed by the Supreme Council of the Armed Forces (SCAF) in November. 'We want new faces, not old men from the past.'

But, what about Amr Moussa, is he old or new? 'No, no, he is *felool*!' he cries, meaning 'remnant'. 'He has a big tail from the old regime, and a big tummy. He was fattened by Mubarak.'

Convincing Egypt's disenchanted voters that he is a breath of fresh air rather than a Mubarak crony is perhaps the biggest challenge facing Moussa in his bid for the presidency. He has commanded an impressive lead in the polls since the regime fell. YouGov gave him a 49 per cent share of the vote last February and Synovate a 42 per cent share in October – vastly more than his nearest competitor. But, his anti-establishment credentials are hardly overwhelming. From 1952 he worked as an Egyptian diplomat, and from 1991 to 2001 he served as Egypt's minister of foreign affairs, before leaving domestic politics to take office as Secretary-General of the Arab League.

Free but flawed

Moussa himself is unapologetic about his record. 'Not only do I not deny it,' he says defiantly; 'I am proud of it.' We are sitting in his office during a sliver of time between meetings on his campaign trail, and the 75-year-old is perched forward on his chair with his feet apart and hands clasped. His pose suggests a kind of relaxed intensity, and his energy and charisma are palpable. I am instantly suspicious – I am yet to meet a bad man who wasn't unashamedly charming – but I vow to keep an open mind. He has escaped many of the corruption scandals engulfing his former colleagues, after all, and his continued popularity among a population baying for blood is impressive.

I ask him first whether he feels that the elections for the People's Assembly were free and fair. Overall, they went 'alright', he believes – 'mostly'. His qualified enthusiasm is understandable. The elections, dominated by the Islamists, were the first truly democratic ones for 60 years, free for the most part from rigging or political intimidation. Yet a series of

Egypt: From dictatorship to democracy

2011:	**24 Jan:**	Thousands of people take part in a 'day of rage' in Tahrir Square, Cairo, protesting against corruption, poverty and government abuses. Further protests break out around the country.
	11 Feb:	Mubarak resigns as president and hands over power to the Supreme Council of the Armed Forces (SCAF).
	13 Feb:	SCAF dissolves Egypt's Parliament and suspends the Constitution. It says it will hold power for six months or until elections can be held.
	3 Mar:	Ahmed Shafik steps down as Prime Minister and is replaced by Essam Sharaf.
	19 Mar:	A constitutional referendum is held and 77.27 per cent agree to amend the old Constitution.
	1/8 Apr:	Thousands of demonstrators flock to Tahrir Square to protest against the slow pace of change and demand the resignation of remaining regime figures.
	25 Apr:	A poll released by Pew Global Attitudes Project shows Egyptians are suspicious of the US and wish to renegotiate the Israeli peace treaty. They have mixed feelings about Islamic fundamentalists.
	27 May:	Thousands of demonstrators return to Tahrir Square to protest against SCAF. They demand an end to military trials and justice for those responsible for killing protesters.
	July:	Every Friday, hundreds of thousands of protesters gather across Egypt to voice frustration with SCAF. Islamist protesters are largely absent.
	10 Sep:	Protesters attack the Israeli embassy, forcing the ambassador to flee. Demonstrations against SCAF continue and the state of emergency is reintroduced.
	October:	A poll by the Al-Ahram Center for Political and Strategic Studies in Cairo says that 89.4 per cent of Egyptians are confident SCAF can govern the transition to democracy. In addition, 44.3 per cent say they would prefer a civil state, while 45.6 per cent would prefer an Islamic state.
	9 Oct:	A group dominated by Coptic Christians protests in front of the Maspero TV building in Cairo following the burning of churches in Upper Egypt. At least 25 people are killed in clashes with the security forces.
	1 Nov:	Deputy Prime Minister Ali al-Selmy releases a 'Declaration of the Fundamental Principles of the New Egyptian State' (aka the 'Selmy document'), which gives SCAF unprecedented powers and immunities over parliament and the Constitution.
	18 Nov:	Hundreds of thousands of demonstrators protest against the Selmy document in Tahrir Square. Between 30 and 40 protesters are killed and 2,000 are injured.
	22 Nov:	SCAF accepts the resignation of Prime Minister Essam Sharaf and his cabinet and later appoints Kamal El-Ganzouri in his place, a former Prime Minister under Mubarak. SCAF apologises for the deaths of protesters and brings forward the presidential elections to June 2012. Protests continue.
	28 Nov – 3 Jan 2012:	Three rounds of elections are held for the People's Assembly, or lower house of parliament. The Muslim Brotherhood storm to victory, followed by the more extreme al-Nour party.
	16 Dec:	Security forces and the army clash with protesters in Cairo, leaving hundreds injured and a handful dead. Several members of the advisory council resign in protest.
	29 Dec:	A series of raids take place on Egyptian civil rights organisations, which are accused of operating without licences and receiving foreign funds.
2012:	**23 Jan:**	The People's Assembly meets for the first time after assuming legislative powers.
	29 Jan – 22 Feb:	Elections for the Shura Council take place.
	Feb – Mar:	The new parliament will form a constitutional committee and write the new Constitution.
	By 31 Mar:	A referendum on the Constitution will be held (to be confirmed by SCAF)
	15 Apr:	Egypt will open nominations for president.
	June:	The presidential elections will take place. The new president is due to take office on 1 July.

allegations and administrative errors sullied the process, including a lack of independent monitors, secretive and flawed ballot counting, religious campaigning around polling booths, and the appointment of judges with political affiliations.

One main concern is that the elections were held too early, giving the Muslim Brotherhood's Freedom and Justice Party (FJP), which has formed strong links in the community during years of political oppression, a huge advantage. They were almost certainly helped by the complexity of the voting system, in which the public had to choose 332 seats from party lists and 166 individual candidates across 27 governorates, most of which were utterly unknown to them.

Due to these concerns, the secular Free Egyptians party threatened to boycott the elections to choose the upper house, from 29 January to 22 February, as IBA Global Insight went to press, and Nobel Peace Prize winner Mohamed ElBaradei decided to pull out of the presidential race. ElBaradei said his 'conscience'

Photograph by Rebecca Lowe

Symbolic coffins lining the centre of the street in Cairo, a reminder of those lost during the protests.

did not permit him to continue in his campaign due to the lack of democratic framework – though his strongly liberal outlook meant his chances of winning the post were slim.

Moussa, however, refuses to be downbeat. 'I know that there are a lot of people who are very negative: everything is bad. But this will not get us anywhere. We are talking about the legislative elections here, but there will be other elections. This is not the end of the story, this is just the beginning.'

For Moussa, postponing the elections and convincing SCAF to hand over power to a civilian government – as proposed by ElBaradei, among others – were never viable options, and would merely serve to extend the transition and undermine stability. Many agree with him, but many do not. For the protesters in and around Tahrir Square, SCAF has managed the post-revolution transition with all the care and sensitivity of a litter of Egyptian wildcats, and their cause is hard to dispute. Since February 2011, the army has killed up to 100 protesters, beaten and tortured hundreds more, subjected 12,000 people to military trials, imprisoned around 4,000 without due process, and launched an aggressive and prolonged campaign against civic organisations across the country.

It has also shown itself particularly unwilling to cede power. In November, SCAF published a set of supra-constitutional principles, dubbed the 'Selmy document' after former deputy prime minister Ali al-Selmy, which would give it veto power over parliament, authority over the military budget and chief control over the writing of the new Constitution. It was almost universally condemned – including by Moussa – and prompted a renewed surge of unrest. Though SCAF finally agreed to discard the document, suspicions remain over what pacts and transactions may be taking place in the shadows to ensure its continuation in everything but name.

'There are a lot of people who are very negative… This is not the end of the story, this is just the beginning'

Amr Moussa

Army abuses

There is indeed 'a gap in the trust', Moussa concedes, with characteristic understatement. He is, I soon realise, a consummate diplomat. The army controls up to 20 per cent of the country's economy and still commands the respect of much of the Egyptian population. To condemn an organisation with such vast

popular, political and economic power takes a certain amount of chutzpah – chutzpah Moussa either lacks or has decided he does not have the luxury to embrace.

Speaking of the recent raids on human rights organisations, accused of 'foreign funding', Moussa is vague and almost defensive. 'It will take time for the people to understand that [...] civil society is part of the political and economic and social scene, and also for those organisations to understand that there are a lot of doubts on this point and they have to assure the public of their role.'

OK, but what about the military trials? There have been about 12,000.

'This was some kind of accusation by the government and I didn't really pursue what happened after that,' Moussa says, cutting me off. I am unsure what he means, and try again.

Moussa interrupts again; it is something he does often. 'There were no charges, there were accusations, right? Because I didn't follow that. There are charges, are there? By the courts? By the public prosecutor?'

I reiterate that apparently there have been around 12,000 military trials which have not gone through the normal court processes.

'This has to be investigated in order for the truth to be known, and I think the sooner the better.'

A little later I try to return to the subject, and bring up the 4,000 protesters in jail. Again, I am cut off. 'What do you have against the military council?' he asks, his voice jovial but sharp. 'I see you are bombarding every question: military council, military council, military council. I am not in this group that is trying to attack the military council morning, afternoon and evening, for whatever reasons they have. I need stability in the country.'

Stability, yes. But justice also, surely? Here Moussa sounds faintly reminiscent of the state media, controlled by SCAF and used to discredit those remaining in Tahrir Square. Whether this is pragmatic realism or cowardly realpolitik is hard to say. As Bahey El Din Hassan, director of the Cairo Institute for Human Rights Studies, tells me later that day: 'This is the same discourse as Mubarak – stability. This is why the West were supporting him, because they thought he would secure stability. But it was proved it was not sustainable.'

Sticks and stones

When Moussa and I meet, on 15 December, there have been two recent altercations between the demonstrators and army: in October, during a peaceful Coptic Christian protest, in which 26 people reportedly died; and in November, when thousands took to the streets to protest against the Selmy document, in which around 40 people died. After the latter conflict, the army apologised, dismissed the government and appointed Kamal El-Ganzouri as Prime Minister. Yet on 16 December, tension erupted again, leaving hundreds wounded and a handful dead, prompting the resignation of several members of SCAF's civilian advisory committee.

One of those caught up in the violence was Kareem Muhammad, a 28-year-old surgeon. When we first meet in Tahrir Square two days before the clash, all is calm and he is manning a doctor's tent. Only a few dozen people remain here as most have relocated to nearby Magles El Shaab St. In the square, violence breaks out almost every night, he says, as youths clash with security forces. Each has its excuses: the army

'It will take time for the people to understand that civil society is part of the political and economic and social scene, and also for those organisations to understand that there are a lot of doubts on this point and they have to assure the public of their role'

Amr Moussa

Photograph by Rebecca Lowe

claim the youths are anarchists who want to disrupt the country, while the youths say hired thugs deliberately provoke the violence to discredit them.

When I visit Magles El Shaab St later, I find it populated by hundreds of tents and dozens of commemorative coffins honouring the dead. About a thousand people are camped out here, ranging from unemployed youngsters to middle class doctors and lawyers, and more apparently arrive each night. Their demands are the same as those left in Tahrir Square: that SCAF must step down and be held accountable for its actions. 'We don't want compensation, we just want trials,' Kareem says. 'If we see justice, we will go back to work. When we see our brothers die in cold blood, how can we go back?'

On 16 December, Muhammad says he arrived at the square to find the army throwing stones from the tops of buildings. After trying to give medical aid to victims, he was detained and tortured, treated with electric shocks and forced to drink mud. Overall, hundreds were arrested and about a dozen were killed, he says. He e-mails me pictures of his own beaten body, showing thick red lesions across his back where he was hit with sticks, batons and shoes. 'They released people like doctors and accountants, but they held others so they would sign confessions saying they started this attack,' he tells me on the phone. 'But it's not true. The army started this.'

Mohamed Omran, regional programme coordinator at the Friedrich Naumann Foundation in Cairo and human rights activist, confirms Muhammad's concerns later that night. 'SCAF is only concerned about one thing: how to keep the military ruling this country,' he tells me. 'The election is presented as the real will of the Egyptian people, but the political and legal climate is catastrophic. It is actually the will of SCAF and the religious movement.'

Political hot-potch

Not everyone is quite so pessimistic, however. During a petrifying car dash through Cairo, in which road markings and traffic lights prove little more than an irritating distraction from his attempts to kill us on the road, Arab Organization for Human Rights secretary general Alaa Shalaby tells me that SCAF are not as malicious as some people make out; they are simply incompetent. 'They are stupid,' he says, asking me to put on my seatbelt as we do a u-turn in front of a minibus. 'But they are not the devil.'

Yet Shalaby still believes SCAF should step down, and said so publicly following the December unrest. Now Egypt has a democratically elected parliament, one might assume it is time for it to do so. Yet the military has vowed it will retain its executive role until the president takes office on 1 July and appoints a government. In the meantime, the parliament will assume legislative powers and be in charge of forming a 100-strong committee to write the Constitution, in line with principles devised by SCAF and its advisory council.

Whether the Islamists listen to SCAF is another matter. Both believe they have a mandate to govern, the former due to their election success and the latter due to their self-imposed role as guardians of the state. And looking anxiously on from the periphery are the liberals, most of whom trust neither SCAF nor the Islamists; and the youngsters, currently disenfranchised from the process they themselves initiated. 'We built the pyramid upside down,' says Shalaby ruefully. Like many others, he believes rewriting the Constitution at the start, as Tunisia is doing, would have prevented many of these problems. 'Now it is a mess. What is the basis on which this parliament has been elected? What is the president doing? What is their legitimacy? You can't start building the third wall without the first and second.'

'Indeed, there is a state of confusion,' Moussa concedes. But look at the positive, he urges: SCAF has agreed to step down; it is being advised by a credible civilian body; and a democratically elected parliament has been formed without serious incident.

So does he trust the Islamists to appoint a committee that reflects the population rather than their own religious agenda? He admits he has concerns. 'But I don't think the majority of the parliament can afford to run the risk to stability of having a lopsided and imbalanced committee,' he adds. 'It is in everybody's interest, in particular the Muslim Brotherhood, to have a committee that commands the approval of public opinion.'

And how about after the Constitution is written? Does he trust the Brotherhood to live up to its moderate rhetoric and support human rights, women's rights, freedom of speech?

Moussa is willing to give them 'the benefit of the doubt'. 'They are in parliament and the parliament is a public forum. So why should I now accuse them of anything? Let us see.' If others are dissatisfied, he says, they can make a stand. 'We need an active arena. The political space was so lazy, so matter-of-fact. But now there is a new challenge.'

Islamic politics

A reluctance to pre-judge the Brotherhood is shared by the majority of civil rights activists I speak to in Cairo. Yet suspicions remain of both

their political and religious ambitions. Because they have refrained from denouncing SCAF's abuses, many believe they may have brokered some kind of deal with the army elite. At the least they may have formed, in the words of El Din Hassan, a convenient 'marriage of interests'. 'Both of them found after Mubarak stepped down that their joint enemy was the young generation movement, the liberal forces, the human rights movements,' he says. 'And those are the main victims of the last 11 months.'

For El Din Hassan, the Islamists' aim is clear: to create a theocracy. At present only Article 2 in the Constitution addresses religion, stating that Islam is the official religion of Egypt and sharia is the foundation of its justice system. Yet there are fears that the FJP and other religious parties wish to take it further. 'It would not be easy, but I think this is what they are working for,' El Din Hassan says. 'The Muslim Brotherhood are clever, they don't disclose all their agenda. If you go back to their platform that was adopted in 2007, it is an agenda for having a theocratic state.'

He, like Negad El Borai, senior partner at Cairo human rights law firm United Group, and Rabha Fathy, chairperson of the Association of Egyptian Female Lawyers, believe there is no profound difference between moderate and fundamental Islamist parties. Religion, they argue, is conservative by nature. 'Islamic parties have a history,' says Fathy. 'Women will have to wear a scarf and stay at home. They say they will respect women's rights, but it is not true.'

Presidential hopefuls: what chance of success?

Several people have publicly announced their candidacy for the presidential elections in June, though the nominations are not currently expected to open until 15 April. *IBA Global Insight* gives its assessment of potential candidates and what chance they have of success.

Amr Moussa	See main article.	HIGH
Abdel Moneim Aboul Fotouh	Secretary-general of the Arab Medical Union and former member of the Muslim Brotherhood.	
Ahmad Mohamed Shafiq	Former senior commander in the Egyptian Air Force and prime minister when the Mubarak regime fell, from January 2011 to March 2011. Rejected by the Tahrir Square protesters and forced to resign.	
Mohammed Salim el-Awa	Moderate Islamist intellectual and former secretary-general of the International Union for Muslim Scholars, based in London.	
Hazem Sallah Abu Ismail	Egyptian lawyer, Islamic intellectual and long-standing member of the Muslim Brotherhood. He is believed to be an extremist Salafi, though he does not declare it publicly.	MEDIUM
Ayman Nour	Jailed in 2006 on forgery charges and can only run in the unlikely event his previous conviction is quashed. But as founder of the liberal El Ghad party and chairman of the Ghad El-Thawra party, he came runner-up to Mubarak in the 2005 presidential elections. His imprisonment is believed to have been politically motivated, and he was released in 2009 on health grounds.	
Hossam Khairallah	Current army lieutenant general and former assistant chairman of the operations room of the Egyptian General Intelligence Services.	
El-Sayyid el-Badawi	Egyptian businessman and current president of the al-Wafd party.	
Muhammad el-Nishai	Physics professor and adviser of the Egyptian Ministry for Science and Technology. Educated in Germany and England, but has voiced his 'hatred' of Western cultural values.	LOW
Sameh Ashour	President of the Egyptian Bar Association and the Democratic Arab Nasserite party, and former member of the People's Assembly. Currently representing families of January 2011 martyrs in the trial of Mubarak and Interior Minister Habib al-Adly.	
Refaat el-Saeed	President of the Leftist party Tagammu and a member of the Shura Council.	
Ahmed Zewail	Egyptian-American scientist who won the 1999 Nobel Prize in Chemistry. Currently barred from running due to his dual-nationality, but there are rumours of a constitutional amendment that may change this.	
Mamdouh Ramzi	Coptic lawyer who is a member of the Free Social Constitutional Party.	
Bothaina Kamel	Television personality and pro-democracy activist.	
Abdullah el-Ashaal	Professor of international relations and law at the American University in Cairo, former aide to the Egyptian foreign minister and former ambassador.	
Anis Degheidy	Novelist and politician.	
Tawfiq Okasha	Egyptian talk show host.	
Mohamed ElBaradei	Former director-general of International Atomic Energy Agency and Nobel Peace Prize winner. Dropped out of the race in January 2012 citing concerns about the democratic process, but only ever had a small chance of winning.	

As I attempt to navigate the streets back to my apartment after speaking to Fathy, I quickly find myself lost again. This time I am rescued by a friendly, avuncular fellow who speaks excellent English – and who, as perplexing serendipity would have it, turns out to be the former assistant foreign minister of Egypt, Hussein Haridy, who retired several years ago.

When asked his opinion of the Brotherhood, Haridy – a former army officer under Nasser – is predictably strident in his attack. 'I have no doubt the Islamist parties will do their very best to maintain their power, whatever it takes,' he says. 'They do not understand democracy. They think it is like a football game, when you score points against the other side.'

'The election is presented as the real will of the Egyptian people, but the political and legal climate is catastrophic. It is actually the will of SCAF and the religious movement'

Mohamed Omran
Friedrich Naumann Foundation, Cairo; human rights activist

Adel Elkady, an elderly doctor I meet in Magles El Shaab St, agrees. He is one of the few at the protest who views the Islamists, rather than SCAF, as enemy number one. Via years of community work, the Islamists successfully rallied the support of simple, illiterate people who knew no better, he says. 'What is most annoying to me is that before the revolution, the Islamists were in hiding and it was the young people that started the revolution,' he adds. 'Now they are jumping over them and taking the fruits of what these people have achieved.'

Cloud in the sky

Though supportive of the ongoing protests, Elkady feels the unrest has now lost its impact. Instead of demonstrating, he believes the youngsters should be organising themselves and speaking to the people. The same is true of the liberals, who have failed to connect with the grassroots. 'Instead of unifying, they choose to wear nice silk ties and talk to the media,' he says. 'The poor man doesn't even see them.'

Moussa is clearly keen to avoid this pitfall, spending much of his time racing around the country engaging with small communities. The strategy seems to be paying off. Several people I speak to throughout the Sinai region give him their backing, and others know no other candidates. Walking the difficult line between tradition and progression, experience and vision, he is perhaps exactly the compromise Egypt needs during this sensitive stage of transition.

Not everyone is convinced, however. 'He is a clown,' says Elkady. 'Anyone who has lived for 60 years in a spoiled, corrupt system just wants something for himself. He has drunk this system and he is not going to vomit it.' Muhammad too is against him – 'he is old and a famous figure of the old regime' – and Ahmed Fawzy, democracy development programme director at the Egyptian Association for Community Participation Enhancement, sees him as one of the least favourable presidential options.

Others are more supportive. El Borai views him as 'a very good man', whereas El Din Hassan believes he is 'good, but hasn't yet developed a comprehensive concept that will help people to look to him as someone separate from the last government'.

To prove his disassociation from the abuses of the Mubarak era, Moussa's top priority upon becoming president would be to tackle corruption and the laws that permit it. 'I always say that corruption is not just a cloud in the sky, but is embedded and codified in laws. You find tens if not hundreds of laws that either allow or prohibit corruption. These are the loopholes.'

Where foreign policy is concerned, Moussa is a less divisive figure. Denouncing Israel is an easy win for any politician, and he scores well here – especially after Israeli forces 'accidentally' killed five Egyptian policemen during a border shoot-out with suspected Palestinian militants last August. However, Moussa has agreed to maintain the current peace process, and if he is worried about what course the Islamists might take, he is reluctant to show it. 'Whoever is coming to power will be responsible,' he says. 'The parliament, the president, will have to help the peace process succeed.'

Whether Egypt as a whole succeeds is currently open to question. The Islamists are new but untested; SCAF and the old guard are tested but untrustworthy; the liberals are neither tested nor trusted. Where Moussa – one part opportunist Machiavellian to two parts enlightened veteran – fits into this craggy political landscape is yet to be determined. But whoever takes the reins can be clear on one thing: if the Egyptian people are unhappy, they will be sure to let them know.

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Liberating in poetry but governing in prose

The African National Congress is viewed as a beacon of hope for those facing human rights abuses around the world. But has it remained true to Nelson Mandela's 'cherished ideal of a democratic and free society'?

KAREN MACGREGOR

South Africa's African National Congress (ANC) celebrated its centenary on 8 January this year, as Africa's oldest surviving political movement and with no end in sight to its 18-year rule. This is no mean feat, given the party's formation under duress following the defeat of African resistance to colonial rule in the early 20th century, and its long liberation struggle against an apartheid government that banned the ANC and jailed its supporters, forcing many into exile.

Because of its unusual and challenging history, the ANC is far more a product of its past than most political parties elsewhere in Africa and the world. This has turned out to be a strength and a weakness. When thousands of supporters flocked to celebrations held in Mangaung (aka Bloemfontein) in central South Africa, where the ANC was born in 1912, there were good reasons to party but also much to be sober about.

One strength lies in the overwhelming popularity the ANC enjoys among voters in a South Africa still smarting from apartheid. The ANC has the moral gravitas of an untiring warrior for freedom that no other party can muster and which it has exploited fully at home, among apartheid's oppressed and abroad, by drawing on an extraordinary cache of goodwill.

The struggle gave rise to iconic leaders such as Nobel Peace Prize-winning Nelson Mandela and Chief Albert Luthuli, and the thousands of liberation activists who people the ANC's rich history. On coming to power in 1994, the party bolstered its moral standing with solid policies and programmes that remained true to Mandela's 'cherished ideal of a democratic and free society', which he had told a court 30 years earlier he was prepared to die for.

Weakness in popularity

But there are weaknesses in such popularity, infamously highlighted by current President Jacob Zuma's statement that the party would rule until Jesus returned. The ANC's election majority is slowly eroding, but in fourth democratic elections in 2009 it won 66 per cent of the vote against 17 per cent for the official Opposition, the Democratic Alliance. There are too many examples of havoc wreaked by hegemonic rule, including in neighbouring Zimbabwe, not to be worried about lack of political alternatives.

Lack of contest at the polls provided the ANC with the power to tackle South Africa's huge problems of inequality, unemployment, poverty and crime. There have been considerable delivery achievements in areas such as housing, electricity, water and rural health care, and social grants now benefit 15 million of the country's 50 million people, but not in key sectors such as education

and policing. A progressive constitution is supported by a legal system that is strong though overwhelmed, and undoubtedly South Africa is free.

Political strength, however, has not translated into sufficient solutions and has provided little incentive for the ANC to be accountable or to rein in corruption. Citizens are bombarded daily by reports of the lavish lifestyles of ANC leaders, dubious fortunes gleaned from public money by the politically connected, and poor governance.

Unassailability has also tempted the party to stack the civil service and state institutions with 'comrades', undermining its once-impeccable democratic credentials.

Writing for the *New York Times* in January, Eusebius McKaiser, a political scientist at the University of the Witwatersrand, blamed South Africa's explosive cocktail of socio-economic problems on under-developed state institutions, 'themselves the product of the ANC's failure to redefine itself from liberation movement to ruling party with a mandate to deliver services to the population. The ANC still hogs and holds on to political power as if for dear life and in so doing neglects the essential task of developing independent state institutions.'

Another key characteristic of South Africa's Government, flowing from its history, is diversity – the broad church of backgrounds and ideologies that make up the ruling 'tripartite alliance' led by the nationalist ANC and also comprising the South African Communist Party and the umbrella labour body, the Congress of South African Trade Unions.

The liberation struggle bundled into one movement the many groups that opposed apartheid. This broad base grew in the 1970s and 1980s as the banned ANC was led from exile, with the anti-apartheid struggle at home taken up by unions and still-legal groups that gathered into the Mass Democratic Movement.

Unity in diversity

After the minority-white government announced reform in 1990 and the ANC was unbanned, there were two distinct 'camps' with different approaches – exiles (inclined to direct, as necessary during the global anti-apartheid campaign) and locals (inclined to ground-up democratic debate, the product of the all-encompassing Mass Democratic Movement).

The slogan of the ANC is 'unity in diversity', and indeed today within South Africa's leaders there are conservative African nationalists and hard-line communists and unionists and social democrats, among others, ostensibly united in the goal of national development and uplift of the poor but with conflicting political agendas.

The strength in this diversity is vigorous debate and, potentially, ideological enrichment. The weaknesses are that the debate takes place within the hegemonic ruling alliance rather than between political parties and in the public domain – although internal battles are regularly waged through the media – a sometimes incoherent national agenda, and cut-throat power struggles of the type currently being waged between Jacob Zuma and the populist (currently suspended) president of the ANC Youth League, Julius Malema, ahead of the ANC's elective conference in Mangaung later this year.

'Political strength, however, has not translated into sufficient solutions and has provided little incentive for the ANC to be accountable or to rein in corruption. Citizens are bombarded daily by reports of the lavish lifestyles of ANC leaders, dubious fortunes gleaned from public money by the politically connected, and poor governance.'

The leaders elected, or re-elected, in Manguang will speak volumes about the ANC as it enters its second century. But for many, the moral mantle of South Africa's liberation party has become tarnished and it has transmogrified into any old government. As the *Guardian* wrote in an assessment of the ANC on its centenary: 'South Africa's governing party found that it could liberate in poetry but had to govern in prose.'

For a movement that takes justifiable pride in an illustrious history, the challenge for the ANC is going to be to deliver a record in the coming years that is at least in prose that is eloquent, restrained and empathetic. ⊗

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Acts or emissions

Climate change has taken a back seat to economic woes and the Arab Spring, further diminishing political will to tackle the issue. As successive summits in Copenhagen, Cancún and Durban have produced mixed results at best, *IBA Global Insight* assesses the challenges.

NEIL HODGE

A commitment to agree to an eventual deal on carbon emissions may have come later than hoped, but hopefully not too late. The conference on climate change in Durban, South Africa in December was seen by many as the last realistic chance of extending the Kyoto Protocol beyond its expiry date of the end of 2012.

And there can now be little doubt that action on climate change does need to be taken. In November, shortly before the Durban conference, the International Energy Agency (IEA) warned in its latest *World Energy Outlook* that cumulative CO2 emissions over the next 25 years amount to three-quarters of the total from the past 110 years, leading to a long-term average temperature rise of 3.5°C.

'As each year passes without clear signals to drive investment in clean energy, the "lock-in" of high-carbon infrastructure is making it harder and more expensive to meet our energy security and climate goals,' said Fatih Birol, the IEA's chief economist.

The report says that without further action by 2017, the energy-related infrastructure currently in place would generate all the CO2 emissions allowed up to 2035. 'Delaying action is a false economy: for every US$1 of investment in cleaner technology that is avoided in the power sector before 2020, an additional US$4.30 would need to be spent after 2020 to compensate for the increased emissions,' it says.

So far, the buzz immediately following the Durban conference has been largely positive, though there are evidently still hurdles to overcome. Negotiators from nearly 200 countries agreed on a deal that provides a second commitment period for the Kyoto Protocol to start from 1 January 2013. It also sets the world on a path to sign a new climate treaty by 2015 that would come into effect in 2020 with legally binding targets.

The agreement – dubbed the 'Durban platform' – is different from the other partial deals that have been struck over the past two decades. For the first time, China, along with other developing countries, agreed to be legally bound to reduce its greenhouse gas emissions.

Previously, poorer nations have insisted that they should not bear any legal obligations for tackling climate change, whereas rich nations – which over more than a century have produced most of the carbon currently in the atmosphere – should. Governments also agreed on full implementation of the US$100bn package to

support developing nations, formulated in Cancún in 2010.

'This is highly significant because the Kyoto Protocol's accounting rules, mechanisms and markets all remain in action as effective tools to leverage global climate action and as models to inform future agreements', according to Christiana Figueres, Executive Secretary of the United Nations Framework Convention on Climate Change (UNFCCC). In another first, the US, the world's second biggest emitter, also agreed that the new pact would have 'legal force' – a step it flirted with in 1997 in Kyoto, but soon abandoned as Congress made clear it would never ratify that agreement.

Blowing hot air

However, the new agreement is not without significant potential pitfalls. For example, between now and 2020, when the new agreement would come into effect, emissions targets are entirely voluntary and are not legally binding. Governments must also agree country-by-country targets for emissions cuts, taking into consideration the historic emissions each is responsible for, the efforts on emissions each has made, their respective populations and how countries may continue to develop.

Furthermore, although talks are supposed to start immediately, politicians and green campaigners warn that there will be plenty more 'horse trading' before a firm protocol is drawn up, which means that targets may be significantly altered and provisions watered down. Casting a long shadow over all of this is the fact that if a Republican were to win the 2012 US Presidential election, it may prove impossible to negotiate a deal anyway.

There is also some concern over the agreement's phraseology. The form of words settled on – 'an agreed outcome with legal force' – means a legally binding commitment, according to EU lawyers, but others claim that it is vague enough for countries to dispute. David Symons, director of environmental consultancy WSP, says that 'the Durban platform provides an anodyne set of words, with much of the detail yet to be agreed and the teeth not really coming for eight years. The real challenge will be in agreeing the fine print'.

The conference was not without some controversy either. Canada withdrew from the agreement altogether, with the country's environment minister Peter Kent lamenting that a failure to achieve its Kyoto targets would force the country to spend US$14bn on emissions trading permits. 'To meet the targets under Kyoto for 2012 would be the equivalent of either removing every car, truck, ATV, tractor, ambulance, police car and vehicle of every kind from Canadian roads or closing down the entire farming and agriculture sector and cutting heat to every home, office, hospital, factory and building in Canada', Kent said. Japan called the withdrawal 'disappointing', while China called it 'preposterous'. Whether Canada's withdrawal will have any long-term effect remains to be seen.

Failure to act

History has shown that international co-ordination and cooperation on climate change has been elusive. Even the Kyoto Protocol endured an eight-year impasse between adoption and implementation to enable states to prepare for its seven-year lifespan.

'There is a lag between compliance and an improvement, and the longer we take to reach a new agreement, the greater the adverse impact on climate change'

Ian Sampson
Shepstone & Wylie Attorneys

Earlier attempts to secure an extension of the Kyoto Protocol all failed. The climate talks in Copenhagen in 2009 and Cancún in 2010 met with little progress and no firm agreements. The Copenhagen Accord was drafted by just five countries (the United States, China, India, South Africa, and Brazil) and was not legally binding – delegates only 'took note' of the accord rather than adopting it. Nor did it commit countries to agree to a binding successor to the Kyoto Protocol. The accord set no real targets to achieve in emissions reductions and there was no agreement regarding an international approach to implement greener technology and phase out old machinery.

The follow-up UN Climate Change Conference in Cancún was more successful, with global leaders agreeing to try to limit the global temperature increase to 2°C. It also included a 'Green Climate Fund' – scheduled to total US$100 billion a year by 2020 – to assist poorer countries in financing emission reductions and adaptation. Developing countries would have their emission-curbing measures subjected to international verification only when they are funded by Western money.

But there was no agreement on how this money would be raised, or whether developing countries should have legally binding emissions reductions or whether rich countries would

Kyoto's legacy

The Kyoto Protocol, adopted on 11 December 1997 and entered into force on 16 February 2005, is an international agreement linked to the United Nations Framework Convention on Climate Change (UNFCCC) aimed at reducing global warming. Its major feature is that it sets legally binding targets for 37 industrialised countries and the European Community to reduce greenhouse gas (GHG) emissions. These amount to an average of five per cent against 1990 levels over the five-year period 2008–2012. The European Union and 192 states and have signed and ratified the protocol.

One of the unique aspects of the UNFCCC is that it adopts a principle of 'common but differentiated responsibilities', which means that the signatories have agreed that the largest share of historical and current global emissions of greenhouse gases originated in developed countries; that per capita emissions in developing countries are still relatively low; and that the share of global emissions originating in developing countries will grow to meet social and development needs.

Furthermore, the Kyoto Protocol has the power to take punitive measures against signatories who fail to meet carbon reduction targets. If the enforcement branch of the UNFCCC determines that an 'annex I' (typically industrialised) country is not in compliance with its emissions limitation, then that country is required to make up the difference – plus an additional 30 per cent – and would be suspended from making transfers under an emissions trading programme. Canada, Greece, Croatia, Romania and Bulgaria are among those to have been investigated to see if they are meeting their obligations.

have to reduce emissions first. Some countries were also accused of scuppering any attempt at negotiating a successor to the Kyoto Protocol. For example, Russia and Japan secured wording that left them with a possible route to escape extension of the Protocol's legally binding emissions cuts.

Climate of fear

Environmental and international law experts believe that trying to negotiate an effective and long-term global agreement on climate change could be a slow and painful process, but that efforts to do so should continue to be encouraged. Ian Sampson, partner at Shepstone & Wylie Attorneys in South Africa and Vice-Chair of the IBA's Environment, Health and Safety Law Committee, thinks that states are taking an incredibly short-term view of a long-term problem and that even with a new agreement, 'the positive effect on climate change will not be seen for a number of years'.

'The Durban platform provides an anodyne set of words, with much of the detail yet to be agreed and the teeth not really coming for eight years'

David Symons
Director of environmental consultancy WSP

He adds: 'In other words, there is a lag between compliance and an improvement, and the longer we take to reach a new agreement, the greater the adverse impact on climate change, and the longer it will take to see an improvement even after a new reduction agreement has been reached'.

Hans Corell, former Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations and Co-Chair of the IBA's World Organisations Committee, says that international law is built on the premise '*pacta sunt servanda*' meaning that 'agreements must be honoured', but adds that there is no truly effective mechanism to take states to task for failure to comply. 'The UN Security Council has the power to act, but it would be a highly unusual move', he says.

'The problem is that each country wants to serve and protect its own interests and not those of the international community', says Corell. 'There is also no common view of what the effects of climate change are, how long before decisive action needs to be taken, and what actually contributes to the change. The Intergovernmental Panel on Climate Change has a view but it is not universally shared, which means that it is difficult to reach agreement', he says.

Corell also points out that it is very difficult to determine whether a country has actually violated an environmental agreement. 'The international community is largely reliant on individual states to commit to honour the object and purpose of an agreement and monitor compliance. Therefore, we are heavily reliant on the goodwill of governments to ensure best practice and that targets are achieved. This is obviously inadequate'.

'Also, a lot of environmental damage caused may be outside of the state where the emissions

Businesses lead the way on sustainability

Many of the world's leading companies have taken a harsh look at the environmental impact of their operations and have set themselves challenging targets, following the lead of organisations like the Global Reporting Initiative (GRI) and the Carbon Disclosure Project, which have established environmental reporting frameworks and encouraged companies to share their emissions data and details on water usage. Companies also face the 'regulatory creep' of the US and Europe wanting greater disclosure on 'green' and non-financial risks.

Marks & Spencer launched 'Plan A' in January 2007, which now sets out 180 sustainable commitments it needs to meet by 2015, ranging from cutting waste and packaging to sourcing more local produce in a bid to reduce the company's carbon footprint.

British Telecom, which accounts for around 0.7 per cent of the UK's total electricity consumption, is also one of the country's largest purchasers of green energy. The company wants to reduce the carbon intensity of its global operations by 2020 to a level 80 per cent lower than in 1997. It has already achieved a drop of over 50 per cent. Last February BT launched its Climate Change Procurement standard which encourages (but does not compel) suppliers to use energy efficiently, and to reduce their carbon footprint during the production, delivery, use and disposal of products and services supplied to it.

Puma released the results of its first environmental profit & loss account (E P&L) to evaluate the impact that its carbon footprint has on its financial bottom line in May 2011. By putting a monetary value on the environmental impacts, the sportswear manufacturer hopes to be ready for potential legislation in the future, such as disclosure requirements.

The analysis revealed that the company's overall environmental impact was valued at €94.4m for 2010: of that, Puma's operations accounted for 15 per cent of the overall greenhouse gas emissions analysed, and 0.001 per cent of water consumption – equivalent to €7.2m of the overall valuation. The remaining greenhouse gas and water consumption valuation of €87.2m fell upon its entire supply chain, the main proportion being attributable to 'tier 4' raw materials suppliers, such as cattle ranching for leather, and natural rubber production.

The company's analysis found that the most water-intensive activity in the production of a t-shirt occurs at the initial stage – the cultivation of cotton.

occur and is therefore not monitored: for example, environmental damage affecting the Arctic is almost entirely a consequence of pollution and carbon emissions from elsewhere'.

Eugene Smary, partner at law firm Warner Norcross & Judd in Grand Rapids, Michigan, and the current Chair of the IBA's Environment, Health and Safety Law Committee, says that environmental issues have become more and more politically contentious, which makes it all the more difficult to form a consensus internationally. 'In the US, it can be a very divisive issue', says Smary. 'The government remains sensitive to imposing stringent environmental rules on US companies which could make them less competitive internationally when companies in emerging markets, for example, are free to operate with less stringent constraints', he adds.

Soft law, hard choices

One way forward, says Smary, is for countries to honour the spirit of 'shallow agreements' based on 'soft law'. 'Shallow agreements are designed to create new behaviour and establish a new "norm" in environmental conduct. These could succeed in gaining international acceptance and compliance as opposed to trying to agree a universal treaty that suits all signatories', he says.

According to Smary, there are over 500 multilateral environmental agreements in place around the globe. 'Those that work best are those which have set agreed standards that countries have already largely complied with, or standards that can be attained relatively easily. These are also the standards that can more easily be enforced – the more capable companies

are of complying with the standard, the less excuse they have for failure to comply', says Smary. 'There is no point imposing standards and rules under the expectation that countries and companies will follow them. There needs to be buy-in from prominent sector representatives that have to comply with these rules – agreements need to be consensual if they are going to be honoured and enforced', he adds.

Corell also believes that the way forward is to adopt 'soft law'. He believes that the international community needs to have a standard that advances the status of international law, essentially becoming customary, in much the same way as the UN Universal Declaration of Human Rights has become the bedrock of international human rights law despite its lack of treaty status. 'We need a similar declaration that countries would follow with regard to environmental protection – "soft law" is more likely to work than an attempt to draw consensus around adopting a legally binding treaty', he says.

'The problem is that each country wants to serve and protect its own interests and not those of the international community'

Hans Corell
Former Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations

Some experts believe that despite the absence of an international agreement, there are legal mechanisms available for individual states to take action against polluters. Kenneth Thompson, II, global chief legal officer at legal information provider LexisNexis and Co-Chair of the IBA's Corporate Social Responsibility Committee, says that it is possible for individual states through their own laws and through collaborative enforcement efforts to take unilateral domestic actions that can have an extraterritorial effect. However, he recognises that the most effective method is to recognise the need for international treaty protocols.

'One method of extraterritorial enforcement which has been used effectively is in the cruise ship industry', says Thompson. 'Here, under the international law of the sea, the state where the cruise ship is registered, or its flag state, is responsible for effectively regulating that ship regardless of where it travels in the world', he says. It is an approach that could prove useful in other areas of law.

Thompson also says that even in the absence of binding international agreements, efforts will still be made to make business operations more sustainable and environmentally-friendly. 'Companies are going to continue to commit to sustainable business practices, not just because investors and stakeholders want to see it, but because it makes commercial sense. The fact that there is no over-riding international agreement in place – though a successor to Kyoto is welcome – is not going to stop companies pursuing more sustainable and efficient operations'.

Ambitious plans

Experts believe that there is enough momentum at an individual state and corporate level to improve sustainable business practices and continue to cut carbon emissions further, with the hope that national governments will follow suit and impose stricter standards.

Corell emphasises that companies, regulators and consumers may set the standard for environmental protection and sustainability rather than governments trying to agree an over-arching international treaty. 'A number of major companies have already embraced greener operating practices, and have ambitious plans to become more sustainable within very small timescales', he reports. 'Investors want more disclosure on this and consumers are choosing to buy goods and services from companies with a proven track record in being environmentally friendly. Perhaps it is therefore more realistic for national governments to embrace what is happening at the grass roots level and encourage that progression', he says.

Speaking shortly after the Durban platform was unveiled, Connie Hedegaard, European Commissioner for Climate Action, said that 'if there is one thing we have learned in Europe, it is this: binding targets work. They help governments remain focused even when other political priorities come up. Important though they are, international agreements are not the only answer to climate change', she stressed. 'What defines whether we have strong and effective, or weak and inadequate, climate policies is what nations, regions, municipalities, companies and individual citizens do. Combating climate change concerns us all'.

Neil Hodge is a freelance journalist specialising in legal and business issues. He can be contacted at neil@neilhodge.co.uk.

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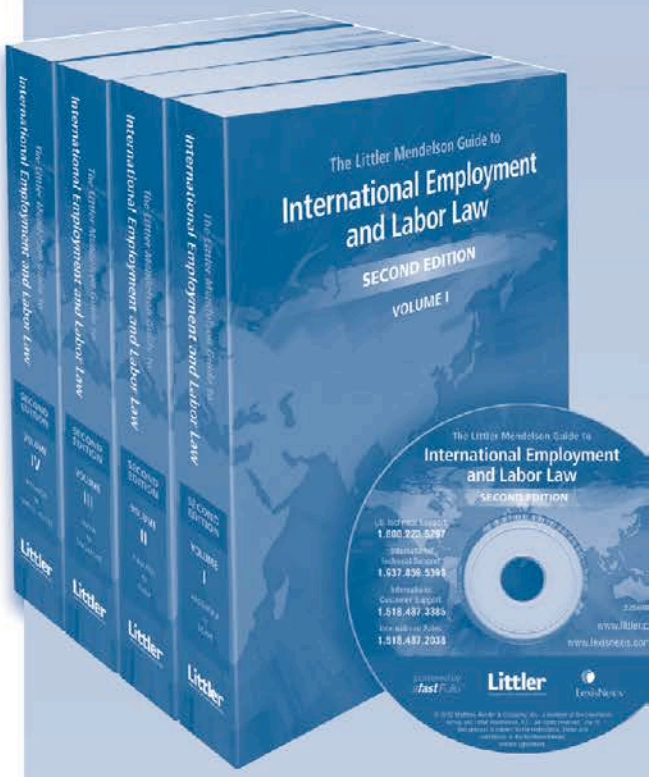

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Erivaldo dos Santos
The quest for prisoners' rights

Sixteen years ago, Erivaldo Santos abandoned his job in a bank and became a judge. He is now renowned in Brazil and beyond for his innovative, award-winning projects.

ANA GALLI

When we meet, Erivaldo dos Santos is seated at his comfortable desk in the National Justice Council head offices in one of the buildings along the Esplanade of Ministries in Brazil's capital city, Brasília, where all the government's top leadership is concentrated. But, this assistant judge, attached to the Presidency of the Council, can remember his first contact as if it were yesterday with the prison environment four years ago. 'I clearly remember the impact it had on me; the unhealthy surroundings, the sub-human conditions, the latent violation of human rights'.

Not even the beautiful view from his office can make him forget the dramatic stories from prisoners, and the experiences he has lived through alongside them. 'We found many condemned prisoners that had already served out their sentences but were still in prison because of failures in the system. One of them became an icon of the *Mutirão* [Collective Effort]; a prisoner serving a five-year sentence who had actually been behind bars for eight years'.

Son of a family from the interior of southern Brazil, Erivaldo dos Santos abandoned his job in a bank as he wanted to help make the world a better place. He became a judge and managed to achieve what he set out to do. Today, Santos has gained recognition for his efforts to improve the Brazilian prison system and has coordinated a process that led to the release of 20,000 prisoners that were being illegally detained. As well as what came to be called *Mutirões Carcerários*, [special collective efforts directed at the prison system], the judge was responsible for developing another high-impact programme entitled 'Begin Again' (*Começar de Novo*) that gives prisoners and ex-prisoners a chance to obtain employment and reintegrate themselves in society. The success of those initiatives led to both the 'Begin Again' and the *Mutirão* programmes receiving the Innovare Institute awards in 2009 and 2010 in recognition of their good practices in the field of human rights in Brazil. Subsequently, Santos's programmes have become an example for some African countries that look to the Brazilian model for ways to improve their own systems (see box).

Trading places

Despite the recognition afforded to his defence of human rights in recent years, Erivaldo's life has not always been dedicated to that cause. After graduating in Law, he began his career in the early 1990s behind the counter in the branch office of a bank. The monotony of that occupation and his urge to do more made

Santos restless and soon afterwards he decided to become a judge: 'I took up my studies again. When I changed my profession, it was because I wanted to contribute towards achieving a better world'. In 1995, Santos passed the civil service entrance examinations and took up the post of federal judge in the south of Brazil.

During his first few years working in the courts, Santos became uneasy at seeing people losing their homes because of his judgments – due to defaults on payment, for example. As a result, Santos initiated his first project. 'Those people had no prospect whatever of recovering their property. That was why I proposed conciliation between banks and clients to ensure that the clients did not lose their homes because of a default on payment'.

The project began in the south of Brazil where Santos was posted at the time, but it was so well received that, today, it is present in most Brazilian states. Considered to be a national success, its outreach has been so great that even the bodies of the justice system that directly participated in it have difficulty in calculating exactly how many thousands of people have benefited from the initiative.

'Those people had no prospect whatever of recovering their property. That was why I proposed conciliation between banks and clients to ensure that the clients did not lose their homes because of a default on payment'

Erivaldo dos Santos

From courts to prisons

As if the considerable change of scenarios from the branch of a bank to the daily round of a court judge were not enough, life had another surprise in store. Thanks to the nation-wide diffusion of his work promoting conciliation between banks and their debtors, Santos acquired national visibility and caught the attention of Gilmar Mendes, then President of the Supreme Federal Court, the highest body in Brazil's Justice Branch hierarchy.

In June 2008, during a conversation with Mendes, Santos received an invitation to take up the post of judge on the National Justice Council, one of the country's most important bodies, responsible for inspecting the Justice Branch. Though the new post had no direct connection with the prison system, the judge's own restless nature and the social circumstances at the time led him to engage with the world of prisons once again. The attention of Brazilian society was being drawn to the question of imprisonment by a report produced by the House of Representatives that had revealed disturbing data about human rights violations. According to the parliamentary report, in the prison population of around 500,000 prisoners, 150,000 were being kept behind bars illegally.

The question was further highlighted by a case that shocked the country. A 15-year-old girl had been locked in a cell with 20 male prisoners and raped repeatedly for two weeks. Minister Gilmar was hotly questioned by society at large and even by a representative of the UN's Human Rights division. 'It was a situation that could not be allowed to continue. and that was what motivated me to elaborate the *Mutirão Carcerário* Project in an attempt to improve the chaotic situation in the prison system'.

Within a few weeks Santos began his pilgrimage to the Brazilian prisons. The first visits of the National Justice Council (NCJ) team led by the judge took place in Rio de Janeiro, in August 2008, with a visit to verify the situation in the state's prisons. The team observed some excesses there, but nothing that was unduly serious. Reality came to the surface, however, on the second mission in October of the same year, when the team conducted a *Mutirão* in the state of Maranhão, in the northeast of Brazil, one of the country's poorest regions. 'There we found a highly dramatic situation that gave credence to the shocking statistics presented in the parliamentary report.'

Violations of every kind

Reports of judges and other civil servants on the working group that visited the prisons reveal violations of every description. The most common situation they found was condemned prisoners that had already served

their sentences but were still in prison because of the state's inefficiency. Many prisoners held under temporary detention orders – awaiting judgment or awaiting a sentence – had exceeded the legal period for temporary detention. The first act of the *Mutirão Carcerário* coordinated by the judge was to guarantee that the law was enforced and that made it possible for many prisoners to be granted conditional parole. Many other prisoners had the right to progress to semi-parole and there were those whose sentences had been commuted or even extinguished, all of which ought to have led to immediate release.

The *Mutirão* visited dozens of prisons. Santos recalls that on various occasions, the team came across highly dramatic situations such as those in one of Brazil's poorest states, Piauí. Data gathered by the *Mutirão* revealed that almost 80 per cent of the prisoners were being held under temporary detention orders; in other words, out of every ten prisoners, only two had actually been sentenced, the rest were merely awaiting trial or judgment. The situation was so precarious in the state's prisons that, in many cases, such prisoners had been waiting three or four years to be tried. Furthermore, many of them had not even been formally accused by the Office of the Public Prosecutor, which mirrored a very serious failure on the part of the Office of the Public Defender itself.

'We came across all kinds of absurdity. The number of those with sentences already served or with highly dramatic stories to tell increased with every action that we undertook'

Erivaldo dos Santos

Each visit revealed new surprises. 'We came across all kinds of absurdity. The number of those with sentences already served or with highly dramatic stories to tell increased with every action that we undertook. I referred to them as 'the *Mutirão* findings'. But there were some cases that were more disturbing than others, like that of a prisoner in Espírito Santo who had been in prison for 14 years without being judged and another in Ceará who had been waiting 11 years to come before a court. Tragically, the same stories were told again and again. There was the case of a prisoner who spent five years in jail because his case documents had disappeared. 'Nobody managed to find the document so that he could be tried and so he was doomed to remain behind bars indefinitely'.

Another outstanding story was of a prisoner in the State of Paraíba who had been detained for five years beyond his original sentence because the judge, although he recognised that the sentence had been served, had ordered the State Security Department to investigate whether there were any other arrest warrants out for him on other charges. 'And what was the result of that? The department took an incredible five years to make that verification, and all that time the individual was kept in jail!'

System failures

It was almost like a military operation in time of war. The work of attempting to solve the problems of the Brazilian prison system was hard and urgent; so urgent that at one point, in 2006, the working groups were running three *Mutirões* at the same time; in Pernambuco, in Ceará and in Paraíba. By April 2010, at the end of Minister Gilmar's term of office and 20 months after the work had begun, the *Mutirões* had liberated 20,000 people in the 17 states where they had been conducted.

'The prisoner is a person devoid of any credibility in the eyes of society. If he declares that he has served five or six years more than his original sentence, the state pays no attention to him because he has no social credit. Things cannot go on that way' says Santos. Irrespective of the prisoner's good or bad faith, the state is obliged to look into his complaint and determine whether he is telling the truth or not.

'Keeping a person locked up without a legal decision having been made to that effect is not compatible with the democratic regime that the Brazilian state embraces.' The judge points out that Brazil is not only a signatory to all the major human rights agreements, but is also recognised by the international community as a country where there is respect for human liberties. However, for that to become applicable to the Brazilian prisons, all the bodies involved need to show greater disposition and have better structures to guarantee that prisoners receive the attention due to them.

The prison system's failure, still latent even today, contributes towards further heightening the prisoners' vulnerability. Santos does not lay the blame for these problems on the Office of the Public Defender or the Office of the Public Prosecutor alone, but on all the various bodies of the legal system involved in the process and on structural inadequacies as well. 'The proper functioning of the system for administering criminal law calls for the participation and

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Innovare Institute awards: knowledge exchange

The successful work implemented in the last few years has brought recognition of Erivaldo dos Santos's programmes that have been put into practice alongside the National Justice Council. Such recognition includes the awards granted for two consecutive years by the Innovare Institute, which rewards good practice in the justice system in Brazil. The prize was granted to Santos in 2009 for the *Mutirão Carcerário*. In 2010, the Innovare Institute and the International Bar Association Human Rights Institute launched a special prize focused on human rights, which Santos won again for his 'Begin Again' project.

Last year, thanks to the award, the judge was given an opportunity to visit Angola, Mozambique and South Africa, to explore local social realities, make a presentation on the Brazilian initiatives and acquire knowledge from the projects being developed by government authorities and society at large in those countries.

On his visit to Mozambique, Santos was highly impressed by his hosts' receptiveness and by how much they admired Brazil. 'They are anxious to learn from us, to learn from our experience'. One outcome of the trip, which involved visits to prisons, justice system bodies and communities, was that Santos was able to establish a partnership in the name of the National Justice Council with the Public University of Maputo, designed to foster a study to adapt the Brazilian alternative sentences programme to Mozambique.

The alternative sentences programme is widely viewed as highly successful insofar as it makes it feasible for people to pay for their crimes without necessarily having to go to jail. We now know that while the rate of re-offending among ex-prisoners is around 85 per cent, but among offenders that receive alternative sentences, it is far lower, somewhere between five and 10 per cent.

'The idea in Mozambique is not to copy the Brazilian version but to adapt it to Mozambique's own culture. In that country the institution of private justice is still firmly rooted. Perhaps it will be best to work with that ingrained concept of justice, traditionally administered by the community itself. So actually we can only serve as a source of inspiration.' The idea is for the university here to catalogue the rules that are in force in the Mozambican communities and in the future, apply them, when it is practicable to do so, as probable alternative sentences.

In addition to the question of alternative sentences, Santos and the Government of Mozambique are negotiating a possible partnership arrangement for reviewing imprisonments in the prison systems as well as Mutirões and the Begin Again programme 'But, here again, serving as an inspiration and not as models to be replicated 100 per cent'.

The judge's visits to public bodies in Angola revealed the poor qualification of the civil servants staffing government entities. To close those gaps, the Council is expected to offer courses on the Rights of Children and Adolescents, access to health and education, including their relation to the context of loss of liberty in the prison system. Although the approach to be adopted will address theoretical aspects, it will be focused much more on practice, and examples of real-life cases of human rights violations will be used with explanations of how to activate legal protection mechanisms, both in local and international spheres.

South Africa was a big surprise. 'There, we are not the ones that have a lot to teach, we have a lot more to learn. They have a fascinating project similar to the Begin Again programme that has been operating in the national sphere for decades. It is run by an NGO called The National Institute for Crime Prevention and the Reintegration of Offenders (NICRO).

'It was very gratifying to find an improved version of our own programme in existence, insofar as we never had the time to seek to seek inspiration in other similar projects before implementing our own.' The idea is to use the South African project as a source of knowledge to improve our work here in Brazil.

Another excellent discovery during the South African trip was the curricular obligation imposed on law students to give classes on rights and citizenship in high schools and in prisons as well. By getting to know their rights, Santos believes that prisoners will be in a better position to understand their situations and even conduct their own defences. 'All these experiences have shown me that we have a long way to go in achieving new partnerships and also in seeking out good examples like South Africa's to guide and inspire us in our efforts to construct a better Brazil'.

active performance of various bodies, including the judiciary, which, I would say, is actually the most important actor.

'However, the participation of the Office of the Public Prosecutor, the Office of the Public Defender and the Brazilian Bar Association is also of the utmost importance. If any one of those bodies effectively assumes its responsibility for the present situation, than it may lead the others to alter their performances as well. I think that is where the NCJ makes all the difference.'

Santos feels that the *Mutirão Carcerário* is not just a lesson learned, but an ongoing lesson for the entire Brazilian legal system. In his view, the criminal justice system's complacency and inertia reflected in the prisoners' situations has gradually begun to change. 'The Council's action has created a feeling of discomfort among those people, which leads me to believe that the *Mutirões* do not merely liberate illegally detained prisoners, they also make many officials within the system [exert] themselves and come out of their former state of comfortable inertia'.

As a result, other public bodies have also woken up to the situation and begun to do their part and take on their share of the responsibilities. The judge believes all those facts have led to a change for the better in the criminal justice system.

The project, which is well on the way to

'In the eyes of local society, we were there simply to release 700 criminals onto the streets. They filled a whole big gymnasium; it was a crazy sight.'

Erivaldo dos Santos

becoming a public policy, has achieved a considerable victory in the form of Resolution Number One, drawn up jointly by the NCJ and the Office of the Public Prosecutor. It determines and regulates the joint actions in prison *Mutirões*. It makes the Office of the Public Prosecutor, the judiciary, the Office of the Public Defender and the Brazilian Bar Association responsible for the project, and that means better chances of achieving more positive results.

Start again

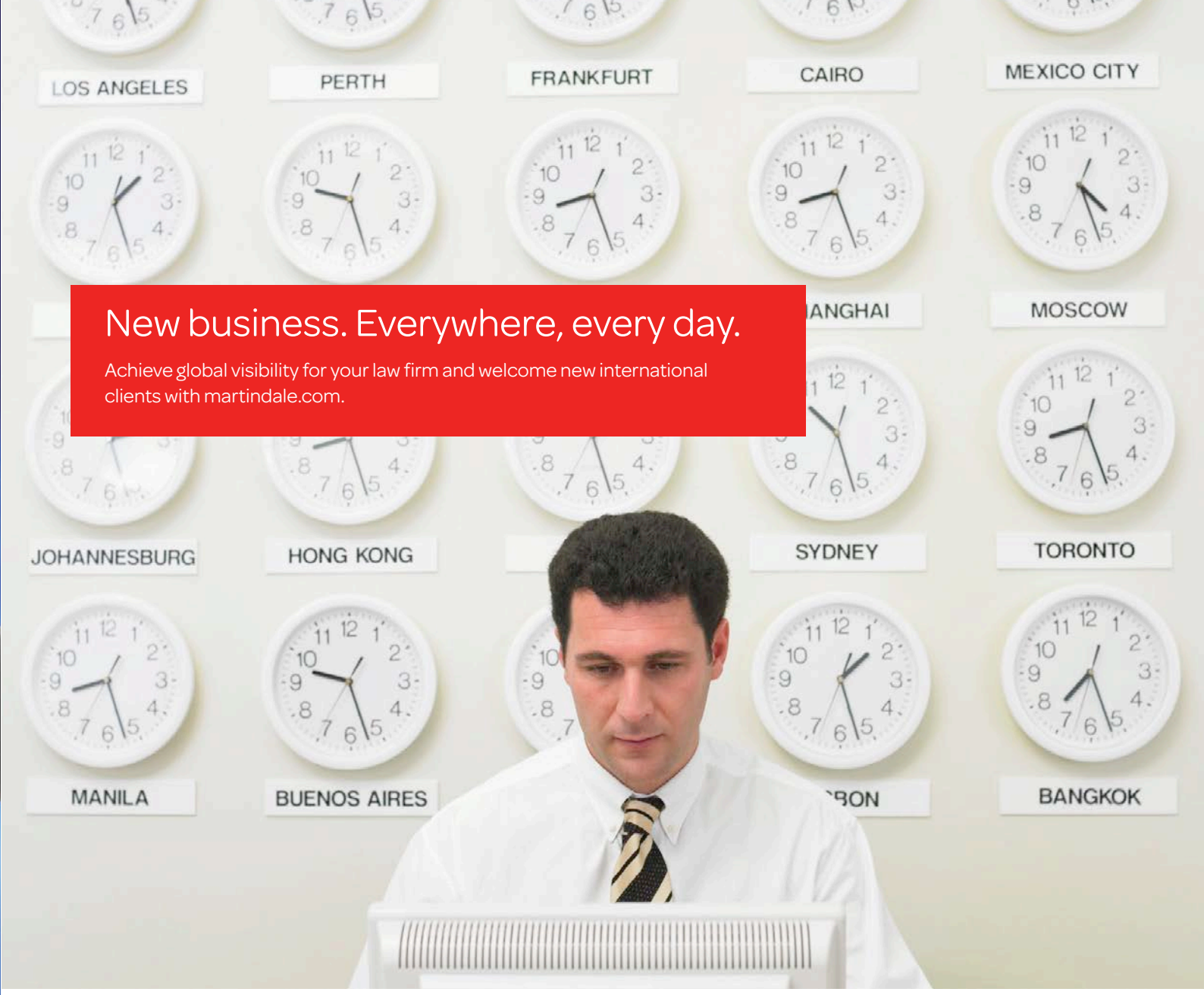
While it is true that the *Mutirões Carcerários* have managed to guarantee prisoners' rights, many people are critical of work that leads to the release of waves of prisoners. Such opposition is most evident among the residents in cities near to the prisons, due to the high probability of the ex-prisoners taking up their criminal activities again on release.

It was during the *Mutirão* in Paraíba that the National Justice Council Working Group became aware of the need to find a solution for the people being released. Over 700 prisoners were released in a single month, throwing the local community into a state of alert. 'In the eyes of local society, we were there simply to release 700 criminals onto the streets', says Santos, who decided to hold a hearing with all the ex-prisoners. 'They filled a whole big gymnasium; it was a crazy sight. I talked to some of those people and many of them actually had a profession – bricklayers, drivers, mechanics – and they needed an opportunity to get back to work. After the hearing, we managed to get some of those people back into the labour market and that was the embryo of the [Begin] Again project.'

The programme guarantees a job to people being discharged from prison, making it possible to resocialise ex-prisoners and drastically reducing the rate of relapsing into a criminal life. Santos explains that not only have recently released individuals shown themselves disposed to getting back to work but there has also been a high rate of adherence to the project among companies and public bodies offering jobs to men and women ex-prisoners. 'Society needs to invest increasingly in this so that people are not drawn back to crime after they get out of prison. Providing this option gives greater meaning to the act of freeing a person because often, the mere act of releasing a person from prison does not signify making him truly free, it often means sending him back to a life of crime insofar as he cannot envisage or believe he has any other option'.

Since the programme began, just over 1,600 vacancies have been filled. There are another 2,551 available but they have not been taken because of the lack of professional qualifications. Those surplus vacancies are a glaring sign that an institutionalised public policy is needed to point the way to resocialisation and not just a relatively isolated programme like the Start Again programme. 'We need to play the role of the state from the start to the finish. We are very good at making arrests but terrible at administering prisons and socially reintegrating these people. The Start Again programme is pointing the way, but there is a need for much more; otherwise we will make no progress in the field of public security'.

Ana Galli is an award-winning journalist based in Brazil. She can be contacted at: **anapaulagalli@gmail.com**.



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

22–25 April 2012 **Santiago, Chile**

Presented by the IBA Section on Energy, Environment, Natural Resources and Infrastructure Law

The IBA SEERIL conference has become a tradition and a must attend event in the industry. It is a highly specialized conference of interest to all markets around the globe and all professionals involved with energy, environment, natural resources and infrastructure transactions. This next conference is taking place in Latin America, given its increasing importance in the production of commodities. The programme will also bring social events at breathtaking sights giving attendees the perfect environment for high level networking.

Topics include:

- Mining
- Oil and Gas
- Construction
- Environment
- Water

Who should attend?

Professionals in mining, energy, oil and gas, construction, water, public regulators and academics.