THE PERISCOPE OF PUBLIC INTERNATIONAL LAW

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In this paper Sir David Baragwanath reflects on the role of public international law in the development of solutions to domestic court matters. The paper was presented as the Peter Allan Memorial Lecture delivered at the Faculty of Law, the University of Hong Kong on Thursday 2 March 2017.

> A new era is unfolding before us. We find ourselves in a political earthquake now. Fresh shocks are opening up unsuspected fault-lines, weight-bearing pillars are in danger of collapse … We need – all of us – to defend international law …the very distillate and sum of human experience … eclipsing all the other identities I may have, I want to feel human first … I want you to feel this too.[1]
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> There will not be one law at Rome, one at Athens, or one now or later, but all nations will be subject all the time to this one changeless and everlasting law.[2]
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> International law is not just a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law.[3]
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> … international law has moved from a horizontal consensual model to a hierarchy of relative normativity and in doing so has given effect to standards of a wider

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1 Prince Zeid Ra'ad Al Hussein, United Nations High Commissioner for Human Rights, 16 February 2017. <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21192&LangID=E> (visited 21 February 2017).

2 Marcus Tullius Cicero *On the State* (III. 3) in *Cicero Selected Works* (Penguin Classics 1971, transl Michael Grant) 6.

3 *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea)* ICJ Judgment 19 June 2012, Declaration of Judge Greenwood para 8, cited by Sir Michael Wood Special Rapporteur *First Report on formation and evidence of customary international law* International Law Commission 17 May 2013 A/CN.4/663 at para 19.

> community than that of States. In consequence, the traditional sources of international law, treaty, custom and general principles of law, based solely on the practice of States, are inadequate to provide support for this new law and its progressive enforceability. The classic sources are too narrow in scope as to actors, period of time and content.[4]

It is a privilege to return to this University to deliver the Peter Allan Memorial Lecture. Peter came from New Zealand to Hong Kong to take up the challenge as Commissioner of the Independent Commission Against Corruption. The successive lectures in his honour have addressed the public law to which he had devoted himself. For reasons given two weeks ago by the United Nations High Commissioner of Human Rights my focus is on public international law: today's conditions require all those concerned with the making and application of such law to help strengthen the crumbling weight-bearing pillars that the High Commissioner has identified as in urgent need of support.

Public international law is the common heritage of humankind. It possesses great institutions, outstanding among them those of the United Nations including the General Assembly, the Security Council and the International Court of Justice. It is extensive, embracing a wide range of activities and disciplines, among them the international criminal justice system in which I am currently engaged in the Special Tribunal for Lebanon in The Hague. Yet compared with the domestic laws of each of the 193 States Members of the United Nations, international law is at an early stage of development.

The bloody Eighty Years War and Thirty Years War that had torn Europe apart were terminated by the Treaties of Münster and Osnabruck of 1648, creating the Peace of Westphalia that recognised the autonomy of each nation state. That principle is recognised by art 2 of the Charter of the United Nations.[5] But the current risks to the seven decades pause in international war since 1945 (leaving aside the

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4 Hazel Fox "Time, History, and Sources of Law Peremptory Norms: is there a need for new sources of international law?" in Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds) *Time, History and International Law* (Martinus Nijhoff Publishers, 2007) 119, 138.

5 Article 2:

> The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.
>
> The Organization is based on the principle of the sovereign equality of all its Members.
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> …
>
> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll.

agonies of regional and local hostilities) reveal the need for better systems and greater effort to strengthen international law. Lacking the legislative element of government identified by Montesquieu as essential to every state, how can international governance manage? How can international law be created and developed to cover the needs of the international community? and how can it be made to adapt to ever-changing conditions?

Part of the answer is to be found in art 38(1) of the Statute of the International Court of Justice:

> Article 38
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> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
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> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
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> b. international custom, as evidence of a general practice accepted as law;
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> c. the general principles of law recognized by civilized nations;
>
> d. … judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
>
> ….

Each of these four elements is of the utmost importance. But they are not enough.

Because international law has traditionally been understood to be the Law of Nations, agreed to by all, it has usually been assumed that if none of the criteria is met there is no relevant international law to apply. That is because of the conventional definition of international law as created either by treaty or by custom as defined in art 38(1)(b). Dean Andrew T Guzman's *How International Law Works*[6] helpfully identifies two elements as necessary for a rule of customary international law: sufficient state practice, and *opinio juris* – that the practice be accepted as law or followed from a sense of legal obligation. But the realities exposed in court can sometimes test the adequacy of these elements.

Explicit in the Common Law, maintained with just exceptions by art 8 of the Basic Law of the Hong Kong Special Administrative Region, was the dual judicial

6 Oxford, 2008 at 185.

obligation: to give effect to the laws and usages of the realm and, in doing so, to do right to all manner of people.[7]

The former obligation, naturally emphasised by the Hong Kong Judicial Oath, is to maintain stability of existing law; it underlies art 38(1) of the ICJ Statute. The latter obligation recognised that the former does not exhaust the topic of judicial responsibility. Evidenced by the practice of the courts of Hong Kong as implicit in their oath, it includes the need while maintaining the law also to do justice.

I IDEAS AND THEIR JUDICIAL APPLICATION

All law, including international law, is ultimately a human construct built on fresh ideas[8] and then accepted, bringing about the changes required to meet the moral standards of the age.

Judges must always recall that in law-making theirs is a subordinate role. In domestic law they must conform with public policy formulated by the legislature which is elected to make such decisions for their community. In international law, where there is no general legislature, they must conform with the art 38(1) criteria, insofar as they exist.

But judges are not permitted to declare a *non liquet* – to say they find the issue too difficult to decide.[9] They must give an answer. When art 38 gives no clear direction, by offering no answer, or several that are inconsistent, what does a domestic or international court do? I have previously suggested,[10] in the words of the 16th century French essayist Michel de Montaigne:[11]

> Fortune … sometimes presents us with a need so pressing that the laws simply must find room for it.

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7 Promissory Oaths Act 1868:

> I, (*Insert full name*), do swear that I will well and truly serve our Sovereign Lady Queen Victoria in the office of (*Insert judicial office of*), and **[1] I will do right to all manner of people [2] after the laws and usages of the realm**, without fear or favour, affection or illwill. [numbers and emphasis added].

8 See Walter Mattli and Ngaire Woods (eds) *The Politics of Global Regulation* (Princeton, 2009) 36.

9 J Stone "*Non liquet* and the Function of Law in the International Community" (1959) 35 BBYIL 124.

10 "The Interpretative Challenges of International Adjudication Across the Common Law/Civil Law Divide" (2014) 3(1) Cambridge Journal of International and Comparative Law 450-488.

11 Ibid at 138.

A contemporary French authority Professor Weill puts it in this way:[12]

> If the legislature refrains from changing the law when society needs it to be changed, it implicitly remits to the courts the responsibility for making the necessary changes.

In such an extreme case, when no law is to be found, law simply must be created; its creation is inherent in the judicial function: those who create judicial decision-makers perforce create law-makers.[13] What such judges create for the purpose of resolving a particular case may of course be rejected by later courts. But if accepted it will be legitimated as new law on the uncontroversial basis of becoming new customary law.

Moreover, in international law, judges must be alert to the movement described by Lady Hazel Fox QC, from a horizontal consensual model – of law agreed to by states – to what she terms "a hierarchy of relative normativity" giving effect to standards of a wider community than just that of states. In an important recent address in honour of the late President Antonio Cassese[14] Vice-President Yusuf of the International Court of Justice has focused on "The Human Dimension of International Law". He cites the Roman law precept applied by Nino Cassese in the *Tadic* Interlocutory Appeal decision:[15]

> *Hominum causa omne jus constitutum est*, all law is created for the benefit of human beings.

Vice-President Yusuf noted:

> … the transformation of international law over the course of the twentieth and twenty-first centuries. At the dawn of the twentieth century, international law used to be a law made by western European States for western European States; it was a *jus publicum Europaeum.* Individuals were only important insofar as the State, as a legal entity, decided to exercise diplomatic protection of its citizens to protect its own rights. This

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12 "Si le législateur s'abstient de modifier le droit quand la société a besoin qu'il soit modifié, il s'en remet implicitement aux Tribunaux, du soin de faire les changements nécessaires". A Weil *Droit Civil: Introduction Générale* (1973) 167.

13 Albeit for the title of his major text the great judge and jurist Sir Hersch Lauterpacht chose more soothing language than "law-making", preferring "clarifying and developing" international law: *The Development of International Law by the International Court of Justice* (1982) 5.

14 *The Role of International Lawyers between Theory and Practice* Fifth Antonio Cassese Lecture, Florence, November 2016.

15 ICTY Appeals Chamber, *Prosecutor v Tadic, Decision on the Defence Motions for Interlocutory Appeal on Jurisdiction*, para 97.

> perpetuated the fiction that it was the State and not the individual that had been wronged. Since that time, international law has transformed from a system in which states have the discretion to protect individuals to one in which individuals can directly enforce their rights against states.

Vice-President Yusuf concluded:

> Happily, ... there are some international lawyers who … recognise the ephemeral nature of legal rules. They recognise that the rules exist only because and for the benefit of the society that they serve. They recognise that rules evolve, grow, fall into desuetude because of the changing needs of society. Most importantly, they recognise that it is their job to identify, propose, and effect these changes in practice. … theory and practice are to a certain extent indissoluble: they are simply two manifestations of our personality.

Such an approach was displayed by President Cassese in the Special Tribunal for Lebanon (STL) in a case where a General had been arrested and detained without charge or trial for 3 ½ years until the Tribunal was established, whereupon the then Prosecutor asked it to release the prisoner because the evidence on the file, now in the possession of the Tribunal, did not justify the detention. On his release the General applied to the Tribunal for access to the file. On an opposed appeal the Appeals Chamber rejected the contention that, since the STL is a criminal court and its Rules of Procedure and Evidence contain no reference to rights of discovery, we lacked jurisdiction to order access. In an initial decision *Jurisdiction and Standing* CH/AC/2010/02 (STL Casebook 2009-2010 139) 10 November 2010 for which President Cassese was Judge Rapporteur, we contrasted the jurisdictions of domestic and international courts, holding:

> 47 [There is] a general rule of international law granting … inherent jurisdiction… .
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> 48 The practice … has the general goal of remedying possible gaps in the legal regulation of the proceedings… inherent jurisdiction can be exercised only to the extent that it renders possible the full exercise of the court's primary jurisdiction … or of its authority over any issue that is incidental to its primary jurisdiction and the determination of which serves the interests of fair justice.

In a subsequent judgment *Decision on Partial Appeal by Mr El Sayed* CH/AC/2011/01 (STL Casebook 2011 319) 19 July 2011 for which I was Judge Rapporteur we held that the claimant could rely on two streams of international jurisprudence.

One was that of a practical right to access to justice as recognised in the cause of action for an equitable bill of discovery seen in *R (Binyan Mohamed) v Secretary of State* [2011] QB 218 (CA). There the claimant contended that, in defending his

capital trial in the United States, he was entitled to access to evidence said to be in the possession of the UK that his confession had been elicited by torture. The other was the right of access to official information, recognised internationally to such extent as to qualify in our judgment as a general principle of customary international law. Both streams are examples of the overarching principle of the rule of law, entailing the recognition of essential human rights, just procedures for their enforcement, guarantee of fair trial, and protection of the dignity of the individual.

Insofar as one's country's laws permit, in considering what contribution judges may properly make to the evolution of law, including public international law, in order to ensure an optimum result in terms of justice and fairness with Judge Greenwood's principle as a provisional goal, we can also extend our view above and beyond the familiar and draw on the learning and experience of others. Hence the periscope metaphor.

The purpose of a periscope is to look above obstacles to secure a clear view. In our globalised world, again so far as is consistent with the laws and values of one's own society, it is desirable to consider not only what is familiar but what is best, from the standpoint of others as well as ourselves.

There can of course be different perspectives. While Judge Greenwood's dictum is a valuable ideal, his ICJ colleague Judge Xue Hanqin has provided a note of caution, writing that:[16]

> Notwithstanding its universal character, international law in practice is nonetheless not identically interpreted and applied among States… it is always important and necessary to study international law from the perspectives of individual States in order to better appreciate how international law operates in each specific political, economic and social context.

So in the STL we must take care not to infringe Lebanese values, just as the courts of Hong Kong will comply with the Hong Kong Basic Law. And as shown by *HKSAR v Chan Kam Shing* FACC No. 5 of 2016 as to criminal liability of parties, delivered on 16 December 2016, even within the Common Law admitted by art 8 of the Basic Law there may be differences among courts as closely linked as those of Hong Kong, England and Australia.

16 *Chinese Contemporary Perspectives on International Law: History, Culture and International Law* Pocket Books of the Hague Academy of International Law.

So the periscope must be used with caution, employing a broad perspective and giving attention to all relevant considerations. The development of international law is however essential to ensure that law keeps pace with evolving standards of justice. It requires reference both to the domestic and the international context and to be performed by domestic, as well as international, courts. In the address already cited Vice-President Ysuf, having emphasised that

> the law has to evolve, and to address the changing needs of society… .

noted with regret that the evolution of the concept of *jus cogens* norms was performed despite:

> the lack of a comprehensive study of domestic law and the total absence of an examination of state practice.

He described how developments in international law:[17]

> have transformed the landscape of international law, moving it away from the State-centric model of European public law that characterised the international law of the nineteenth century. Contemporary international law recognises that law is there to protect and serve individuals. Whilst the State still plays an important role in the creation and enforcement of international law, the fact that international law now recognises the rights of individuals, and in many cases establishes mechanisms through which they can address their grievances against States, shows that it has reoriented itself towards the most fundamental building block of society – the individual, the human being.

As to the role of domestic courts in this process, Lord Mance wrote last January:[18]

> 148 …The role of domestic courts in developing (or … even establishing) a rule of customary international law should not be undervalued. This subject was not the object of detailed examination before us, and would merit this in any future case where the point was significant. But the intermeshing of domestic and international law issues and law has been increasingly evident in recent years. Just as States answer for

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17 Likewise in *Belhaj v Straw* [2014] EWCA Civ 1394, [2015] 2 WLR 1105, appeal dismissed [2017] UKSC 3, the Court of Appeal of England and Wales stated:

> 115 … a fundamental change has occurred within public international law. The traditional view of public international law as a system of law merely regulating the conduct of states among themselves on the international plane has long been discarded. In its place has emerged a system which includes the regulation of human rights by international law, a system of which individuals are rightly considered to be subjects.

18 In *Al-Waheed v Ministry of Defence* [2017] UKSC 2, drawing on Lauterpacht's earlier article "Decisions of Municipal Courts as a Source of International Law" (1929) 10 British Yearbook on International Law 65-95 and later writings, especially by Sir Michael Wood.

> domestic courts in international law, so it is possible to regard at least some domestic court decisions as elements of the practice of States, or as ways through which States may express their opinio juris regarding the rules of international law. The underlying thinking is that domestic courts have a certain competence and role in identifying, developing and expressing principles of customary international law.

In such a case the court should form its own opinion in the matter in order to adjudicate; and if its answer later commends itself to others, it can become part of international law via art 38(1)(4).

The alternative to using the periscope is to ensure the injustice of anachronism: blindly applying the second element of the Common Law judicial oath and ignoring the first.

II SOME EXAMPLES

A Criminal Liability of Companies

In *Decision in Proceedings for Contempt* (2014)[19] I was faced with that problem. Rule 60*bis* of the STL's Rules of Procedure and Evidence of the STL states:

> The Tribunal, in the exercise of its inherent power, may hold in contempt those who knowingly and wilfully interfere with its administration of justice … .

Two news media companies and in each case a senior staff member were alleged to have infringed the Rule by publishing the names of purported confidential witnesses. As scheduled STL Contempt Judge during the month of publication I was required to determine whether contempt charges should be brought. Criminal liability for legal persons, such as corporations, is a familiar and increasingly pervasive legal construct, based on the premise that criminal conduct of certain natural persons done in their official capacity should be attributed to the legal entity. However I discovered to my surprise that up to then, international law had applied an ancient principle, indeed expressed in Latin as *societas delinquere non potest* and by a 19th century English judge as "Corporations have neither bodies to be punished, nor souls to be condemned; they therefore do as they like". Whatever the position prior to the Companies Acts, I considered that nowadays, where corporate entities hold great power in their ability to publicly broadcast and otherwise disseminate information, it would be not only naïve but dangerous to accept that only natural persons could undermine the justice process. And since Lebanon had updated its Criminal Code to render a legal person liable for conduct of their personnel

19 STL-14-06/I/CJ ((STL Casebook 2014 21) 31 January 2014).

performed on its behalf, it would be bizarre for the Tribunal to deny protection of its due process against corporate interference because of an ancient maxim that the state it serves has rejected. I therefore directed commencement of proceedings against both companies, a decision upheld by two appellate panels (one by majority). One company was acquitted following trial, the other convicted.

B International Investment Contracts

The development of public international law by arbitrators appointed under bilateral investment treaties is now familiar and results from the consent of States Parties to such process.[20] A further evolution is in my opinion occurring in a new aspect of contract law: the International Swaps and Derivatives Association (ISDA) Master Agreement that usually governs derivatives transactions. It has been described by the High Court of England and Wales as:[21]

> probably the most important standard market agreement used in the financial world. … It is axiomatic that it should, as far as possible, be interpreted in a way that serves the objectives of clarity, certainty and predictability, so that the very large number of parties using it should know where they stand.

Expert commentators advise that:[22]

> …a judicial mistake made when interpreting a standard term can 'infect' trillions of dollars of trading based on the same term.

Moreover, while markets can do many good things, self-regulation is not their main skill. Recent history has shown that complex financial transactions made hundreds of times a day, involving very large investments, require a no less sophisticated dispute resolution system. If none is in place other precautions are required to deal not only with judicial error but indeed with excesses permitted by de-regulation and judicial self-restraint; the remedy may extend to legislation. As was candidly acknowledged by a New Zealand judge applying the NZ Credit Contract and Consumer Finance Act 2003:[23]

> The evidence adduced by the parties in this case included an extensive discussion of accounting principles and the suitability of applying them to the assessment of

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20 Jeffrey Golden and Carolyn Lamm (eds) *International Financial Disputes: Arbitration and Mediation* (Oxford, 2015) paras 5.03-5.06.

21 *Lomas v JRB Firth Rixon Inc* [2010] EWHC Civ 3372 Briggs J at [53]. The author of a standard text considers it "perhaps the most successful financial form document ever, anywhere." SK Henderson *Henderson on Derivatives* (Butterworths LexisNexis, 2010) 803.

22 Jeffery Golden and Carolyn Lamm, above n 20 at 14.

23 *Commerce Commission v Sportzone Motorcycles Ltd* [2013] NZHC 2531 para 70 per Toogood J.

> reasonableness which the Court is required by s 41 to undertake. Evidence was also called from economists intended to support the parties' contentions on accounting issues by reference to the economic consequences. As to the latter, I was assisted by the evidence to understand the discussion about statutory purpose; *but if the approach which I consider to be required by the text and purposes of the CCCFA has unintended economic or market consequences, that will be a matter for the relevant government ministries to address*. [Emphasis added]

In two recent cases courts were required to interpret the 1980 Rome Convention on the law applicable to contractual obligations, which includes in its Uniform Rules *Article 3 Freedom of Choice* a rule stating:

> 3. The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, *where all the other elements relevant to the situation at the time of the choice are connected with one country only*, prejudice the application of rules of the law at the country which cannot be derogated from by contract, hereinafter called 'mandatory rules'. [Emphasis added]

In an important decision *Sociedade de Desenvolvimento do Norte da Madeira v BST*[24] the District of Lisbon Central Court refused to accept a jurisdiction which was dependent on the transaction being classified as purely domestic. It held that:

> … the adoption of the standard ISDA model contract is an element – par excellence – of the international nature of the interest rate swap contracts in the proceedings.

In *BancoSantander Torra SA v Companhia de Carris de Fetto de Lisboa SA*[25] the Portuguese decision was followed by Blair J, rejecting an inconsistent English decision:

> 404 … For the purposes of Art. 3(3) of the Rome Convention, in determining whether … all the other elements relevant to the situation are connected with one country only, *the enquiry is not limited to elements that are local to another country, but includes elements that point directly from a purely domestic to an international situation. In financial transactions, the use of ISDA or other standard documentation used internationally may be relevant*, and the fact that the transactions are part of a back-to-back chain involving other countries may also be relevant. [Emphasis added]

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24 538/14.2TVLSB 14 July 2015.

25 [2016] EWHC 465 (Comm) [2016] 4 WLR 49.

Then in *Waterfall IIC*,[26] while Hildyard J recognised that the ISDA Master Agreements permit flexibility,[27] he emphasised that the issues in that case were:[28]

> of systemic importance given the widespread use of ISDA Master Agreements, in their various iterations, for over the counter derivative transactions internationally.

The creators of PRIME Finance, as the authors of the documentation referred to, and others, such as those responsible for the 1980 Rome Convention, have together transformed what began as domestic commercial contracts into documents that now transcend any single domestic jurisdiction. Employed, with any necessary local modification, across State borders they engage private international law. Within such broader contexts as the 1980 Rome Convention they have moved a long distance from the sphere of private law – domestic and international – towards that of public international law and the principle formulated by Judge Greenwood of the International Court of Justice: International law is not just a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a single, unified system of law.[29] Indeed a respected colleague has suggested that (whether directly or by useful analogy) art 31(3) of the Vienna Convention of the Law of Treaties might warrant attention:

> There shall be taken into account [in interpreting a treaty]
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> …
>
> (c) any relevant rules of international law applicable in the relations between the parties.

Judges and arbitrators charged with applying the Master Agreements should be aware that more is at stake in their decisions than the parties' interest in competent and timely decisions; the reasons for requiring competence and efficiency lie beyond any individual case. Hardening of economic arteries by inefficient methods of dispute resolution affects more than the immediate parties.

To the extent that entrepreneurs are deterred by lack of confidence in the systems for enforcing their rights, there will be equivalent increase in the "financing gap" –

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26 *Lomas v Burlington Loan Management Limited* [2016] EWHC 2417 (Ch).

27 Para 48(4).

28 Para 22.

29 *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) (Compensation owed by the Democratic Republic of the Congo to the Republic of Guinea)* ICJ Judgment 19 June 2012, Declaration of Judge Greenwood para 8, cited by Sir Michael Wood Special Rapporteur *First Report on formation and evidence of customary international law* International Law Commission 17 May 2013 A/CN.4/663 at para 19.

between the needs of humanity to avert poverty and hunger and the economic success of business that sustains the community.[30]

In 2015 an UNCTAD (*United Nations Conference on Trade and Development)* Annual Report emphasised:[31]

> the financing gap for meeting the Sustainable Development Goals (SDGs) (developing countries faced an annual gap of $2.5 trillion).

It identified an apparent paradox: the world's enormous investment needs and opportunities are associated with sustainable development. Private investors worldwide appear to have sufficient funds available. Yet these funds are not sufficiently finding their way to sustainable-development-orientated projects, especially in developing countries.

UNCTAD's 2016 Annual Report[32] now warns that:

> the regulatory and normative framework on which healthy markets depend, having already warped, is beginning to buckle as the weight of Greenspan's mistake is felt in an ever-widening swathe of economic and social life – from precarious employment conditions to corporate tax inversions to undrinkable tap water. Trust in political leadership is at an all-time low, just when the need for decisive political action is at an all-time high. This is particularly true for a series of interconnected global challenges,

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30 Christine Lagarde, Jim Yong Kim and Roberto Azevêdo *The Wall Street Journal* October 4 2016:

> Many of the world's economic leaders gathering this week in Washington for the International Monetary Fund/World Bank annual meetings may face discontent back home. Adding to a variety of worries, skepticism over trade has risen, protectionism has increased, trade itself has stagnated, and productivity growth has lagged. Particularly in the advanced economies, growth that has been too low and unequally distributed for too long is eroding support for the open trade policies that are essential for sustained recovery and boosting global growth and equity for years to come.
>
> To avert a downward spiral of low growth and protectionism, we must make trade an engine of growth for all. Through international cooperation we must extend the benefits of openness and economic integration, including to small businesses, in developing countries. We must also mitigate the side effects for those individuals and communities being left behind.
>
> Let's be clear about what's at stake: Trade is not an end in itself, but a tool for better jobs, increased prosperity and reduced global poverty. With open markets, more people benefit from access to goods and services, ideas spread, and firms access larger markets abroad.

31 <http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf> 128 visited 28 January 2016.

32 <http://unctad.org/en/PublicationsLibrary/tdr2016_en.pdf> visited 6 October 2016.

> codified in the Sustainable Development Goals, which can only be met through effective international cooperation and action.

They include tackling the basics of poverty and ill-health that link to the corruption and violence that lead to conflict.

To encourage investment that benefits the wider public requires a dispute resolution system that is and is seen to be truly protective of the private interest of both parties to any transaction. In the light of the Cassese/Ysuf overview another by Adam Smith may be recalled:[33]

> the extension of trade [as being a] noble and magnificent object… .

Subject to *ad hoc* alterations made to meet parties' particular requirements, interpretation internationally of the ISDA Master Agreements may now be argued to fall within Lord Steyn's statement in *R v Secretary of State for the Home Department; ex parte Adan* (2000) concerning multipartite treaties (there the 1951 Refugee Convention):[34]

> In principle… there can be only one true interpretation of [such treaty] … in practice it is left to national courts, faced with a material disagreement on an issue of interpretation, to resolve it. But in doing so it must search, untrammelled by notions of its national legal culture, for the true autonomous and international meaning of the treaty. And there can only be one true meaning.

That echoes the admiralty judgment of Sir William Scott, later Lord Stowell, as to the international law of the sea:[35]

> ... [the] law itself has no locality. It is the duty of the person who sits [in London] to determine the question exactly as he would determine the same question if living in Stockholm.

C Competing Principles of Interpretation

Within courts of the Common Law there needs however to be faced an unhappy collision between competing principles. In *Boyce v R (Barbados)* (2004)[36] Lord Hoffmann stated for the Privy Council that:

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33 Knud Haakonssen (ed) *The Theory of Moral Sentiments* Sixth edition 1790; *Cambridge Texts in the History of Philosophy* 2002, 216-7.

34 [2000] UKHL 67 at 12, [2001] 2 AC 477.

35 Sir William Scott (later Lord Stowell) as to the international law of the sea *The Maria* (1799) 1 Christopher Robinson's Admiralty Reports 350.

36 [2005] AC 400, [2004] UKPC 32.

> … the courts will so far as possible construe domestic law so as to avoid a breach of the State's international obligations.

Yet in *R (Wang Yam) v Central Criminal Court* (2015)[37] a seven member UK Supreme Court held that:

> … a domestic decision-maker exercising a general discretion (i) *is neither bound to have regard to this country's purely international obligations* nor bound to give effect to them, but (ii) may have regard to the United Kingdom's international obligations, if he or she decides this to be appropriate.

In the passage emphasised,[38] the Supreme Court plainly rejected the previous dissenting judgment of one of their number, Lord Mance,[39] in *R (Hurst) v Commissioner of Police of the Metropolis* (2007):[40]

> I find unattractive the proposition that it is entirely a matter for a discretionary decision-maker whether or not the values engaged by this country's international obligations, however fundamental they may be, have any relevance or operate as any sort of guide.

Fortunately in another, particularly sensitive, judgment of 2015, *Keyu v Secretary of State*,[41] Lord Mance has noted that:[42]

> 144. The basis and extent to which customary international law ("CIL") is received into common law was not examined in great detail in the parties' submissions before us… .
>
> 146 … Common law judges on any view retain the power and duty to consider how far customary international law on any point fits with domestic constitutional principles and understandings … .
>
> 150 Speaking generally, in my opinion, the presumption when considering any such policy issue is that CIL, once established, can and should shape the common law, whenever it can do so consistently with domestic constitutional principles, statutory

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37 [2016] AC 771, [2015] UKSC 76.

38 Presumably reverting to *R (Brind) v Home Secretary* [1991] 1 AC 696, [1991] UKHL 4.

39 Who in delivering the *Wang* decision loyally applied the majority decision in *Hurst*.

40 [2007] 2 AC 189, [2007] UKHL 13.

41 [2016] AC 1355, [2015] UKSC 69.

42 See now Lord Mance's essay "International Law in the UK Supreme Court" 13 February 2017 <www.supremecourt.uk/docs/speech-170213.pdf> visited 28 March 2017.

law and common law rules which the courts can themselves sensibly adapt without it being, for example, necessary to invite Parliamentary intervention of consideration.

It may be noted that the nominee to the US Supreme Court, Federal Judge Gorsuch, disagrees with its decision in *Chevron USA Inc v Natural Resources Defense Council Inc* 467 US 837 (1984) which delegates to agencies the power to determine the meaning of ambiguous language in the statute they are administering, considering that such issues are for the court to decide.[43] Despite *Wang Yam,* I respectfully agree.

D Lis Pendens

What happens when more than one court or tribunal has potential jurisdiction over the issue?

That is the subject of a perceptive monograph containing the lectures of Professor Campbell McLachlan QC at the Hague Academy of International Law (2009).[44] He contends that in such cases each judicial body must apply to itself the principle of *forum conveniens*: take a broad view of the issues and the respective advantages and disadvantages of adjudication by itself or by others, and evaluate what decision best meets the overall justice of the case, accepting or declining jurisdiction accordingly. We came close to having to apply that principle in the Appeals Chamber of the STL when the legality of its creation by Security Council resolution, and thus our jurisdiction, was challenged. The obvious *forum conveniens* for determining such a dispute was surely the International Court of Justice (ICJ), created by the very Charter of the United Nations which created the Security Council. The Appeals Chamber of the STL, purportedly created by the Security Council resolution, was faced with the interest of all its judges in the issue the answer to which would determine the validity of their own purported status in that role. But since no party with authority to refer the issue to the ICJ under art 92 of the Charter had elected to do so, the principle of necessity required us to determine our own status.

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43 *The Washington Post* 24 August 2016 (washingtonpost.com visited 8 February 2017). He is also reported as stating that, rather than contemplating the future, "judges should instead strive (if humanly and so imperfectly) to apply the law as it is, focusing backward, not forward." Jill Lahore "Weaponizing the past: how should the courts use history?" *The New Yorker* 27 March 2017. I cordially disagree. <www.newyorker.com/magazine/2017/03/27/weaponizing-the-past> visited 4 April 2017.

44 *Lis Pendens in International Litigation* (Martinus Nijhoff Publishers, Leiden, 2009).

E Global Warming

A familiar subject of immense topicality and importance is that of global warming. In the ICJ Danube Case (1997) Vice-President Weeramantry emphasised:[45]

> the preservation of [peoples'] human right to the protection of their environment …a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself… damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments … there is … a duty to ensure that [development] projects do not significantly damage the environment.

The States Parties to the United Nations Framework Convention on Climate Change (COP21)[46] acknowledge that the case for urgent intervention to reduce greenhouse gases, at the very least within an ultimate limit of 2% and preferably 1.5% above pre-industrial levels, is made out. The 2011 UNDP Human Development Report and annual IPCC reports and other research had provided overwhelming evidence that we are reaching an upper limit to our capacity to emit greenhouse gases without dire consequences.[47]

Yet here too there is compelling need for the potential of international public law to be recognised.

In *West Coast Ent Incorporated v Buller Coal Limited* [2013] NZSC 87 the appeal to the Supreme Court of New Zealand raised the question whether extraction of coal for export required consideration of the climate change effects of its contemplated end use. The Court, over the dissent of the Chief Justice, held the answer was no. On such construction of the legislation, it betrays inadequate concern for the international environment.

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45 *Gabćikovo-Nagymaros Project (Hungary v Slovakia)* 1997 ICJ Rep, 90-2.

46 Endorsed by the Joint Communiqué of the G & Foreign Ministers' Meeting in Hiroshima on April 10-11 2016 <www.mofa.go.jp/files/000147440.pdf> visited 11 April 2016.

47 See Patrick Huntjens and Ting Zhang "Climate Justice: Equitable and Inclusive Governance of Climate Action" 13 April 2016 *The Hague Institute for Global Justice* <www.thehague instituteforglobaljustice.org/information-for-policy-makers/working-paper/climate-justice-equitable-and-inclusive-governance-of-climate-action/> page 1 visited 26 January 2017.

F Terrorism

On another urgent front, in a recent address *Is Terrorism Now an International Crime*[48] I contended that the result of the decision of the Appeals Chamber in *Interlocutory Decision on the Applicable Law: Terrorism et al*[49] – that there should be international recognition of a crime of terrorism at international law – should be endorsed, whether or not the particular arguments we advanced are supported. In that and other addresses I have urged the use of arts 92 and 96 of the UN Charter to secure the decision of the ICJ on this vital topic.[50] There is also need for consideration by the Security Council and, if necessary, by the ICJ, of the nature of the Council's "duties" under art 24 of the Charter of the United Nations. Such duties impose, I contend, responsibility to devise, lay down and maintain safeguards against profound systemic risk[51] – of terrorism and of environmental damage – each of which constitutes the threat to international peace and security against which it is the Council's delegated obligation to protect the people of the states who established it.

III CONCLUSION

Today's turbulent world is one of constant change. My lifetime has seen greater evolution in global society than in attitudes to international law. The combination of such overlapping elements as television, the wide-bodied jet aircraft, the internet, containerisation, the Shengen Agreement and other incentives to international trade and tourism has made many of us de facto citizens of the world as well as of our state of nationality.[52] Certainly there has been much consequential legal change. Bilateral

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48 USC Gould 31 January 2017; also "Energising the law's response to terrorism: the decision of the Appeals Chamber of the Special Tribunal for Lebanon and the need for further action" (to be published).

49 STL-11-01/I Appeals Chamber Special Tribunal for Lebanon, 16 February 2011, STL Casebook 2011 29.

50 The same argument is advanced by Philippe Sands QC in relation to international environmental law and global warming. "Climate Change and the Rule of Law" 21 September 2015 <www.supremecourt.uk/news/climate-change-and-the-rule-of-law> visited 21 December 2015.

51 See *De Tchernobyl en Tchernobyls* (Odile Jacob, Paris, September 2005) 490.

52 Jessica T Mathews provides a masterly overview:

> Borders haven't disappeared, and won't, but they have become more porous. Whether it's fisheries or currencies, air pollution or information (including nuclear knowhow), exploding levels of transnational investment or carbon dioxide, transnational crime or trade, just about the only resource that doesn't cross borders more easily today than decades ago is people. By acts of commission or omission, states impinge much more heavily on others. Governments have responded by adopting a huge variety of treaties, rules, agreements, codes of conduct, coalitions, conventions, accords, and ad hoc procedures. This is what the globalization of several decades has meant in practice: a constantly widening net of multilateral arrangements enfolding new issues and norms of behaviour that cross borders.

and multipartite treaties have emerged in great numbers to respond to such immediate needs as safety in aviation and efficient international commerce.

It is not feasible to contemplate a general globalisation of law. Each of us is a citizen of one of the 193 Member States of the United Nations and proud of his or her national identity, accustomed to local institutions and ways of doing things, and unwilling to have uninformed foreigners tell us what to do in relation to local issues that affect local values. There globalisation of law must be kept within its proper boundaries.

But where conduct risks adverse cross-border consequences the opposite is the case. Current conditions raise very different issues that on any sensible view require the addition, to other options, of urgent legal response. Hence the need for all those who can influence the creation and application of international law to give high priority to: by whom is the necessary law to be made and enforced? how and according to what criteria? and, fundamentally, what use is and should be made of the periscope of public international law that allows us to look beyond our own limitations to wisdom of the world beyond?[53]

The New York Review, 9 February 2017, 11 at 13.

53 I express my appreciation of ideas received from my friend Alberto Alvarez-Jimenez.