SMALL STATES AND THE ENVIRONMENT

FINAL SESSION 7 September 2018

An over-arching theme has been- by what means can disputes be resolved?

The optimum answer would be a multipartite agreement giving effect to Eden's visionary proposal for a new international legal agreement.

I assume however that – like the failure of international decision-makers for eight decades to agree on the excellent definition of terrorism proposed to the League of Nations in 1937 – it is simply not attainable within any reasonable period. Professor Marc Fontecave in Tuesday's *Le Monde* proposes we do no more that advance by little steps over time. But Elizabeth, with unrivaled experience, has asked for how long negotiation should continue and when does action begin? There is no agreement that could lead to arbitration. I therefore examine the judicial alternative.

As I understood Lord Carnwath, having referred to difficulties he has advised us, with all his authority, that there can be no rational challenge to two basic facts:

(1) the need to achieve reduction in global warming;
(2) failure will be catastrophic.

Judges must think long and hard before engaging in judicial legislation in matters which might be resolved by politicians.

But judge-made international law is prepared to use broad concepts to do justice and acknowledge that upon "a foundation of very general precepts of justice and good faith" exists, as in disputes over delimitation of the continental shelf, "a rule of law which itself requires the application of equitable principles": *North Sea Continental Shelf Cases* ICJ Reports 4 at 47. Following Grotius and Cicero, and as illustrated by the *North Sea* case, I have argued that where settled principle is lacking, there should be applied `the highest standard of practical necessity'.[1]

In my view that test is met:

(1) when the facts of the problem and the answer to it are undeniable;
(2) where no political solution is reasonably within contemplation;
(3) when judicial inaction will result in grave injustice.

The principle, although not its application, is illustrated by the reasoning of Lord Neuberger in the UK Supreme Court in *Nicklinson* [2014] UKSC 31, [2015] 1 AC 697. He stated that, if after 12 years' delay in determining whether by prohibiting assistance to a loved one to travel to Europe to terminate life the Suicide Act 1961 infringed Article 8 of the European Convention on Human Rights as to respect for … private life", Parliament took no action,

[1] "The Interpretative Challenges of International Adjudication Across the Common Law and Civil Law Divide" (2014) *Cambridge Journal pf International and Comparative Law* 450-488 at 452, 455, 459, 460

the judges should hold there was infringement. (In the event Parliament did intervene, deciding there was no infringement).

There are four basic principles:

(1) it is the obligation of those with sovereign power to protect the citizen: *Calvin's Case* (1608) 7 Coke's Reports 1a, 77 ER 377 per Sir Edward Coke, endorsed by Sir John Salmond (1901) LQR;
(2) the ancillary legislative role of the judiciary to avoid inevitable harm to the community is a facet of that principle;
(3) the whole of international law – not only that identified via Art 38(1) of the Statute of the International Court of justice – other than that created by treaties, but also that derived from practical necessity, derives from judges' decisions to recognize its existence as law;
(4) in a recent address "The Human Dimension of International Law" President Abdulqawi Yusuf of the International Court of Justice cited the Roman law precept:

> *Hominum causa omne jus constitutum est*, all law is created for the benefit of human beings[2]

and stated:

> 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.[3]

The concern expressed about judicial reticence, based on the nuclear case *Marshall Islands v UK* where the ICJ declined jurisdiction, may warrant another look given the facts:

1 outstanding though he is as an international jurist, Judge Greenwood who voted with the majority in that case has retired from the ICJ;

2 his replacement, Judge Salam, another outstanding international jurist, in 2011 as Lebanese Ambassador to the United Nations and member of the Security Council supported its intervention in relation to global warming;

3 Judge Crawford, in the oral comment on Professor Sands QC's argument at the UKSC conference in 2015 for use of Art 96 by the General Assembly to refer to the ICJ suitable

[2] Used by President Antonio Cassese ICTY Appeals Chamber, *Prosecutor v Tadic, Decision on the Defence Motions for Interlocutory Appeal on Jurisdiction*, para 97.
[3] Address in honour of Antionio Cassese, Florence 2017

issues of environmental fact and law, said words to the effect that if the facts and law justify it, the ICJ should accept such a case.