The Myth of Customary International Law

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Introduction

The *Encyclopedia Britannica* commenced the section on (Public) International Law of its 1969 edition as follows:[1] "International law, or the law of nations, is a body of rules and principles which States consider legally binding upon them." The article pointed out that "[o]bviously, every system of law must have criteria by which one can set about discovering the rule of law on a particular matter at a given time. For international law, those tests of validity have been authoritatively stated in art. 38 of the Statute of the International Court of Justice." According to paragraph 1 of that Article, the Court, "whose function is to decide in accordance with international law such disputes as are submitted to it" is to apply inter alia: "a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting States; b. international custom, as evidence of a general practice accepted as law".

In citing those so-called sources of international law, the author merely conformed to the ritual observed by most writers on the subject. He went on to say that to "establish a rule of customary international law it must be shown that there exists not only a practice or habit among States, but also a recognition that the practice follows a rule legally binding on them. Customary law must accordingly be distinguished from mere usage, however well established; and from the rules of international comity which, however well observed they may be, are recognized by States as being demanded by courtesy rather than by law. Thus, the elements necessary to establish a rule of customary law are, in the words of Judge M.O. Hudson,[2] . . . 'the concordant and recurring action of numerous States in the domain of international relations, the conception in each case that such action was enjoined by law, and the failure of other States to challenge that conception at the time.'"

Students of the subject have, from the cradle so to speak, been brought up to embrace this kind of affirmation as an article of faith. Indeed, to question its veracity might well be regarded as tantamount to a heretical attack on the fundamental beliefs and dogma of the creed, shaking, if not destroying, the very foundations on which international law is built.

But feelings of misgiving and of intellectual dishonesty at our slavish

1. Vol 12, 423 (RYJ). The 1974 edition, Vol 9, 744 (GSc), adopts a different approach.
2. *The Permanent Court of International Justice*, 609.

obeisance to orthodoxy could no longer be suppressed after reading the judgment of the Court of Appeal in the *Trendtex* case.[3]

On the other hand, it may be that such doubts and fears are groundless and will quickly be dispelled by a wiser and more knowledgeable legal pundit. Meanwhile, however, I venture as an act of conscience to give some reasons for regarding the concept of customary international law as merely a fiction or myth. Somebody once said that it is always healthy to see a gadfly attacking received ideas.

Sources of international law

The Survey of International Law, in Relation to the Work of Codification, submitted in 1949 by the Secretary-General of the United Nations to the International Law Commission,[4] stated that "the codification of this aspect of international law has been successfully accomplished by the definition of the sources of international law as given in art. 38 of the Statute of the International Court of Justice. That definition has been repeatedly treated as authoritative by international arbitral tribunals. It is doubtful whether any useful purpose would be served by attempts to make it more specific as, for instance, by defining the conditions of the creation and of the continued validity of international custom or by enumerating, by way of example, some of the general principles of law which art. 38 of the Statute recognizes as one of the three principal sources of the law to be applied by the court."[5] It is believed that the late Sir Hersch Lauterpacht was entrusted with the composition of this valuable Survey. Why, one might ask, did he not consider it expedient to attempt to define "the conditions of the creation and of the continued validity of international custom"?

Almost two years earlier, Professor Brierly, the Rapporteur of the Committee on the Progressive Development of International Law and its Codification, which met at Lake Success from 12 May to 17 June 1947, reported that "in connection with the development of the law through the judicial process, the Committee desired to recommend that the International Law Commission consider ways and means for making the evidence of customary international law more readily available by the compilation of digests of State practice, and by the collection and publication of the decisions of national or international courts on international law questions."[6] The Chairman of the Committee explained that this paragraph did not mean "that there were no other sources of international law, but only that the evidence of customary international law was not easily available in contra-distinction to evidence of scientific international law which was always laid down in books".[7]

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3. *Trendtex Trading Corporation* v *Central Bank of Nigeria* [1978] QB 529.
4. A/CN. 4/1/Rev.1, 10 February 1949.
5. Ibid, 22.
6. A/AC. 10/40, 5 June 1947, cited in *Ways and Means of Making the Evidence of Customary International Law more Readily Available*, A/AC. 4/6. 1949 (hereinafter referred to as *Ways and Means*).
7. A/AC. 10/SR. 27, 20 June 1947, 11: *Ways and Means*, 4.

It is to be noted that Professor Brierly seems to have intended that a distinction should be made between "the development of customary international law" and "the development of the law (presumably international law) through the judicial process". However, the paragraph in question was amended slightly with a view to greater clarity in Sub-Committee 2 of the Sixth Committee of the General Assembly and became without further change Article 24 of the Statute of the International Law Commission. The English text of that Article provides that "the Commission shall consider ways and means for making the evidence of customary international law more readily available, such as the collection and publication of documents concerning State practice and of the decisions of national and international courts on questions of international law, and shall make a report to the General Assembly on this matter."[8] It would appear that the distinction made by Professor Brierly between two different kinds of law was removed in the text of Article 24, and that customary international law was envisaged as embracing both State practice and the judgments of courts. A jurisprudential question is raised when one begins to consider whether State practice can become law before it has been submitted to judicial examination. It is also difficult to understand what the Chairman had in mind when he said that "the evidence of customary international law was not easily available in contradistinction to evidence of scientific international law which was always laid down in books." What is the meaning of "scientific" in this connection? How is it possible to reconcile scientific knowledge with the mere subjective opinion of writers?

The memorandum on *Ways and Means* proceeded to survey the existing state of the evidence of customary international law including collections of documents (official and otherwise) relating to something like twenty-five countries; digests of State practice, particularly of the United States — no other country appearing at the time to have any digests comparable to the works of Moore or Hackworth; reports and digests of decisions of international tribunals in general and of specific international tribunals such as the International Court of Justice, the Permanent Court of International Justice, the Permanent Court of Arbitration, the Central American Court of Justice, the Mixed Arbitral Tribunal etc.; reports and digests of decisions of municipal courts on questions of international law relating to eight or ten countries; national legislation relating to international law on which there was said to be "a great scarcity of publications"; collections of decisions and opinions of the League of Nations and United Nations; the Harvard Research in international law; the preparatory work for the First Conference on the Codification of International Law; writers; suggestions of organizations and publicists for the improvement of documentations of customary international law. This unbalanced, incomplete and arbitrary miscellany was said to "reveal that a substantial body of evidence of customary international law is available".[9] One of the alternatives suggested for making "the evidence of customary international law more readily available" was "the undertaking of

8. *Ways and Means*, 4.
9. Ibid. 103.

a completely new *Corpus Juris Gentium,* derived from all the different categories of evidence of customary international law".[10] But even if a "systematic and comprehensive compilation of evidence of customary international law" could be accomplished, what would be its value? To what would the evidence relate? Surely it was not suggested that the multifarious sources listed above all relate to law — even in the unlikely event of their unanimity. Moreover, how can there be evidence of law? Either the law exists or it does not. It is possible to have reports of State practice, the opinions of writers and the like; but they do not constitute law.

The maze of speculation in which we are now wandering characterized the draft Convention, formulated in 1926 under the auspices of the American Institute of International Law, and entitled *Fundamental Bases of International Law.*[11]

The preamble stated that "it is proper to determine clearly for the future the fundamental bases of international law, and an end should be put to the uncertainty and the diversity of doctrines heretofore existing on this subject." Article 1 provided that "the reciprocal relations of nations forming the international community are governed by the principles, rules, customs, practices, or usages which are recognized as applicable and which taken together constitute international law." It is unlikely that such a statement did much to "end the uncertainty and the diversity of doctrines heretofore existing on this subject." There remains the fundamental question of how and by whom are those principles, rules, etc. to be "recognized as applicable" and, indeed, where they can be found.

The problem is not made more tractable by Article 6 which announced that "international principles, rules, customs, etc. are either *general* or *particular*. Those followed by all or nearly all nations of the world are *general.* The *particular* principles, rules or usages may be: (a) continental, (b) regional, (c) particular to a school, (d) special, (e) national, or (f) constitute rules of civilization." Nothing is to be gained by setting out here the definition given in the draft Convention of those *particular* principles etc. Article 7 stated that "international rules on the American Continent may also be derived from custom recognized as obligatory by the majority of the American Republics"; but Article 10 added that "in the absence of rules of custom, recourse shall be had to the more or less general practices or usages of the American Republics. Such practices or usages can only be invoked by the Republics observing them."

Article 14 provided that "the general principles of international law are those drawn from the rules in force of that law, especially when they have been recognized by diplomatic acts or arbitral awards"; Article 15 that "the precepts of international justice are those which public opinion recognizes should govern the relations between nations. Those precepts must have been expressed in such acts as *voeux* of international conferences, resolutions of

10. Ibid, 108.
11. *Documents from the League of Nations Committee of Experts for the Progressive Codification of International Law,* (1926) 20 AJIL Supp, 304-7.

recognized scientific institutions, or opinions of contemporary publicists of authority."

Article 18 stipulated that "diplomatic precedents, arbitral awards, decisions of national courts in international matters, as well as the opinion of publicists of authority, have value only in so far as they throw a light upon existing law or upon the other elements mentioned above to which recourse should be had in the absence of legal rules"; and Article 20 that "the observance of international law rests principally upon the honour of the American Republics, under the sanction of public opinion."

The commendable aims expressed in the preamble cited above must surely invite ridicule by the pretences which followed it, and which seem only to add to "the uncertainty and diversity of doctrines heretofore existing on this subject."

The Trendtex case: "We must take the current when it serves, or lose our ventures" (Julius Caesar, IV, iii), per Lord Denning MR

For present purposes, the facts of the case[12] can be stated simply. In July 1975, there was a queue of 400 ships outside Nigeria's main port of Lagos. Ships were arriving every day bringing more cement. Until 1975 Nigeria had been importing two million tons of cement annually. At the beginning of 1975 Government orders had raised cement imports by ten times and, not unnaturally, the ports were unable to cope with the situation. The chaos in Lagos harbour swelled the tide of impatience with the existing Government which led to its replacement in July 1975 by a military administration. The subsequent cancellation by the new Government of the cement orders resulted in the dishonouring by the Central Bank of Nigeria of a letter of credit for more than 14 million dollars held by Trendtex, a Swiss company. In November 1975, Trendtex issued a writ in the English High Court claiming demurrage on six ships, the price of cement shipped on two, and damages for non-acceptance. The Central Bank applied to set aside the writ claiming that the Bank was a department of the Federal Republic of Nigeria and therefore immune from suit. Donaldson J set the writ aside on grounds of sovereign immunity and discharged an earlier injunction granted by Mocatta J requiring the Bank to retain sufficient funds in London to meet the claim. The appeal by Trendtex came before Lord Denning MR, Stephenson LJ and Shaw LJ.

The leading judgment was delivered by Lord Denning who declared that "the doctrine of sovereign immunity is based on international law. It is one of the rules of international law that a sovereign State should not be impleaded in the courts of another sovereign State against its will. Like all rules of international law, this rule is said to arise out of the consensus of the civilised nations of the world. To my mind this notion of a consensus is a fiction. The nations are not in the least agreed upon the doctrine of sovereign immunity. The courts of every country differ in their application of it. Some grant

12. [1978] QB 529.

absolute immunity. Others grant limited immunity, with each defining the limits differently. There is no consensus whatever."[13]

However, his Lordship then proceeded to make the surprising observation that "this does not mean that there is no rule of international law upon the subject. It only means that we differ as to what that rule is. Each country delimits for itself the bounds of sovereign immunity. Each creates for itself the exceptions from it."[14]

But how can this be? If a rule of international law, in the words of the learned Judge, arises from the consensus of civilised nations, and if there is no consensus among the nations in respect of sovereign immunity, how can it be maintained that "this does not mean that there is no rule of international law upon the subject"?

Lord Denning then said that each country decides for itself what that rule is. Each creates for itself the exceptions from the rule. But, with respect, that is not what takes place in practice. In the absence of legislation on the matter, which until recent times has been almost universally non-existent, it is not the executive but the courts which create or declare the law applicable to the case in hand. Moreover, the courts cannot create or declare a rule of *international law* which does not exist; they must perforce create or declare a rule of *municipal law* applicable solely within the confines of the particular country in question. In fact, Lord Denning seemed instinctively to sense this without being willing to carry the argument through to its logical conclusion. For he immediately went on to say: "It is, I think, for *the courts of this country* to define the rule as best they can, seeking guidance from the decisions of the courts of other countries, from the jurists who have studied the problem, from treaties and conventions and, above all, defining the rule in terms which are consonant with justice rather than adverse to it".[15]

In other words, courts must resort to the subjective criteria discussed in the earlier part of this paper. But the mistake is perpetuated by a constant reference to international law, instead of acknowledging frankly that the court is merely applying or fashioning the law of its own country.

The learned Judge then proceeded to consider the fundamental question of the relationship of international law to municipal law, a matter which is not strictly within the ambit of this paper. However, it again involves the problem of customary international law. Lord Denning did not ask, what is the place of international law in municipal law — meaning thereby the municipal law of all States. He did not look for a rule of international law which prescribes universally the relationship of international law to all systems of municipal law. This was because, presumably, such a universal customary rule does not exist. So he had to pose the question in the form: "What is the place of international law in our English law?"[16] This is a different question altogether for the reason that a court, in attempting to answer it, will not apply a rule of international law — which in fact does not exist — but whatever doctrine or

13. At 552.
14. Ibid.
15. At 552-3 (emphasis added).
16. At 553.

principle of municipal law happens to obtain in that particular country. The court is thereby applying its own municipal law to an international dispute.

The complaint is that courts are not prepared to acknowledge the reality of what they do, but remain content to perpetuate the fiction that it is international law which is being applied. Lord Denning did this by discussing what he called two schools of thought. "One school of thought holds to the doctrine of *incorporation*. It says that the rules of international law are incorporated into English law automatically and considered to be part of English law unless they are in conflict with an Act of Parliament. The other school of thought holds to the doctrine of *transformation*. It says that the rules of international law are not to be considered as part of English law except in so far as they have been already adopted and made part of our law by the decisions of the judges, or by Act of Parliament, or long-established custom".[17]

Let us pause here to inquire what Lord Denning meant by the phrase "long-established custom". What kind of custom was he referring to? Who creates the custom? Who defines the custom? Who applies it? If the judge formulates the custom — and it would appear that no other person has that authority — then this would be done in a judgment and the phrase is without meaning.

The learned Judge proceeded to point out that the difference between the doctrines of incorporation and transformation "is vital when you are faced with a change in the rules of international law. Under the doctrine of incorporation, when the rules of international law change, our English law changes with them."[18] But how can this be? Who but the judge of the municipal court is to say if a rule of international law has changed? What criteria does he use to consider the question? What authority has he to decide for the rest of the world that a rule of international law has changed? Surely, all that he can do is to change the previous rule of municipal law if he believes the occasion warrants it. "But", continued Lord Denning, "under the doctrine of transformation, the English law does not change. It is bound by precedent. It is bound down to those rules of international law which have been accepted and adopted in the past. It cannot develop as international law develops."[19]

It is respectfully suggested that what Lord Denning should really have been saying was that English courts are bound by precedent. They can apply only municipal law. If they wish to alter the municipal law, not to conform with some imagined change in so-called customary international law but to express a different view of what the municipal law should be, there is difficulty because of the doctrine of precedent. This failure to pursue logically to its conclusion the myth of customary international law is apparent in the judgment, cited by Lord Denning,[20] of Cockburn CJ in *R* v *Keyn*:[21] "For

17. Ibid.
18. Ibid.
19. Ibid.
20. At 553-4.
21. (1876) LR 2 Ex D 63, at 202-3.

writers on international law, however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have received the assent of the nations who are to be bound by it. . . . Nor, in my opinion, would the clearest proof of unanimous assent on the part of other nations be sufficient to authorise the tribunals of this country to apply, without an Act of Parliament, what would practically amount to a new law. In so doing, we should be unjustifiably usurping the province of the legislature." But in common with Lord Denning, Cockburn CJ failed to acknowledge that only the judge can decide for himself whether he thinks some international practice of States has received the "unanimous assent of other nations". What criteria are to constitute "the clearest proof"? And even if the judge is satisfied that such a universal practice of States exists, that practice does not of itself constitute a rule of law. The rule of law does not come into existence until it is created by the judge in a particular case. It then becomes a rule of municipal law. The myth is in assuming that universal State practice *ipso facto* creates law. Law can only be created by legislation or by the judgment of a court, or, in the case of international law, by a treaty. The same may be said of the judgment, also cited by Lord Denning[22] of Lord Atkin in *Chung Chi Cheung* v *The King*:[23] "So far, at any rate, as the courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law." This statement would be unexceptionable if Lord Atkin had substituted "international practice of States" for "international law".

Lord Denning admitted to having contributed to the confusion by accepting without question the doctrine of transformation in *R* v *Secretary of State for the Home Department; ex parte Thakrar*.[24] "I now believe that the doctrine of incorporation is correct. Otherwise, I do not see that our courts could ever recognize a change in the rules of international law. It is certain that international law does change . . . and the courts have applied the changes without the aid of any Act of Parliament. Thus, when the rules of international law were changed (by the force of public opinion) so as to condemn slavery, the English courts were justified in applying the modern rules of international law. . . . Again, the extent of territorial waters varies from time to time according to the rule of international law current at the time, and the courts will apply it accordingly. . . . The bounds of sovereign immunity have changed greatly in the last 30 years. The changes have been recognized in many countries, and the courts — of our country and of theirs — have given effect to them, without any legislation for the purpose".[25]

It is respectfully suggested that what Lord Denning should have said is that international State practice changes and that municipal courts have reflected such changes in new rules of municipal law. It was the force of public opinion which altered State practice in respect of slavery. The extent of territorial

22. [1977] QB at 554.
23. [1939] AC 160, at 167-8.
24. [1974] QB 684, at 701.
25. [1977] QB at 554.

waters does not vary because of a new rule of international law, but in accordance with the current practice of States, and the same may be said for the bounds of sovereign immunity. Moreover, the learned Judge seemed to have forgotten his earlier pronouncement that "that nations are not in the least agreed upon the doctrine of sovereign immunity. The courts of every country differ in their application of it."[26] Why could not Lord Denning have conceded that, in the absence of a treaty, there is no rule of international law in respect of sovereign immunity; and that the courts of each State act differently, not in their application of some supposed universal rule of international law — which would not, in any case, permit such deviation — but because of the divergent rules of municipal law created by national courts in the light of their subjective interpretation of State practice?

Lord Denning concluded: "Seeing that the rules of international law have changed and do change — and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law. It follows, too, that a decision of this court — as to what was the ruling of international law 50 or 60 years ago — is not binding on this court today. International law knows no rule of *stare decisis.* If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change — and apply the change in our English law — without waiting for the House of Lords to do it."[27]

Even supposing that rules of international law can be created otherwise than by treaty or by a judgment of the International Court of Justice, who is to say when such a rule has changed and what evidence for such change is required? Why did Lord Denning impose a time factor of 50 or 60 years? And what has international law to do with *stare decisis?* The latter is merely a product of the English common law and is alien to most other municipal systems. What authority did Lord Denning have for suddenly declaring that *stare decisis* shall not apply to a particular type of municipal dispute? It is not a question of the court being satisfied that a particular rule of international law has changed from what it was 50 or 60 years ago, but of a change in the international practice of States which should be reflected in a municipal decision.

His Lordship then turned his attention to the doctrines of absolute and restrictive sovereign immunity in the light of "the complete transformation in the functions of a sovereign State. Nearly every country now engages in commercial activities . . . This transformation has changed the rules of international law relating to sovereign immunity. Many countries have now departed from the rule of absolute immunity. So many have departed from it that it can no longer be considered a rule of international law. It has been replaced by a doctrine of restrictive immunity. This doctrine gives immunity to acts of a governmental nature, described in Latin as *jure imperii,* but no immunity to acts of a commercial nature, *jure gestionis."*[28]

26. At 552.
27. At 554.
28. At 555.

The learned Judge pointed out that in 1951 many European countries had abandoned the doctrine of absolute immunity and adopted that of restrictive immunity. "Since that date there have been important conversions to the same view. Great impetus was given to it in 1952 in the famous 'Tate letter' in the United States. Many countries have now adopted it. We have been given a valuable collection of recent decisions in which the courts of America and others have abandoned absolute immunity and granted only restrictive immunity."[29]

But it may be asked how the transformation in the functions of a sovereign State can change rules of international law? How can "many countries depart from the rule of absolute immunity"? It is the courts of the different States which have changed, in varying and individual ways, their domestic rules of law to suit their own purposes. States themselves have nothing to do with the law. It is only their behaviour or practice which has changed. Secondly, when Lord Denning asserted that "so many have departed from it that it can no longer be considered a rule of international law", how many States did he have in mind? And what was the total number of States a proportion of which had transformed their former functions? How much evidence had he received of what is done by all States? Or did he merely refer to a sample? And was the sample based on any criterion of size, wealth, status and the like — or did it depend upon the accessibility of evidence in English, e.g., reports of cases. Only four countries were mentioned by name. There were many others. How many countries have not abandoned the doctrine of absolute immunity? Further, how is one to distinguish acts of a governmental nature from acts of a commercial nature? It is a most difficult task as the French courts, for example, have discovered.[30] His Lordship said that in 1951 many European countries had abandoned the doctrine of absolute immunity. But he did not say how many, or who they were. He said that since then there had been important conversions to the same view. What States was he referring to, and what did he mean by important? The 'Tate letter' is merely evidence of the practice in one State. A municipal court is entitled to look around the world and receive what evidence it likes, sparse or voluminous, of the practice currently adopted by other States, but such practice cannot amount to law. A municipal court creates the law, and it is not international law, to fulfil what it deems to be the requirements of its own State.

In the same vein, the learned judges continued: "Seeing this great cloud of witnesses, I would ask: is there not here sufficient evidence to show that the rule of international law has changed? What more is needed? Are we to wait until every other country save England recognizes the change? Ought we not to act now? Whenever a change is made, someone some time has to make the first move. One country alone may start the process. Others may follow. At first a trickle, then a stream, last a flood. England should not be left behind on the bank — 'We must take the current when it serves, or lose our ventures' — *Julius Caesar,* Act IV, Sc III."[31]

29. At 555-6.
30. See Dunbar, "Controversial Aspects of Sovereign Immunity in the Case Law of some States", (1971-I) 132 HR 199.
31. [1977] QB at 556.

What did Lord Denning mean by a great cloud of witnesses? Did he mean that a large number of States engage in commercial activities, or that the municipal courts of a large number of States have changed their view in the matter of sovereign immunity? Presumably the latter. But how many constitute a great cloud of witnesses? And whatever it is that the courts do, they certainly do not change international law, but merely change their own municipal law. Otherwise, what is happening when, as Lord Denning observed, "Someone some time has to make the first move. One country alone may state the process. Others may follow." Does the country or court making the first move change the law, irrespective of the remaining countries? If not, is it acting illegally? If it changes the law, are the remaining States acting illegally? His Lordship said that "others *may* follow" — there is no apparent obligation on them to do so. How many countries are required to change the law? What did he mean by saying that England should not be left behind on the bank? It may suit her to be left behind. It is entirely a matter for her Government to decide so far as State practice is concerned, and for her courts to decide so far as English municipal law is concerned.

Lord Denning then criticized the timidity of the Privy Council in its partial abandonment of the absolute theory in *The Philippine Admiral*,[32] in which that court took the view that the absolute theory still applied to actions in *personam* until the House of Lords decided otherwise. Lord Denning was of the opinion that the restrictive theory was of general application and he saw "no reason why we should wait for the House of Lords to make the change. After all, we are not considering here the rules of English law in which the House has the final say. We are considering the rules of international law. We can and should state our view as to those rules and apply them as we think best, leaving it to the House to reverse us if we are wrong."[33]

With great respect, this pronouncement must be challenged. The court is applying rules of common law laid down in previous decisions of English courts in cases of sovereign immunity. It is quite open to Lord Denning to create a new rule of English law if he wishes, but he may be acting contrary to precedent in so doing. He is supposed to be bound by previous decisions. The question of justice in relation to the restrictive theory is entirely a subjective matter for each court to determine. If the courts were applying so-called external rules of international law, why should it be necessary for the court to "state its view as to those rules and apply them as we think best"? The rule should be imperative. It should not be open to the court to apply it as it thinks best.

The learned Judge cited[34] several English and United States cases,[35] and the United States Foreign Sovereign Immunities Act 1976, in support of his view.

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32. [1977] AC 373.
33. [1977] QB at 557.
34. At 557.
35. *Rahimtoola* v *Nizam of Hyderabad* [1958] AC 379 at 422; *Thai-Europe Tapioca Service Ltd* v *Government of Pakistan* [1975] 1 WLR 1485 at 1491 (both pronouncements of Lord Denning himself); *The Philippine Admiral* [1977] AC 373; *Alfred Dunhill of London Inc* v *Republic of Cuba* 425 US 682 (1976).

But none of them constitute international law — they are all expressions of municipal law.

His Lordship then made the extraordinary observation that even "if there were no settled rule of international law on the subject, there should at least be one settled rule for the nine countries of the European Economic Community. The Treaty of Rome is part of the law of England. One of the objectives contained in Article 3(h) is to ensure "the approximation of the laws of member-States to the extent required for the proper functioning of the Common Market. . . . In view of those provisions, it seems to me that it is the duty of each of the member-States — and of the national courts in those States — to bring the law as to sovereign immunity into harmony throughout the Community. The rules applied by each member-State on the subject should be the same as the rules applied by the others. There is only one acceptable way of doing it. That is by adopting the doctrine of restrictive immunity on the lines I have suggested."[36]

This passage seems to have no relevance in the present context. Neither Nigeria nor Switzerland, for example, is a member of the European Economic Community. Article 3(h) of the Treaty of Rome is in the first place simply stating an objective; secondly, the approximation of the laws is to assist the proper functioning of the Community — quite alien to the circumstances of the instant case; thirdly, it is in any event very doubtful if the proper functioning of the Common Market in any way depends upon the doctrine of sovereign immunity.

However, Lord Denning conceded that it is a domestic question — particularly for municipal courts — how the law as to sovereign immunity shall be harmonized. The international law aspect seems momentarily to have disappeared. But his Lordship neglected to examine the municipal law of the nine member-States in order to discover what doctrine of sovereign immunity is applied by their respective courts.

Lord Denning referred[37] to an almost identical case, then before the German courts, and cited a passage from the judgment of the Commercial Court of Frankfurt which relied on decisions in 1962 and 1963 of the Federal Constitutional Court. The latter Court adopted a restrictive view of sovereign immunity based on the proposition that "no general rule of public international law exists under which the domestic jurisdiction for actions against a foreign State in relation to its non-sovereign activity is *precluded*". In other words, the question of sovereign immunity is one for the municipal court applying its own domestic law.

Although espousing the doctrine of restrictive immunity, his Lordship acknowledged some uncertainty by observing that "if we are still bound to apply the doctrine of absolute immunity there is, even so, an important question arising upon it."[38] This hesitation was tantamount to an admission that there is no unanimity in respect of sovereign immunity and that the court may be bound — presumably by the principle of *stare decisis* — to apply the

36. [1977] QB at 557-8.
37. At 558-9.
38. At 559.

doctrine of absolute immunity. Such a stance seems incompatible with that adopted in his Lordship's previous discussion about incorporation and transformation.

Lord Denning acknowledged that the "cases on this subject are difficult to follow, even in this country: let alone those in other countries. And yet, we have to find what is the rule of international law *for all of them.* It is particularly difficult because different countries have different ways of arranging internal affairs. . . . Another problem arises because of the internal laws of many countries which grant immunities and privileges to its own organisations. Some organisations can sue, or be sued, in their courts. Others cannot . . . It cannot be right that international law should grant or refuse absolute immunity according to the immunities granted internally. . . . In these circumstances, I have found it difficult to decide whether or not the the Central Bank of Nigeria should be considered in *international law* a department of the Federation of Nigeria, even though it is a separate legal entity. But, on the whole, I do not think it should be. This conclusion would be enough to decide the case, but I find it so difficult that I prefer to rest my decision on the ground that there is no immunity in respect of commercial transactions, even for a government department."[39]

What Lord Denning appears to have been saying, in the first place, was that no clearly defined doctrine of sovereign immunity exists either in English law or in the jurisprudence of other countries. How is it therefore possible to conclude that "we have to find what is the rule of international law *for all of them*"? In the absence of unanimity in the judgments of the courts, was it being suggested that a different rule of international law applies to each of the conflicting decisions? The learned Judge conceded that even the practice of States and their internal laws are as diverse as the number of countries involved. In those circumstances, how can one speak of a rule of customary international law? Secondly, he said that "it cannot be right that international law should permit or refuse absolute immunity according to the immunities granted internally". That observation must confirm the absence of a rule of customary international law in the matter. The granting or refusal of sovereign immunity is a prerogative of national legislation or of municipal courts applying internal law. How can it be decided "whether or not the Central Bank of Nigeria should be considered in *international law* a department of the Federation of Nigeria"? There is no international law on the subject; neither has the question anything to do with international law. Finally, Lord Denning found the problem so intractable that he chose to rest his decision on the ground that "there is no immunity in respect of commercial transactions, even in respect of a government department". This was clearly a personal judgment having no connection with any so-called rule of customary international law. It was an *ad hoc* municipal decision not even based on a binding precedent.

Stephenson LJ, in his judgment, recognized that the first difficulty in deciding between the rule of absolute or restrictive immunity was "caused by the nature of international law and the manner in which municipal courts

39. At 559-60 (emphasis supplied).

ascertain what it is, how the law of nations is made and how proved."[40] His Lordship quoted the famous passage from the *Commentaries* of Blackstone, which has probably been more influential than any other writing in perpetuating the myth of customary international law: "The law of nations . . . is here adopted in its full extent by the common law, and is held to be a part of the law of the land."[41]

Blackstone defined the law of nations as "a system of rules, deducible by natural reason and established by universal consent among the civilised inhabitants of the world" and which "must necessarily result from those principles of natural justice in which all the learned of every nation agree".[42] However, Stephenson LJ pointed out that "the universal consent required by this confident and exacting 18th century definition is, as Lord Denning MR has said, a fiction; if it ever existed, it is not now forthcoming in many spheres of international law, and certainly not, in my judgment, in the area of sovereign immunity. There is, however, ample authority not for the view that each nation can decide what rule suggested by any jurist or body of jurists, or laid down and applied by any foreign court or courts, it can and should itself apply, but for the view that it can and should apply a generally accepted rule."[43] His Lordship cited[44] the opinion of Sir Samuel Evans P in *The Odessa*[45] that the law of nations is "the law which is generally understood and acknowledged to be the existing law applicable between nations by the general body of enlightened international legal opinion."

The learned Lord Justice, for his part, was of the opinion that the difference between the doctrines of incorporation and transformation might be "more apparent than real", for "it is the nature of international law and the special problem of ascertaining it which create the difficulty in the way of adopting, or incorporating, or recognizing as already incorporated, a new rule of international law. I would find less difficulty in accepting restrictive immunity . . . in place of absolute immunity if restrictive immunity were as generally accepted today as absolute immunity was in the past — and that may not have been as universally accepted as I have assumed. But rules of international law, whether they be part of our law or a source of our law, must be in some sense 'proved', and they are not proved in English courts by expert evidence like foreign law: they are 'proved' by taking judicial notice of 'international treaties and conventions, authoritative textbooks, practice and judicial decisions' of other courts in other countries which show that they have 'attained the position of general acceptance of civilised nations': the *Cristina* [1938] A.C. 485, 497, per Lord Macmillan: and those sources come seldom if ever from every civilised nation or agree upon a universal rule; they move from one generally accepted rule towards another. But if none moved, old rules would never die and new rules never come into being. Some move

40. At 567.
41. 15th ed. (1809), Book IV, Ch 5, 67.
42. Ibid, 66.
43. [1977] QB at 567.
44. At 567-8.
45. [1915] P 52 at 61–2.

must be made by States, or their tribunals, or jurists, to prevent petrifaction of the living law. When should a court of law accept or adopt or incorporate or assent to what is alleged to be a new rule of international conduct? Can an English court ever make the first move in this country? Or must it wait for a 'Tate letter' from the Government of the United Kingdom? Or for an Act of Parliament? . . . Have civilised States agreed that the doctrine of restrictive immunity shall be binding upon them in their dealings with one another? The answer is doubtful; may have. Is there evidence that Great Britain has ever assented to the doctrine? The answer must be no — until she ratifies the European Convention on State Immunity which she signed at Basle on May 16, 1972, and perhaps also the Brussels Convention of 1926. Has it been proved by satisfactory evidence that the doctrine has been recognized and acted upon by our own country? No. Or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilised State would repudiate it? . . . Have the opinions of jurists received the express sanction of international agreement, or have they grown to be part of international law by their frequent practical recognition in dealings between various nations? On all the material put before us I could not answer that question in the affirmative. It is clearly difficult if not impossible to prove that governments have acted on the "rule" of restrictive immunity by failing to plead immunity for ordinary commercial transactions. How do you prove that the gestation of a new rule is over and that it has come to birth? Or that an old rule has grown and developed into a new form?"[46]

Stephenson LJ then continued: "It is part of Mr Bingham's case that a vacuum may have been created in the law of nations by the dissent of many from the old rule, but that the vacuum has not been filled by any agreed new rule. Even if the law of nations does not abhor a vacuum, it is entirely unsatisfactory that the courts of this country should not lift a finger to help fill it by a new rule which is 'consonant with justice'. In my judgment this new rule is consonant with justice. It is in accord with the law merchant which requires that payments on letters of credit should be honoured. It is now so widely and generally accepted that no civilised country which has not yet expressly assented to it should be presumed to repudiate it. It would be repugnant to justice if an English court were to repudiate it in modern conditions and so in effect extend the old rule of immunity to transactions which were never considered subject to it by former judges and jurists because such transactions would never in their time have been carried out by sovereign States or their emanations."[47]

This extract from the judgment of Stephenson LJ has been quoted at length because, although his Lordship appeared to acknowledge the problems, contradictions and illogicalities inherent in the idea of customary international law, he continued to manifest a belief in the existence of such a law and a refusal to accept the reality of the situation. While it is unnecessary to reiterate the criticism levelled at the similar stance adopted by Lord Denning, attention might be drawn to the following ambiguities.

46. [1977] QB at 569-70.
47. At 570.

The learned Judge recognized the problems connected with the nature of international law — a system of law supposed to be based on the consent of nations — "the manner in which municipal courts ascertain what it is, how the law of nations is made and how proved". His Lordship admitted that "the universal consent required . . . is a fiction", but refused to accept "that each nation can decide what rule suggested by any jurist or body of jurists, or laid down and applied by any foreign court or courts, it can and should itself apply". Even if it were true that customary international law is created by the consent of States, such consent is not the same thing as the writings of jurists or the decisions of courts. If, therefore, there is no universal consent of States to customary international law, why should a municipal court not refer to the writings of jurists or to the decisions of foreign courts in formulating its own judgment, not based on international law? If the "universal consent" of States is a fiction how can municipal courts "apply a generally accepted rule"? It is difficult to understand what is meant by the assertion of Sir Samual Evans that the law of nations is "the law which is generally understood and acknowledged to be the existing law applicable between nations by the general body of enlightened international legal opinion". What is signified by the phrases "generally understood and acknowledged", and "general body of enlightened international legal opinion"? How does he define "enlightened"? If there were no such thing as customary international law, there would be no question as to doctrines of incorporation and transformation, or of "the difficulty in the way of adopting, or incorporating, or recognizing as already incorporated, a new rule of international law".

How could Stephenson LJ "find less difficulty in accepting restrictive immunity in place of absolute immunity if restrictive immunity were as generally accepted today as absolute immunity was in the past" — and then go on to say "and that may not have been as universally accepted as I have assumed". Surely, some *evidence* is required that absolute immunity was generally accepted in the past, not merely an *assumption* that it must have been universally accepted. The learned Judge realized that customary international law must "be in some sense 'proved', but not be expert evidence". It is suggested that expert evidence is necessary to "prove" the universal consent of States. How else can it be done? What are "authoritative text-books"? Is it not a purely subjective choice of the judge as to which textbooks he prefers to regard as authoritative? How can he take judicial notice of the "practice and judicial decisions" of courts in other countries, unless they are "proved" by expert evidence? What evidence of practice and judicial decisions is the judge prepared to accept? What evidence is required "to show that they have 'attained the position of general acceptance by civilised nations'"?

If "those sources come seldom if ever from every civilised nation or agree upon a universal rule" — what is the definition of customary international law, and how can "they move from one *generally* accepted rule towards another"? What is the meaning of "generally" in this context? What is the import of the phrase "some move must be made by States, or their tribunals, or jurists, to prevent petrifaction of the living law"? How can States, tribunals or jurists "move"? Move in what way? Each has a different way of "moving". Do all the different "ways" constitute different sources of international law?

How many of those agencies, i.e. States, courts, or jurists, have to "move" before the law is supposed to change? What is meant by "petrifaction of the living law"? Who is to say that the law is petrifying — States, courts or jurists? If one says that the law is petrifying, there must be some objective criteria, otherwise the normative question is purely subjective. What could possibly be the criteria save the convenience or expediency of the law in the eyes of States? His Lordship asked "When should a court of law accept or adopt or incorporate or assent to what is alleged to be a new rule of international *conduct*?" He was at least in the sphere of reality when he substituted the word "conduct" for "law". Nevertheless, a court does not "accept or adopt", etc., international conduct. It tries to discover, if it so chooses, what the international practice is on a particular matter, and then enunciates a rule of municipal law in harmony with it. His Lordship was not even sure whether "an English court can ever make the first move in this country? Or must it wait for a 'Tate letter' from the Government of the United Kingdom? Or for an Act of Parliament?" He asked whether "civilized States have agreed that the doctrine of restrictive immunity shall be binding upon them". How can this be "proved" without "expert evidence"? The same applied to the question, "have the opinions of jurists received the express sanction of international agreement". Moreover, in the words of his Lordship, "how do you prove that the gestation of a new rule is over and that it has come to birth? Or that an old rule has grown and developed into a new form"? How can a vacuum be created in international law? If there were no customary international law, the question would not arise. "What is meant by a new rule which is consonant with justice"? Whose justice? What is the criterion? Should it not be "consonant with State practice"? In this case, his Lordship decided that "the new rule is consonant with justice", and his criterion appeared to be based on some requirement of the law merchant that payments on letters of credit should be honoured.

What is the significance of the passage: "It would be repugnant to justice if an English court were to repudiate it (i.e. the honouring of letters of credit) in modern conditions and so in effect extend the old rule of immunity to transactions which were never considered subject to it by former judges and jurists because such transactions would never in their time have been carried out by sovereign States or their emanations"? If such transactions were never in their time carried out by sovereign States and their emanations, there would be no occasion for "former judges and jurists" to consider extending the "old rule of immunity" to them.

Finally, Shaw LJ, in his judgment, said that "in civilized States that law (municipal law) will derive from those principles of international law which have been generally accepted among such States."[48] His Lordship was satisfied "that the preponderant contemporary rule of international law supports the principle of qualified or restrictive immunity."[49] But again it must be asked what is the meaning and what are the criteria for the word

48. At 575.
49. At 576.

"preponderant", and how is it related to the orthodox view of customary international law? In common with the other judges, he maintained that what "*is* immutable is the principle of English law that the law of nations (not what *was* the law of nations) must be applied in the courts of England".[50] The learned Judge affirmed that "even the law of England changes quite apart from what may be happening to international law. Moreover, changes in rules of international law do not come about abruptly; and changes will not be recognised in an English court without convincing support."[51] It may again be asked at what stage is a rule of customary international law supposed to change if such change does not come about abruptly? And what is the measure of "convincing support"? The ambiguous use of terminology is again exemplified in the following sentence: "Lastly, there must be a greater risk of confusion if *precepts* discarded outside England by a majority (or perhaps all) of civilised States are preserved as effective in the English courts in a sort of judicial aspic."[52] What is meant by the word *precepts,* introduced for the first time? How many constitutes all? What States are uncivilised?

Conclusion

The Statute of the International Court of Justice, as we have seen, provides that one of the sources of international law which the Court shall apply in such disputes as are submitted to it is "international custom, as evidence of a general practice accepted as law". The Encyclopedia Britannica, cited at the beginning of this article, explained that the term source was there used to connote "those agencies by which rules of conduct acquire the character of law by becoming objectively definite, uniform and, above all, compulsory".[53]

It will have become clear from this article that the supposed existence of such a thing as customary international law has been seriously questioned. In any event, there is little evidence to support the view that it is "objectively definite, uniform and, above all, compulsory". It seems almost impossible to hazard a realistic and satisfactory definition of customary international law. What, for example, is the meaning of a "general practice" and how is one to know if it is "accepted as law"? The specification of the "conditions of the creation and of the continued validity of international custom" (*Survey of International Law* 1949[54]) has been studiously avoided by international organizations, courts and publicists alike. On the contrary, the last mentioned have been satisfied to express a belief, almost as an act of faith, in the existence of customary international law without requiring evidence to support that supposition or any general consensus in respect of its essential ingredients.

It is submitted that the foregoing analysis of the judgment of the Court of Appeal in the *Trendtex* case manifestly supports the claim that the idea of customary international law is no more than a legal fiction or myth. Even

50. At 579.
51. Ibid.
52. Ibid.
53. Allen, *Law in the Making* 6th ed (1958), 1.
54. Above fn 4.

Lord Denning and Stephenson LJ acknowledged that "this notion of the consensus of the civilised nations is a fiction". It must therefore be a hypocrisy for courts to perpetuate the belief in its existence when they are in fact dispensing their own municipal law. This is so even where a new rule of law is created or an old one modified or displaced under the impulse of developing State practice or the decisions of foreign courts.

It is suggested that the time is more than ripe for courts to abandon the use of the term customary international law in favour of international State practice or custom, qualified perhaps by adjectives such as general, particular, regional, etc. Whether or not a court takes cognizance of such practice or custom in the formulation of its judgment or seeks guidance from the decisions of foreign municipal courts is entirely a matter within its own discretion. In many cases the criterion likely to be applied is based for the most part on notions of justice and expediency. In the result, honesty and candour would at last prevail and some difficult jurisprudential conundrums vanish in consequence from the literature.