Chapter 18

Customary International Law in Domestic Courts: Imbroglio, Lord Denning, Stare Decisis

Stéphane Beaulac*

1) THE THEORIES: APPARENT SIMPLICITY

René Provost said it well when he recently spoke of the "*apparent* simplicity of the idea of the application in domestic law of international norms."[1] The key word here being "apparent," of course, because this matter is obviously nothing but, in Canada, in the United Kingdom and in many Commonwealth countries.[2]

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[1] R. Provost, "Le juge mondialisé: légitimité judiciaire et droit international au Canada," in M.-C. Belleau & F. Lacasse, eds., *Claire L'Heureux-Dubé à la Cour suprême du Canada, 1987–2002* (Montreal: Wilson & Lafleur, 2004), 569, at 569 [emphasis added]. The original French version reads: "L'apparente simplicité de l'idée d'appliquer en droit interne les normes internationales".

[2] See, generally, F. G. Jacobs & S. Roberts (eds.), *The Effect of Treaties in Domestic Law* (London: Sweet & Maxwell, 1987); A. Mason, "The Influence of International and Transnational Law on Australian Municipal Law" (1996) 7 Public L. Rev. 20; K. Keith,

Christopher P.M. Waters (Ed.), *British and Canadian Perspectives on International Law*, pp. 379–392.

This is also true in the legally isolationist United States, as recently witnessed.[3] The first fundamental problem is the existentialist self-doubt of the discipline of "international law."[4] Although the expression coined in 1789 by Bentham[5] is relatively recent, the substance dates back to Vattel[6] and Grotius,[7] along with the very question of whether the "law of nations" is law at all.[8] The actual sources of international legal norms (codified in the *Statute of the International Court of Justice*[9]) continue to be debated by contemporary scholars,[10] espe-

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"The Impact of International Law on New Zealand Law" (1998) 6 Waikato L. Rev. 1; B. R. Opeskin "Constitutional Modelling: The Domestic Effect of International Law in Commonwealth Countries – Part I" [2000] Public L. 607; and B. R. Opeskin, "Constitutional Modelling: The Domestic Effect of International Law in Commonwealth Countries – Part II" [2001] Public L. 97.

[3] These issues are also front and centre in that jurisdiction with the Supreme Court cases *Lawrence v. Texas*, 123 S.Ct. 2472 (2003), and *Roper v. Simmons*, 125 S.Ct. 1183 (2005). See also, generally, J. F. Murphy, *The United States and the Rule of Law in International Affairs* (Cambridge: Cambridge University Press, 2004); and, specifically, S. G. Calabresi & S. D. Zimdahl, "The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision" (2005): http://ssrn.com/abstract=700176; J. Ku, "Structural Conflicts in the Interpretation of Customary International Law" (2005) 45 Santa Clara L. Rev. 857; R. D. Glensy, "Which Countries Count? Lawrence v. Texas and the Selection of Foreign Persuasive Authority" (2005) 45 Virginia J. Int'l L. 357; and J. Larsen, "Importing Constitutional Norms from a 'Wider Civilization': Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation" (2004) 65 Ohio St. L.J. 1283.

[4] See, generally, S. Beaulac, *The Power of Language in the Making of International Law – The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia* (Leiden & Boston: Martinus Nijhoff, 2004). On international law today, see B. Kingsbury, "The International Legal Order" in P. Cane & M. Tushnet, eds., *The Oxford Handbook of Legal Studies* (Oxford: Oxford University Press, 2003).

[5] This British author introduced it in his influential book *An Introduction to the Principles of Morals and Legislation* (London: Pickering, 1823), first published in 1789.

[6] E. de Vattel, *Le Droit des Gens; ou Principes de la loi naturelle appliqués à la conduite & aux affaires des Nations & des Souverains*, 2 vols. (London: N.p., 1758). See also S. Beaulac, "Emer de Vattel and the Externalization of Sovereignty" (2003) 5 J. History Int'l L. 237.

[7] H. Grotius, *De Iure Belli ac Pacis Libri Tres. In quibus ius naturae & gentium: item iuris publici praecipua explicantur* (Paris: Buon, 1625).

[8] See the classic piece by G. L. Williams, "International Law and the Controversy Concerning the Word 'Law'" (1945) 22 British Y.B. Int'l L. 146. See also A. A. D'Amato, "Is International Law Really 'Law'" (1985) 79 Northwestern U.L. Rev. 1293. *Contra* see T. M. Franck, *Fairness in International Law and Institutions* (New York: Oxford University Press, 1995), who speaks of the post-ontological era of international law.

[9] *Statute of the International Court of Justice*, adopted on 26 June 1945, U.N.T.S. 961, Can. T.S. 1945 No. 7 (entered into force 24 October 1945), at article 38(1).

[10] See D. B. Hollis, "Why State Consent Still Matters – Actors, Treaties, and the Changing Sources of International Law" (2005) 23 Berkeley J. Int'l L. 137. On sources

cially customary international law.[11] It is therefore in a context of lingering theoretical difficulties with the norms on the international plane that the uneasy situation concerning the relation between the international and the domestic legal realities must be considered.[12]

Putting aside this initial problem, let us proceed on the premise that, indeed, international normativity exists. In such a scenario, is the conceptualisation of the international / national interface not straightforward, with the classic heuristic tools that are the "monist" theory for customs and the "dualist" theory for treaties?[13] Simply put, the former postulates a non-*ad hoc* structural link between the international and the national legal spheres which, for customs, would mean that no implementation measure by a state is needed to give them legal effect domestically. From the national point of view, one speaks of the "adoptionist" model – or "incorporationist" model in British terminology – according to which international customary norms would be automatically part of the law of the land. On the other hand, dualism affirms the legal reality division between the international and the national which, for treaties, would mean that incorporation by means of individual state measure is required to allow them any domestic legal effect. From a national perspective, one speaks of the "transformationist" model, to the effect that treaty norms would not be part of the law of the country unless and until formally implemented.

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theory, generally, see P. Allott, *Eunomia – New Order for a New World* (Oxford & New York: Oxford University Press, 1990); M. Koskenniemi, *From Apology to Utopia* (Helsinki: Lakimiesliiton Kustannus, 1989); and A. Carty, *The Decay of International Law? – A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester: Manchester University Press, 1986).

[11] Recent literature includes: A. T. Guzman, "Saving Customary International Law" (2005): http://ssrn.com/*abstract=708721; E. T. Swaine, "Rational Custom" (2002) 52 Duke L. J. 559; A. E. Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation" (2001) 95 American J. Int'l L. 757; J. P. Kelly, "The Twilight of Customary International Law" (2000) 40 Virginia J. Int'l L. 449; M. H. Mendelson, "The Formation of Customary International Law" (1998) 272 Recueil des Cours 155; and D. P. Fidler, "Challenging the Classic Conception of Custom" (1997) German Y.B. Int'l L. 198.

[12] On the influence of the sources theory on the interplay between the international and the national legal spheres, see L. Ferrari-Bravo, "International and Municipal Law: The Complementary of Legal Systems," in R. St. J. Macdonald & D. M. Johnston (eds.), *The Structure and Process of International Law* (Dordrecht: Martinus Nijhoff, 1983).

[13] For some classic contributions on the subject, see H. Triepel, *Droit international et droit interne* (Oxford: Oxford University Press, 1920); G. Fitzmaurice, "The General Principles of International Law: Considered from the Standpoint of the Rule of Law" (1957) 92 Recueil des cours 263, at 389–418; I. Seidl-Hohenveldern, "Transformation or Adoption of International Law into Municipal Law" (1963) 12 Int'l & Comp. L.Q. 88; and G. Sperduti, "Dualism and Monism: A Confrontation to be Overcome?" (1977) 3 Italian Y.B. Int'l L. 31.

2) REAL SITUATION: AN IMBROGLIO

This picture is not simple but simplistic, as monism and dualism have actually come to be seen, rightly so, as hiding more than explaining.[14] Important among many questions unanswered by these two theories are these: What is meant by domestic incorporation pursuant to the dualist logic? Is it still by means of implementing legislation,[15] done either directly by reference in a statute or indirectly by legislative harmonization,[16] or can it be seriously said that there are no less than ten ways to implement treaties,[17] including on the basis of pre-existing domestic legislative norms?[18] Is it intellectually honest to say

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[14] See, for instance, J. H. Currie, *Public International Law* (Toronto: Irwin Law, 2001) at 197.

[15] The traditional proposition that domestic transformation of treaty norms needs to be done through legislation comes from the *Labour Conventions* case – that is, *Attorney General for Canada v. Attorney General for Ontario*, [1937] A.C. 326, at 347, *per* Lord Atkin: "Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires *legislative action*" [emphasis added]. One author has suggested that implementation could be done by non-legislative means such as government policy measures: E. Brandon, "Does International Law Mean Anything in Canadian Courts?" (2001), 11 J. Environmental L. & Prac. 399, at 407. This proposition is clearly unsupported by case law and actually runs in the face of the three rationales behind the doctrine of transformation, namely separation of powers, federalism and democracy. For more detail on them, see S. Beaulac, "Arrêtons de dire que les tribunaux au Canada sont 'liés' par le droit international" (2004), 38 Rev. jur. Thémis 359, at 378–381.

[16] This is the long-standing position, as recently summarised by R. Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, Ont. & Vancouver: Butterworths, 2002), at 430. See also, for an analytical scheme of the persuasive force of international treaty norms based on these two techniques of legislative incorporation, S. Beaulac, "National Application of International Law: The Statutory Interpretation Perspective" (2003), 41 Canadian Y.B. Int'l L. 225.

[17] This is what Gibran van Ert has claimed recently, though unconvincingly because the proposition is unsupported by case law and practice: G. van Ert, "What is Treaty Implementation?," in C.C.I.L. (ed.), *Legitimacy and Accountability in International Law – Proceedings of the 33rd Annual Conference of the Canadian Council on International Law* (Ottawa: Canadian Council of International Law, 2005), 165, at 168–169.

[18] Also known as "passive incorporation", this novel proposition really seems to have been suggested out of the blue in the context of international human rights law in Canada by I. Weiser, "Effect in Domestic Law of International Human Rights Treaties Ratified without Implementing Legislation," in C.C.I.L. (ed.), *The Impact of International Law on the Practice of Law in Canada – Proceedings of the 27th Annual Conference of the Canadian Council on International Law* (The Hague: Kluwer Law International, 1999), 132, at 137–139. See also I. Weiser, "Undressing the Window: Treating International Human Rights Law Meaningfully in the Canadian Commonswealth System" (2004), 37 U. British Columbia L. Rev. 113.

that the domestic courts of a sovereign state are indeed "bound"[19] by treaties,[20] or is it more sound to view the role of such norms within the interpretative function constitutionally entrusted to the judiciary,[21] more particularly in terms of the contextual argument of construction.[22]

With respect to customs, if the international and the national are really one pursuant to the monist logic, how can domestic legal actors, such as judges, resort to such international norms domestically? Are legal counsel limited to the customs already discovered internationally or can they make a demonstration of the constituting elements of such norms in a domestic court? How realistic is this scenario in terms of resources and costs?[23] If a custom has yet to be discovered internationally but has been recognised as such by courts of another jurisdiction, say Australia, is relying on this legal norm in Canada an argument of international law or of comparative law? For a custom to enjoy automatic domestic legal effect, must there be evidence of that particular state's implicit consent to it by means of practice and *opinio juris*?[24] What effect, if any, does

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[19] On this way of formulating the issue, see S. Beaulac, "On the Saying that 'International Law Binds Canadian Courts'" (2003), 29 C.C.I.L. Bulletin 1.

[20] See, for instance, what was candidly written by J. Brunnée & S. J. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002), 40 Canadian Y.B. Int'l L. 1, at 55.

[21] In Canada, it has been suggested that the so-called "modern principle" of statutory interpretation, from the work of Elmer Driedger, constitutes the most appropriate way to resort to the international law argument. See S. Beaulac, "L'interprétation de la Charte : reconsidération de l'approche téléologique et réévaluation du rôle du droit international" in G.-A. Beaudoin & E. P. Mendes (eds.), *Canadian Charter of Rights and Freedoms*, 4th ed. (Markham, Ont.: LexisNexis Butterworths, 2005), 27; reprinted in (2005), 27 Supreme Court L. Rev. (2d) 1; and S. Beaulac, "International Treaty Norms and Driedger's 'Modern Principle' of Statutory Interpretation", in C.C.I.L. (ed.), *Legitimacy and Accountability in International Law – Proceedings of the 33rd Annual Conference of the Canadian Council on International Law* (Ottawa: Canadian Council of International Law, 2005), 141. A similar view, that international law can only be "influential" or "persuasive" in the interpretation and application of domestic law, is expressed by K. Knop, "Here and There: International Law in Domestic Courts" (2000), 32 New York U.J. Int'l L. & Pol. 501.

[22] On how it is a better strategy to use international treaties as a contextual argument of construction, instead of referring to a presumption of legislative intent, known as the presumption of conformity with international law, see S. Beaulac, "Le droit international comme élément contextuel en interprétation des lois" (2004), Canadian Int'l Lawyer 1; and S. Beaulac, "Recent Developments on the Role of International Law in Canadian Statutory Interpretation" (2004), 25 Statute L. Rev. 19.

[23] On this reality, see A. W. La Forest, "Domestic Application of International Law in *Charter* Cases: Are We There Yet?" (2004), 37 U. British Columbia L. Rev. 157, at 194.

[24] This is an important aspect of the issue discussed by R. Provost, *supra*, note 1, at 575–578, who opined that the difficulty with the state-specific consensual basis of customary international legal norms explains in large part why Canadian courts prefer to

the codification of a custom into a treaty have in relation to the national application of the legal norm? What is the story with *jus cogens*,[25] peremptory customary international law from which there can be no derogation?[26]

This enumeration of queries, which is far from exhaustive, explains the suggestion in the title of the chapter that the situation with respect to the national application of customs is beyond problematic and confusing. It is nothing short of an imbroglio, really. The following discussion attempts to address one major flaw in the reasoning that led to the general belief that customs obey the logic of monism but, ironically, it might very well create more uncertainties and chaos. The argument is quite straightforward, namely that the most allegedly authoritative British case law (relied upon also in some Commonwealth countries) for the proposition that customary international law is automatically part of the law of the land is fundamentally wrong. The proposed analysis must be understood, however, having in mind the traditional basic tenets of our international relations system and of our international law system.

3) The International Tenets: Westphalia

The matrix within which international affairs are conducted and in which international law operates is based on the Westphalian model of international relations, at the centre of which is the "*idée-force*"[27] of state sovereignty.[28] The

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resort to treaty-based international law arguments, which raise no question of voluntary acceptance of the norms.

[25] The *Vienna Convention on the Law of Treaties*, adopted 23 May 1969, 8 I.L.M. 679 (1969), Can. T.S. 1980 No. 37 (entered into force 27 January 1980), defines peremptory norms at article 53.

[26] At a symposium organised by the Department of Justice of Canada at McGill University, Montreal, on 15–16 June 2005, on issues relating to the relationship between international and domestic law, Stephen Toope expressed the opinion during the discussion that the *jus cogens* nature of some customary international legal norms should have no influence whatsoever on their use by the courts. The present author finds this position untenable and must strongly object to the suggestion that legal norms which the international community considers of the outmost importance should not be recognised as such when they are considered at the domestic level. In fact, the decision of the Supreme Court of Canada in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, at para. 61–65, is a recent example where the *jus cogens* character of the legal norm at issue (that is, the prohibition against torture) was recognised and given weight in the consideration of the international law argument. On this aspect of the case, see S. Beaulac, "The *Suresh* Case and Unimplemented Treaty Norms" (2002), 15 Rev. québécoise d. int'l 221.

[27] That is, "idea-force." See A. Fouillée, *L'évolutionnisme des idées-forces* (Paris: Félix Alcan, 1890), at XI.

[28] Of course, Westphalia is an "aetiological myth" (that is, a myth of origin), created by international society to explain the whens, wheres and hows of its becoming and

international reality consists of a community of sovereign states, which are independent from one another and have their own wills and *raisons d'être* as corporate-like representatives of the people or peoples living on their territories. This model involves an international realm that is distinct and separate from the internal realm. John Currie explained thus: "Public international law is not so much an area or topic of the law as it is *an entire legal system, quite distinct from the national legal systems* that regulate daily life within states."[29] As far as the relation between international law and domestic law is concerned, there is no inherent link because the two systems are distinct and separate[30] – "public international law exists outside and independent of national legal systems."[31] Dwelling on these issues, Justice LeBel of the Supreme Court of Canada (extra-judicially, with Gloria Chao) pointed out: "At the heart of the debate is the tension between the democratic principle underlying the *internal legal order* and the search for conformity or consistency with a developing and uncertain *external legal order*."[32] Appositely, Karen Knop schematically explained that "domestic law is 'here' and international law is 'there.'"[33]

The continuing distinct and separate reality within which our modern state system is conceptualised, explains two fundamental principles of international law.[34] The first one is that, from an international point of view, a sovereign state cannot invoke its internal law – including its constitutional structure[35] – to

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its being. This acknowledgement, however, does not diminish in any way the most extraordinary semiotic effects of Westphalia on the consciousness of international society. See S. Beaulac, "The Westphalian Model in Defining International Law: Challenging the Myth" (2004), 8 Australian J. Leg. History 181; and S. Beaulac, "The Westphalian Legal Orthodoxy – Myth or Reality?" (2000), 2 J. History Int'l L. 148.

[29] J. H. Currie, *supra*, note 14, at 1 [emphasis added].

[30] It follows that the suggestion that the legislative power of a sovereign state has the competence to "violate" international law is completely nonsensical because, in addition to being a fundamentally flawed inquiry for countries of the British-type constitutional system based on the supremacy of Parliament, this statement wrongly assumes some kind of inherent connection between the international plane and the national level – see G. van Ert, *Using International Law in Canadian Courts* (The Hague: Kluwer Law International, 2002), at 55 ff.

[31] J. H. Currie, *supra*, note 14, at 1.

[32] L. LeBel & G. Chao, "The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law" (2002), 16 Supreme Court L. Rev. (2nd) 23, at 24 [emphasis added].

[33] K. Knop, *supra*, note 21, at 504.

[34] There is absolutely no doubt that the Westphalian model of international relations, governed by the Vattelian legal structure, continues to represent our system's paradigm, in spite of the globalisationist claim of the progressive end of the sovereign state. *Contra*, see P. Allott, *The Health of Nations – Society and Law beyond the State* (Cambridge: Cambridge University Press, 2002).

[35] See R. Jennings & A. Watts, *Oppenheim's International Law*, 9th ed., vol. 1 (London: Longman, 1992), at 254.

justify a breach of its international obligations.[36] Indeed, such an argument is impossible because these norms and duties are part of two distinct and separate legal systems. The second core principle of international law flowing from the international / internal divide relates to the administration of the relationship between the two systems. John Currie referred to this feature as the "international-national law interface" and wrote that the relationship "will depend on legal rules that determine, as a matter of law, how one legal system treats another."[37] Like many other Commonwealth countries,[38] Canada's rules of reception bring into play constitutional norms, which are unwritten;[39] they come from the British parliamentary tradition through the preamble to the *Constitution Act, 1867*,[40] which provides that Canada shall have "a Constitution similar in principle to that of the United Kingdom."

4) LORD DENNING IN *TRENDTEX*: THE REVERENCE

Stephen Toope once wrote that, in Canada, "[w]e know for certain that we *do not* know whether customary international law forms part of the law of Canada."[41] However, this does not represent the majority view in the country where, along with the highly influential piece by Ronald St. John Macdonald,[42]

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[36] The basic authority for this proposition is the arbitration decision in the *Alabama Claims* case (United States/United Kingdom) (1872), Moore, *Arbitrations*, i. 653. This rule was codified in section 27 of the *Vienna Convention on the Law of Treaties*, *supra*, note 25.

[37] J. H. Currie, *supra*, note 14, at 193. See also F. G. Jacobs, "Introduction" in F. G. Jacobs & S. Roberts (eds.), *The Effect of Treaties in Domestic Law* (London: Sweet & Maxwell, 1987), xxiii, at xxiv.

[38] See, for instance, the Australian situation with the *Commonwealth of Australia Constitutional Act*, 63 & 64 Victoria, c. 12 (U.K.), and the decision of the Australian High Court in *Minister for Immigration and Ethnic Affairs v. Teoh* (1995), 183 C.L.R. 273, at 286–287.

[39] As Lamer C. J. confirmed in *Re Provincial Court Judges* [1997] 3 S.C.R. 3, at 68, "the general principle [is] that the Constitution embraces unwritten, as well as written rules."

[40] 30 & 31 Victoria, c. 3 (U.K.), reprinted in R.S.C. 1985, Appendix II, No. 5.

[41] S. J. Toope, "The Uses of Metaphor: International Law and the Supreme Court of Canada" (2001), 80 *Can. Bar Rev.* 534, at 536 [emphasis in original]. See also S. J. Toope, "Inside and Out: The Stories of International Law and Domestic Law" (2001), 50 U. New Brunswick L.J. 11, at 16–17.

[42] R. St. J. Macdonald, "The Relationship between International Law and Domestic Law in Canada," in R. St. J. Macdonald, G. L. Morris & D. M. Johnston (eds.), *Canadian Perspectives on International Law and Organization* (Toronto: University of Toronto Press, 1974), 88. For an even earlier statement, see C. Vanek, "Is International Law Part of the Law of Canada?" (1949–1950), 8 U. Toronto L.J. 251.

most international law scholars opine that the adoptionist model (or incorporationist model) applies.[43] The Canadian law on the matter was in such a mess,[44] Toope once scorned, that he felt forced to use British precedents in his public international law course, including what he called the "marvelous contribution"[45] of Lord Denning in *Trendtex Trading Corp. Ltd. v. The Central Bank of Nigeria*.[46] "Because we are told that our constitution [Canada's] is modeled in principle on that of the United Kingdom," wrote Toope with a tint of colonialised complex, "I prefer to rely upon Lord Denning's pronouncement that customary law is automatically incorporated within our domestic law."[47]

That Lord Denning in *Trendtex* is revered in such a way by Toope is a bit troubling and, from a Canadian perspective, completely unjustified. Neither the Supreme Court of Canada[48] nor any lower court in this country[49] – except in

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[43] For recent examples, see H. M. Kindred, "Canadians as Citizens of the International Community: Asserting Unimplemented Treaty Rights in the Courts," in S. G. Coughlan & D. Russell (eds.), *Citizenship and Citizen Participation in the Administration of Justice* (Montreal: Thémis, 2002), 263; and W. A. Schabas, "Twenty-Five Years of Public International Law at the Supreme Court of Canada" (2000), 79 Can. Bar Rev. 174.

[44] The Supreme Court of Canada has never properly addressed, let alone settled, the issue of whether or not the national application of international customs follow the monist logic. See *Reference as to Powers to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] S.C.R. 208; *Municipality of Saint John v. Fraser-Brace Overseas Corp.*, [1958] S.C.R. 263; *La Republique Democratique du Congo v. Venne*, [1971] S.C.R. 997; *Re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (City)*, [2001] 2 S.C.R. 241; and *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 39, 28 June 2005.

[45] S. J. Toope, "Canada and International Law," in C.C.I.L. (ed.), *The Impact of International Law on the Practice of Law in Canada – Proceedings of the 27th Annual Conference of the Canadian Council on International Law* (The Hague: Kluwer Law International, 1999), 33, at 36.

[46] [1977] 1 Q.B. 529 [hereinafter "*Trendtex*"].

[47] S. J. Toope, *supra*, note 45, at 37.

[48] See the cases in footnote 44, *supra*.

[49] See *Bouzari v. Iran* (2004), 243 D.L.R. (4th) 406 (Ont. C.A.); *Foxford Entreprises S.A. v. Cuba*, [2003] 4 F.C. 1182 (F.C. T.D.); *Wier v. British Columbia (Environmental Appeal Board)* (2003), 19 B.C.L.R. (4th) 178 (B.C. S.C.); *Mack et al. c. Canada (Attorney General)* (2002), 217 D.L.R. (4th) 583 (Ont. C.A.); *Rahaman v. Canada (Minister of Citizenship and Immigration)*, [2002] 3 F.C. 537 (F.C.A.); *Copello v. Canada (Minister of Foreign Affairs* (2003), [2002] 3 F.C. 24 (F.C. T.D.); *R. v. Rumbaut* (1998), 127 C.C.C. (3d) 138 (N.B. Q.B.); *R. v. Kirchhoff* (1995), 172 N.B.R. (2d) 257 (N.B. Q.B.); *Zolfagharkhani v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 540 (F.C.A.); *Rudolph v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 653 (F.C.A.); *R. v. Palacios* (1984), 7 D.L.R. (4th) 112 (Ont. C.A.); *Reference re Mineral & Other Natural Resources of Continental Shelf*

one somewhat incongruous case,[50] that quoted the key passage but in the context of treaty law – has ever paid any attention whatsoever to this precedent for the issue of the national application of international customary law.[51] Even in Great Britain, it has only been relied upon in a few subsequent cases to justify the adoptionist model for customs.[52] Merely three such references occurred in our Commonwealth counterparts, Australia[53] and New Zealand.[54] The latest instance in Britain is *R. v. Jones and others*,[55] where the Court of Appeal was asked whether the crime of aggression at international law was a crime in domestic law and thus a justiciable issue in courts; this question was answered by the negative, a conclusion that is under appeal at the House of Lords, judgment pending.

5) LORD DENNING IN *TRENDTEX*: THE CHALLENGE

What is viewed as so extraordinary in the reasons Lord Denning gave in *Trendtex* is the detailed analysis of the "two schools of thought" concerning the domestic utilisation of customs, namely the doctrine of incorporation (that is,

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(1983), 145 D.L.R. (3d) 9 (Nfld. & Lab. C.A.); *Alberta Union of Provincial Employees v. Alberta*, [1980] A.J. No. 531 (Alb. C.Q.B.)

[50] *R. v. Bonadie* (1996), 109 C.C.C. (3d) 356 (Ont. Ct. Prov. Div.), at 370.

[51] This is a material fact that could not be silenced by the unconditional advocates of the adoptionist model for international customary law. See, for example, G. van Ert, *supra*, note 30, at 158.

[52] See *The Uganda Co. (Holdings) Ltd. v. The Government of Uganda*, [1979] 1 Lloyd's Rep. 481 (Q.B.); *I Congreso del Partido*, [1983] 1 A.C. 244 (H.L.); *The Goring*, [1987] Q.B. 687 (C.A.); *J. H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry* (1989), [1990] 2 A.C. 418 (H.L.); *Westland Helicopters Ltd. v. Arab Organisation for Industrialisation*, [1995] Q.C. 282 (Q.B.); *Chagos Islanders v. The Attorney General and another*, [2003] E.W.H.C. 2222 (Q.B.).

[53] See *Koowarta v. Bjelke-Petersen and others* (1982), 39 A.L.R. 417 (H.C. Aust.); and *Re Jane* (1988), 85 A.L.R. 409 (Fam. Ct. Aust.). In Australia, however, courts have adopted what is known as the "source view" of customs, to the effect that "international law is not a part, but is one of the sources, of English law" – J. L. Brierly, "International Law in England" (1935), 51 L.Q.R. 24, at 31. See *Chow Hung Ching v. The King* (1948), [1949] A.L.R. 298; *Nulyarimma v. Thompson* (1999), 165 A.L.R. 621; and *Commonwealth of Australia v. Yarmirr and others* (2000), 101 F.C.R. 171. See also G. Brennan, "The Role and Rule of Domestic Law in International Relations" (1999), 10 *Public L. Rev.* 185; and A. Mason, "International Law as a Source of Domestic Law," in B. R. Opeskin & D. R. Rothwell (eds.), *International Law and Australian Federalism* (Melbourne: Melbourne University Press, 1997), 215.

[54] See *Marine Steel Ltd. v. Government of the Marshall Islands*, [1981] 2 N.Z.L.R. 1 (H.C.). See also, on the situation with regard to international customary law in New Zealand, T. Dunworth, "The Rising Tide of Customary International Law: Will New Zealand Sink or Swim?" (2004), 15 Public L. Rev. 36.

[55] [2004] 4 All E.R. 955.

adoption) and the doctrine of transformation. After considering each of them in turn and asking which is the correct one, he held:

> 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.[56]

Most clearly, therefore, the only reason behind Lord Denning's conclusion that the adoptionist model (or incorporationist model, as called in Britain) should prevail with respect to customary law is the doctrine of *stare decisis*. Indeed international law knows no *stare decisis*, but English law does. Hence the monist logic is warranted for customs because, otherwise, changes in international law would not be reflected in domestic law.

This reasoning based on *stare decisis* is the fundamental flaw in Lord Denning's decision in *Trendtex*. Two criticisms: The first personal; the second substantive. How can his Lordship's statement about *stare decisis* enjoy credibility when his disregard for precedent is commonly known. *Cassell & Co. Ltd. v. Broome*,[57] the *cause célèbre* on punitive damages,[58] drives the point home. In that case, not only did Lord Denning cavalierly disregard the recent precedent by the House of Lords in *Rookes v. Barnard*,[59] but he audaciously invited the lower courts to ignore it.[60] Beyond this credibility problem, however, there is a substantive one that destroys the *stare decisis* argument in *Trendtex*.

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[56] *Trendtex*, *supra*, note 46, at 554.

[57] [1972] A.C. 1027 (H.L.).

[58] On this issue and, particularly, the said episode by Lord Denning, see S. Beaulac, "A Comparative Look at Punitive Damages in Canada" (2002), 17 *Supreme Court L. Rev. (2d)* 351, reprinted in S. Beaulac *et al.* (eds.) *The Joy of Torts – Essays in Honour of Mr. Justice Allen M. Linden* (Markham, Ont.: LexisNexis Butterworths, 2003), 351; and S. Beaulac, "Les dommages-intérêts punitifs depuis l'affaire *Whiten* et les leçons à en tirer pour le droit civil québécois" (2002), 36 Rev. jur. Thémis 637.

[59] [1964] A.C. 1129 (H.L.).

[60] See the judgment at the Court of Appeal, *Broome v. Cassell*, [1971] 2 Q.B. 354 (C.A.), at 384, *per* Lord Denning: "This case may, or may not, go on appeal to the House of Lords. I must say a word, however, for the guidance of judges who will be trying cases in the meantime. I think the difficulties presented by *Rookes v. Barnard* are so great that the judges should direct the juries in accordance with the law as it was understood before *Rookes v. Barnard*. Any attempt to follow *Rookes v. Barnard* if bound to lead to confusion."

Simply put, perhaps because of Lord Denning in fact[61] – or maybe in spite of or unrelated to him – the doctrine of *stare decisis* is not at all what it used to be in the common law systems of the UK, Canada and other Commonwealth countries.[62] The old 19th century directive which even bound the House of Lords to its own previous decisions, as stated in *London Street Tramways Co. Ltd. v. London County Council*,[63] is now long gone. It has been replaced by the *Practice Statement (1966)*,[64] where their Lordships proposed "to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so."[65] This new approach to legal precedents at the country's highest instance had an obvious trickling down effect on the lower courts, where the doctrine of *stare decisis* is known perhaps more in its breach than in its adherence.[66] It has also influenced, most certainly, judicial decision-making all over the Commonwealth.[67]

At the Supreme Court of Canada, the strict doctrine of *stare decisis* was also professed in the early 20th century with *Stuart v. Bank of Montreal*[68] but, before the end of the 1950s, started its progressive relaxation.[69] Since *Watkins v.*

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[61] See H. Carty, "Precedent and the Court of Appeal: Lord Denning's view explored" (1981), 1 Legal St. 68.

[62] On the doctrine of *stare decisis* and on its history in the common law tradition, see R. Cross & J.-W. Harris, *Precedent in English Law*, 4th ed. (Oxford: Clarendon Press, 1991); J. Evans, "Change in the Doctrine of Precedent During the Nineteenth Century," in L. Goldstein (ed.), *Precedent in Law* (Oxford: Clarendon Press, 1987), 35; A. Joanes, "Stare Decisis in the Supreme Court of Canada" (1958), 36 Can. Bar Rev. 175; D. H. Laird, "The Doctrine of Stare Decisis" (1935), 13 Can. Bar Rev. 1; R. von Moschzisker, "Stare Decisis in the Courts of Last Resort" (1923–1924), 37 Harvard L. Rev. 409; and J. A. Salmond, "The Theory of Judicial Precedent" (1990), 17 L.Q. Rev. 375.

[63] [1898] A.C. 375 (H.L.).

[64] [1966] 1 W.L.R. 1234; [1966] 3 All E.R. 77.

[65] *Ibid.*

[66] See G. Slapper & D. Kelly, *The English Legal System*, 7th ed. (London: Cavendish Publishing, 2004), at 81–89.

[67] See H. P. Glenn, "Sur l'impossibilité d'un principe de stare decisis" (1993–1994), 55 Rev. recherche jur. 1073, at 1080–1081.

[68] [1909] 41 S.C.R. 516.

[69] See, for instance, *Re Farm Products Marketings Act*, [1957] S.C.R. 198; *Binus v. The Queen*, [1967] S.C.R. 594; *Peda v. The Queen*, [1969] S.C.R. 905; *Paquette v. The Queen*, [1977] 2 S.C.R. 189; *McNamara Construction (Western) Ltd. v. The Queen*, [1977]; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436; *Minister of Indian Affairs v. Ranville*, [1982] 2 S.C.R. 518; and *Hunter Engineering Co. Inc. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426. See also R.J. Sharpe, "The Doctrine of *Stare Decisis*," in D. J. Guth (ed.), *Brian Dickson at the Supreme Court of Canada, 1973–1990* (Winnipeg: Canadian Legal History Project, 1998), 193; and G. F. Curtis, "Stare Decisis at Common Law in Canada" (1978), 12 U. British Columbia L. Rev. 1.

Olafson[70] and *R. v. Salituro*[71] at the turn of the 1990s, the issue has ceased to be about bindingness of precedents and is now centred on the framework within which courts can adapt and develop common law rules. In the latter case, Iacobucci J. wrote: "Blackstone's static model of the common law has gradually been supplanted by a more dynamic view. This Court is now willing, where there are compelling reasons for doing so, to overturn its own previous decisions."[72] He offered these edicts: "Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country;"[73] but they should limit themselves "to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society."[74] These remarks are apposite to alleviate Lord Denning's concerns that, because of *stare decisis*, domestic legal norms based on international customary law could not change over time.

The new reality of the weaker role for *stare decisis* in common law jurisdictions goes a long way to justify putting aside *Trendtex* as a precedent for the proposition that customs may be used domestically pursuant to the adoptionist (or incorporationist) model and its monist logic. Indeed, it is not true anymore (assuming it once was) that the rigidity of the doctrine means that an old legal precedent will stand in the way of allowing judge-made-law to evolve. Similarly, it is not true nowadays – nor, arguably, was it already when *Trendtex* was decided in 1977 – that customary law at the international level that was nationally applied by means of case law cannot see changes in its legal norms be given domestic effect because of strict precedents. "International law knows no rule of stare decisis,"[75] as Lord Denning put it; national law in common law countries, for its part, knows a considerably watered-down such doctrine. Customary international law evolves over time, no doubt, but so does the national judge-made-law that gives it legal effect domestically, according to the contemporary version of *stare decisis*.

What happens then if Lord Denning's reasoning in *Trendtex*, based on *stare decisis*, is fundamentally wrong? In terms of positive law, it shatters the authority of the case and allows back the traditional, and more accurate, British case law on the national application of international customary law. One such instrumental case is *Chung Chi Cheung v. The King*,[76] where Lord Atkin declared: "It must always be remembered that, so far, at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its

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[70] [1989] 2 S.C.R. 750.

[71] [1990] 3 S.C.R. 654.

[72] *Ibid.*, at 665.

[73] *Ibid.*, at 670.

[74] *Ibid.*

[75] *Trendtex, supra*, note 46, at 554.

[76] [1939] A.C. 160 (P.C.).

principles are accepted and adopted by our own domestic law."[77] This passage was read by Lord Denning in *Trendtex*[78] as rejecting the adoptionist (or incorporationist) model for customs and as requiring implementation by means of legislation. This interpretation is totally unfounded; it is not what Lord Atkin stated and it is crucial in these concluding remarks to address this point.

The suggestion that, if not applied nationally pursuant to the monist logic, customs have to be incorporated through legislation is based on a complete misconception of this international law source, as well as on a fundamental misunderstanding of the incorporationist model and, with it, the dualist logic. Customary law is on the international plane, in a way, what common law is in a domestic jurisdiction, namely unwritten legal norms. Just like conventional law is internationally, in a way, what statutory law is domestically, namely written legal norms. Now, bearing in mind that the Westphalian paradigm postulates two distinct and separate legal realities which need to be bridged somehow, the following propositions appear logically sound: Common law, and its unwritten national legal norms, is the proper vehicle to incorporate unwritten international legal norms found in customs. Statutory law, with its written national legal norms, is the proper vehicle to transform written international legal norms found in treaties.

In the end, recalling that the dualist theory is essentially about requiring a state measure to link the international and the national, there is no difficulty in seeing that customs know a faith similar to treaties. The state measure to transform a treaty is accomplished by the legislator, with an implementing enactment establishing the statutory rule, while the state measure to incorporate a custom is done by the judicial branch of government, with a decision identifying the common law rule.[79] The remaining question, which will have to wait for another day, is whether this process ought to be viewed still through the prism of the adoptionist (or incorporationist) model. Is it not really an application of the transformationist model, the only difference being the type of state measure that gives domestic effect to international law? Could this conceptualisation mean less chaos, less of an imbroglio situation, as regards the national application of customary legal norms? One can only speculate as to what Lord Denning would answer.

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[77] *Id.*, at 167.

[78] *Supra*, note 46, at 554.

[79] This point was made by F. Rigaldies & J. Woehrling, "Le juge interne canadien et le droit international" (1980), 21 C. de D. 293, at 305–306.