# THE CRIME OF GENOCIDE IN AUSTRALIA
## AN EXEGETIC ANALYSIS

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## INTRODUCTION

Recently, in the Australian case of *Nulyarimma v Thompson,*[1] the majority in the full Federal Court held that genocide is not an offence known in Australian law.[2] Shortly after, Senator Greig stated:[3]

> While the details of this case are certain to be debated for years to come – the one resounding message is clear – at this present time, genocide is not unlawful[4] in Australia.

This article will test the above statement and argue that it is wrong. However, it is not intended to argue that genocide as a crime has occurred in Australia.

First, the article will describe the conceptual framework that shapes the relationship between international law and municipal law.[5] The traditional *monistic* and *dualistic (pluralistic)* theories will be considered and a *realistic* account presented. Lord Talbot's rule that "international law forms part of the common law"[6] will be reconciled with the *reality* of state sovereignty and the fact that international law binds individuals as well as

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* LLB (Hons).

[1] (1999) 165 Australian Law Reports 621.

[2] Ibid per Wilcox and Whitlam JJ; Merkel J (dissenting).

[3] Senator Greig, 2nd Reading Speech – Information Package on the Anti Genocide Bill 1999, Senate Legal and Constitutional References Committee (2000, Australian Government Printing Service, Canberra).

[4] "Unlawful" in this context seems to suggest that genocide is not a criminal wrong and neither is it a civil wrong: refer Trindade F and anor, The Law of Torts in Australia (1999, 3rd edition, Oxford University Press, Oxford).

[5] The term "municipal" is synonymous with "internal", "national", "state", or "domestic" within the context of the law of a State. A more exact expression may be "droit interne": Starke, "Monism and dualism in the theory of international law", (1936) XVII British Yearbook of International Law 66.

[6] Buvot v Barbuit [1737] Cases Temp Talbot 281, sometimes known as "Barbuit's case in Chancery", ("Barbuit's case").

States. Secondly, an exegetic survey of the cases will show that Lord Talbot's rule, duly received into Australia, has not been dislodged nor should it be. Thirdly, the majority judgments in *Nulyarimma v Thompson*[7] will be discussed and shown to be questionable because they rest on irrelevant jurisdictional grounds. Finally, it will be shown that a norm of customary international law prohibits genocide, the prohibitive norm falls within Lord Talbot's rule, and the incorporation of the crime of genocide by the Australian common law is warranted.[8]

## THE CONCEPTUAL FRAMEWORK

The relationship between international law and municipal law is commonly referred to as a problem.[9] Since the traditional monistic and dualistic theories fail to account for state sovereignty and the fact that international law binds individuals as well as States a realistic account is needed. The monistic-dualistic controversy revolves basically around two questions: Are international law and municipal law separate legal orders? If so, is one superior to the other?[10]

### *Monism*

Monists aver that international law and municipal law exist within a single order. Natural law monists[11] contend that the two systems of law cannot

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[7] (1999) 165 Australian Law Reports 621.

[8] In Re Thompson; Ex parte Nulyarimma (1998) 148 Federal Law Reports 285, Crispin J held that there was no "sufficient jurisprudential basis for any attempt to graft [an offence of genocide] on the corpus of the Common Law": at 306. However, this article will argue below that there is jurisprudential support for this engrafting.

[9] Case Concerning Certain German Interests in Polish Upper Silesia [1926] Permanent Court of International Justice Reports, Series A, No 7 at 39 per Anzilotti J; Shearer, "The relationship between international law and domestic law" in Opeskin B and anor (editors), International Law and Australian Federalism (1997, Melbourne University Press, Melbourne) 34; Sawyer, "Australian constitutional law in relation to international relations and international law" in O'Connell DP and anor (editors), International Law in Australia (1996, Law Book Company, Sydney) 50.

[10] Fitzmaurice, "The general principles of law considered from the standpoint of the rule of law", (1957-II) 92 Recueil des Cours 5, 70.

[11] Notably, Suarez and St Thomas Aquinas: see Blay S and ors (editors), Public International Law (1997, Oxford University Press, Melbourne) 18-20. Refer also Grotius H (Kelsey translator), De Jure Belli Ac Pacis, Volume 2 (1925, Clarendon Press, Oxford) 267; Shearer IA (editor), Starke's International Law (1994, 11th edition, Butterworths, London) 19.

collide because they derive from the same higher source, human reasoning. Modern monists from the Vienna school[12] assert that both systems are coordinated by a supreme norm, the *grundnorm.* However, all of these positions have intractable problems since municipal law is sometimes inconsistent with international law,[13] and States may not necessarily submit to any, let alone the same, coordinating principle.[14] On the other hand, positivist-monists[15] reject the notion of a common *co-ordinating principle* and seek to eliminate potential conflict by holding one system subordinate to the other. If so, which system is superior?

One view is that international law is superior, but permitting States to regulate their domestic affairs within parameters.[16] There are insuperable difficulties with this view, including the fact that States preceded international law in time[17] and the sovereign has no limitation except those which it allows to be imposed on itself.[18] This lack of limitation has led many States to permit external rules to apply within their legal system.[19]

An alternative view is that municipal law is superior but it embraces and obliges the State to comply with international law.[20] This view should be

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[12] Particularly Kelsen and Verdross: see Starke, "Monism and dualism in the theory of international law", (1936) XVII British Yearbook of International Law 66, 76; Kelsen H, Principles of International Law (1952, Reinhart, New York); Malanczuk P, Akehurst's Modern Introduction to International Law (1997, 7th edition, Routledge, London) 63.

[13] Harris DJ, Cases and Materials on International Law (1998, 5th edition, Sweet & Maxwell, London) 90-91.

[14] The admission of new States with different religious, social, and political values has exacerbated the problem: Stone J, Of Law and Nations: Between Power, Politics and Human Hopes (1974, William S Hein, New York) 55.

[15] Notably, Scelle. Sir Hersch Lauterpacht has been labelled a forceful exponent of monism: Brownlie I, Principles of Public International Law (1998, 5th edition, Oxford University Press, Oxford) 32.

[16] Kunz and Verdross accept that municipal primacy was not possible: Starke, "Monism and dualism in the theory of international law", (1936) XVII British Yearbook of International Law 66, 75.

[17] Fitzmaurice, "The general principles of law considered from the standpoint of the rule of law", (1957-II) 92 Recueil des Cours 59.

[18] The Schooner Exchange v M'Fadden (1812) 7 Cranch 116, 136 per Marshall CJ; Austro-German Customs Union case [1931] Permanent Court of International Justice Reports, Series A/B, No 41 per Anzilotti J.

[19] For example, see Bishop, "General course of international law", (1965-II) 115 Recueil des Cours 151, 193-194; Buergenthal, "Self-executing and non-self-executing treaties in national and international law", (1992-IV) 235 Recueil des Cours 313, 341-367.

[20] Starke, "Monism and dualism in the theory of international law", (1936) XVII British

rejected because the manner in which international law affects a State cannot depend on its municipal law. This would offend the cardinal rule of international law that States cannot plead their own municipal law to escape their international obligations.[21] Thus, subordination and mutual independence (state sovereignty) are either antithetic or mutually exclusive, yet the latter exists in fact.[22] Hence, the monistic account is untenable because both legal systems deny that they are subordinate to the other or another system, and neither defers to a common co-ordinating authority.

### *Dualism*

Dualists acknowledge that international law and municipal law exist as mutually independent normative orders[23] and traditional dualists contend that each system regulates a different set of social relations. To them, international law regulates only the relations between States, and municipal law regulates only the relations between the State and its subjects, and between its subjects *inter se.*[24] They suggest that every legal system has a different juridical source, with municipal law deriving from the will of the State and international law deriving from the common will *(Gemeinwille)* of States.[25] Notwithstanding the latter point, the primary explanation is not entirely correct,[26] and so it appears that traditional dualists have misconceived their own perfect theory.

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Yearbook of International Law 66, 76; Fitzmaurice, "The general principles of law considered from the standpoint of the rule of law", (1957-II) 92 Recueil des Cours 5, 9.

[21] A classic authority is the Advisory Opinion on the Treatment of Polish Nationals in Danzig [1932] Permanent Court of International Justice Reports, Series A/B, No 44, p 24; Anglo-Norwegian Fisheries case [1951] International Court of Justice Reports 116, 132, 181.

[22] Monism may be an accurate account of the "federal legal order" since Commonwealth laws have primacy, not the laws of the Australian States: refer section 109 of the (Cth) Constitution. See Starke, "Monism and dualism in the theory of international law", (1936) XVII British Yearbook of International Law 66, 75; Fitzmaurice, "The general principles of law considered from the standpoint of the rule of law", (1957-II) 92 Recueil des Cours 5, 70.

[23] Most notably Triepel, Strupp and Anzilotti: see Starke, "Monism and dualism in the theory of international law", (1936) XVII British Yearbook of International Law 66, 70.

[24] Ibid.

[25] Ibid 70, citing Triepel, "Les Rapports entre le Droit Interne et le Droit International", (1923) 1 Recueil des Cours 74, 77.

[26] The latter point should be ignored because it misconstrues pacta sunt servanda and denies the normative status of international law: Starke, "Monism and dualism in the theory of international law", (1936) XVII British Yearbook of International Law 66, 72.

According to JG Starke, the main proposition that "each system is mutually independent and different" rests on the premise that "each system governs different relations".[27] In turn, this rests on the observation that "only States are subject to international law".[28]

***Realism***

However, and despite earlier contrary views,[29] international law does not bind States only since it applies directly to individuals as well.[30] The international law offences of piracy, slavery and genocide are apt examples of this direct application.[31] Nevertheless, even if international law governed States only, it would not follow logically that only States would be subjected to international law. As seen earlier, it would be inherently dangerous to infer the universal truth of the premise that "it" cannot be done merely from the fact that "it" has not been done yet.

The practical aspects of dualism may be illustrated as follows. It is well settled in international law that State A cannot unilaterally bind State B.[32] Even so, State A may resolve to bind State B and deem this to be effective, and if so, it will be effective but only in so far as State A is concerned. While this action may place State A in breach of international law because of the extraterritorial nature of the law, it will not invalidate State A's laws where State A is concerned.[33] State B, on the other hand, is free to determine whether it will recognise the purported imposition and, if not, it

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[27] Ibid.

[28] Ibid 70.

[29] In the 1st edition of his book, Oppenheim indicates that "States *solely and exclusively* are the subject of international law": Oppenheim L, Oppenheim's International Law, Volume 1 (1905, Longman, Essex) at para 13; cf the 9th edition, which recognises that "States are the *principal* subjects of international law": Jennings R and anor (editors), ibid (1992, 9th edition, Longman, Essex) at 956. *(emphases added)* See also Harris DJ, Cases and Materials on International Law (1998, 5th edition, Sweet & Maxwell, London) 16.

[30] Sunga LS, Individual Responsibility in International Law for Serious Human Rights Violations (1992, Martinus Nijhoff, Dordrecht) 64-97.

[31] Starke, "Monism and dualism in the theory of international law", (1936) XVII British Yearbook of International Law 66, 71.

[32] Austro-German Customs Union case [1931] Permanent Court of International Justice Reports, Series A/B, No 41; SS Lotus (France v Turkey) [1927] Permanent Court of International Justice Reports, Series A, No 10, p 18-19.

[33] Bishop, "General course of international law", (1965-II) 115 Recueil des Cours 151, 193-195; Buergenthal, "Self-executing and non-self-executing treaties in national and international law", (1992-IV) 235 Recueil des Cours 313, 341-367.

will not be bound. Australia's legislative responses to *Re Uranium Antitrust Litigation; Westinghouse Electric Corporation v Rio Algom Ltd,*[34] a case on the United States' antitrust legislation, provide a lucid illustration of this principle.[35]

As such, it may be argued that different and independent legal systems cannot conflict because they may ignore impositions purported by the other.[36] However, Professor Hans Kelsen was doubtful. He argued:[37]

> International law and national law cannot be mutually different and mutually independent systems [if] both systems are considered to be valid for the same space and at the same time.

Kelsen seems to have overlooked the point that if two systems are mutually independent, then they must also be mutually different and able to determine what is valid within their own system.[38] In answer to Kelsen, Sir Gerald Fitzmaurice states:[39]

> Everything here depends of course on "if" – which surely assumes the very point to be proved. What calls for question is precisely the phrase

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[34] (1979) 480 Federal Supplement 1138.

[35] Report from the Joint Committee on Foreign Affairs and Defence, Australian-United States Relations: the Extraterritorial Application of United States Laws (1983, Commonwealth Printer, Canberra); Reicher H (editor), Australian International Law (1995, LBC, Sydney) 286 et seq. See also American Banana v United Fruit Co (1909) 213 United States 347, 356.

[36] Fitzmaurice, "The general principles of law considered from the standpoint of the rule of law", (1957-II) 92 Recueil des Cours 5, 79.

[37] Kelsen H, Principles of International Law (1952, Reinhart, New York) 404. Kelsen stated: "It is logically not possible to assume that simultaneously valid norms belong to different, mutually independent systems": ibid. He had previously postulated that there cannot be two simultaneously valid but contradictory norms, adding that "the contradiction is, from a purely logical point of view, fundamentally insoluble": Kelsen, "Les rapports de systeme entre le droit interne et le droit international public", (1926-IV) 14 Recueil des Cours 227. If Kelsen's postulate is correct, then section 109 of the (Cth) Constitution dealing with inconsistency between State and federal laws in Australia would be pointless: see Polites v Commonwealth (1945) 70 Commonwealth Law Reports 60; Cheng, "The rationale for compensation for expropriation", (1959) 44 Grotius Society Transactions 267, 271-273.

[38] SS Lotus (France v Turkey) [1927] Permanent Court of International Justice Reports, Series A, No 10, p 18-19.

[39] Fitzmaurice, "The general principles of law considered from the standpoint of the rule of law", (1957-II) 92 Recueil des Cours 5, 73.

> "valid for the same space at the same time". Had this passage said "valid for the same class of relations", it would not have been open to question, though only because international law and national law do not in fact govern the same set of relations.

Since one system may resolve to govern another, it appears that Fitzmaurice's statement rests on a partly incorrect and partly unnecessary assumption. What higher authority is there to deny to each system the right of self-determination? If neither system is or regards itself as being subservient to the other or another system, then both must be superior in their own sense, in their own "field", "plane", or "sphere".[40] Fitzmaurice therefore concludes as follows:[41]

> Ultimately therefore, there can be no conflict between any two systems in the domestic field, for any apparent conflict is automatically settled by the domestic conflict rules of the forum. Any conflict between them in the international field...would fall to be resolved by the international law.

Fitzmaurice adds:[42]

> Formally, therefore, international law and domestic law as systems can never come into conflict. What may occur is something strictly different, namely a conflict of obligations, or an inability for the [subject of international law] on the domestic plane to act in a manner required by international law.

Thus, the *real* relationship may be summarised as follows:

1. both legal systems are mutually independent;
2. both can make individuals the subject of their laws;
3. such laws may give rise to conflicting obligations; and
4. if such conflict occurs, one should consider the position within each system.[43]

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[40] Ibid 69-73.
[41] Ibid.
[42] Ibid 79.
[43] Shearer, "The relationship between international law and domestic law" in Opeskin B and anor (editors), International Law and Australian Federalism (1997, Melbourne University Press, Melbourne) 34.

The international legal system is resolute on the fourth point. It requires the laws of States to conform to international law and rejects the defence of "superior orders".[44] If States fail to do so they expose their subjects to mutually valid but conflicting laws resulting in a real predicament. For example, state laws may require the commission of war crimes, genocide or other conduct that is prohibited by international law.[45] If this happens, States have a political choice on whether to take steps internally to ameliorate any conflict of obligations or ignore conflict, thereby exposing their subjects to international sanctions.[46] States in the former class may be described as selfless and Lord Talbot places the common law in this class.[47] On the other hand, those in the latter class may be labelled selfish.

## LORD TALBOT'S RULE

In *Buvot v Barbuit,*[48] Barbuit held a commission from the King of Prussia to assist Prussian subjects in England. He traded in his own right and claimed the privilege of an ambassador or foreign minister. Lord Talbot LC held that Barbuit was not immune because he was not entrusted to transact affairs between the two crowns. More importantly, Lord Talbot ruled[49] that the impugned statute[50] was merely declaratory of the "law of nations which, in its fullest extent was and formed part of the law of England". The latter ruling is known commonly as "Lord Talbot's rule". According to Professor Brierly:[51]

> there is nothing in the report to suggest that the Lord Chancellor [Talbot] thought he was introducing a new principle; he seems to have been merely stating one that was already well established in the law.

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[44] Exchange of Greek and Turkish Populations Case (Advisory Opinion) [1925] Permanent Court of International Justice Reports, Series B, No 10, p 20; Article 27 of the 1969 Vienna Convention on the Law of Treaties, 1155 United Nations Treaty Series 331.
[45] Attorney-General (Israel) v Eichmann (1968) 36 International Law Reports 5, 313-319.
[46] Blackstone had stated that the sanction would be that the defaulting State would "cease to be part of the civilised world": Blackstone's Commentaries, Book IV (1809, 15th edition, A Strahan, London) 67.
[47] In SS Lotus (France v Turkey) [1927] Permanent Court of International Justice Reports, Series A, No 10, Moore J stated that the practical consequence was "the majestic stream of the Common Law, united with international law": ibid 75.
[48] Refer Barbuit's case.
[49] Ibid 283.
[50] 7 Anne, c 10; (UK) 1708 Diplomatic Privileges Act.
[51] Brierly JL, The Law of Nations (1955, 5th edition, Clarendon Press, Oxford) 83.

Though its precise point of origin may be debated, Lord Talbot's rule has become firmly entrenched, endorsed and applied consistently by many eminent jurists in England[52] and the United States[53] without a hint of dissent, until 1876.[54] The significance of this rule lies in its practical consequence. Since English law agrees with international law, English citizens never encounter conflicting legal obligations in this sense unless their Parliament expressly so intends. The English, understandably, brought this rule to the Antipodes.

## THE RECEPTION OF LORD TALBOT'S RULE IN AUSTRALIA

It is settled doctrine that the first white European settlers brought their "birth right" with them, which was so much of the common law as was applicable reasonably to the local conditions.[55] The reception of English law was confirmed subsequently by the (Imp) 1928 Australian Courts Act.[56] It should be observed that "the law of England was not merely the personal law of the colonists; it became the law of the land, *protecting* and *binding* colonists and indigenous inhabitants alike".[57] *(emphases added)*

It seems that Lord Talbot's rule was received by the Colony of New South Wales on 7 January 1788, whereupon Governor Phillip caused his second Commission to be read and published "with all due solemnity".[58] The

[52] Triquet v Bath (1764) 3 Burr 1478, 1481; Dolder v Huntingfield (1805) 11 Ves 283; Wolf v Oxholm (1817) 6 M&S 92, 100-106; Novello v Toogood (1823) 1 B&C 554, 562, 564; Blackstone's Commentaries, Book IV (1809, 15th edition, A Strahan, London) 67; Shearer IA (editor), Starke's International Law (1994, 11th edition, Butterworths, London) 68-69.

[53] Eyde v Robertson (Head Money Cases) (1884) 112 United States 580; The Paquete Habana (1900) 175 United States 677, 700.

[54] Cockburn CJ's judgment in R v Keyn (1876) 2 Exchequer Division 63 is cited as the genesis: Shearer IA (editor), Starke's International Law (1994, 11th edition, Butterworths, London) 68-69.

[55] State Government Insurance Office v Trigwell (1979) 142 Commonwealth Law Reports 617, 625, 634; Mabo v Queensland [No 2] (1991) 175 Commonwealth Law Reports 1, 34-38, 79-80, 180-184; Blackstone's Commentaries, Book IV (1809, 15th edition, A Strahan, London) 107.

[56] 9 Geo IV c 8, s 24.

[57] R v Wedge [1976] 1 New South Wales Law Reports 581, 585; Mabo v Queensland [No 2] (1991) 175 Commonwealth Law Reports 1, 38, 80; Walker v R (1994) 126 Australian Law Reports 321, 323-4. The common law has been painfully slow with the first (protection) promise.

[58] Historical Records of Australia (1914), Series 1, Volume 1 at 9. These materials were cited by Deane and Gaudron JJ in Mabo v Queensland [No 2] (1991) 175 Commonwealth

occasion was apt because it involved an act of State and the Crown had claimed sovereignty by way of settlement according to international law.[59] The act made international law highly relevant by barring any municipal challenge to British sovereignty[60] and triggering civil remedies for Aboriginal subjects who were dispossessed of their property.[61]

Since Lord Talbot's rule arrived with a "valid visa", the question is whether it has survived. On this point, Brennan J states:[62]

> Although the Court is free to depart from English precedent which was earlier followed as stating the common law of this country, it cannot do so where the departure would fracture what I have called the skeletal principle.

Lord Talbot's rule is a "skeletal principle" because it safeguards individuals from conflicting legal obligations in the above context. However, Australian courts have rejected Lord Talbot's rule with very little justification, as shown below.

## INTERNATIONAL LAW AS PART OF THE COMMON LAW

It appears that jurists have typically presented a descriptive account rather than an exegetic or explanatory analysis of Lord Talbot's rule. They observed that attitudes moved through three phases.[63]

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Law Reports 1, 78-80.

[59] Irrespective of whether Australia was "settled" according to international law, it is sufficient that "settlement" was purported: Mabo v Queensland [No 2] (1991) 175 Commonwealth Law Reports 1, 36, 79-80. Also refer Western Sahara (Advisory Opinion) [1975] International Court of Justice Reports 12, 38-40.

[60] New South Wales v Commonwealth (Seas and Submerged Lands case) (1975) 135 Commonwealth Law Reports 337, 388; Coe v Commonwealth (1979) 24 Australian Law Reports 118; Mabo v Queensland [No 2] (1991) 175 Commonwealth Law Reports 1, 32, 78.

[61] Ibid 34.

[62] Ibid 29-30.

[63] Holder WE and anor, The International Legal System (1972, Butterworths, Sydney) 118; Crawford and anor, "International law in Australia" in Ryan KW (editor), International Law in Australia (1984, 2nd edition, Law Book Company, Sydney) 71; Shearer IA (editor), Starke's International Law (1994, 11th edition, Butterworths, London) 66; Reicher H (editor), Australian International Law (1995, LBC, Sydney); Brownlie I, Principles of Public International Law (1998, 5th edition, Oxford University Press, Oxford) 41-47; Blay S and ors (editors), Public International Law (1997, Oxford University Press,

First, in 1737, it was accepted that customary international law was "automatically incorporated" into the common law and such norms applied *ipso facto* on the municipal plane.

Secondly, it was noted in 1876 that some norms of international law could not be incorporated by the common law and that international law could not apply "as such" on the municipal plane because it must first be transformed into municipal law. Some jurists distilled a universal truth from the fact that legislative transformation had been required consistently, and henceforth they stated that legislation was required in all cases. Other jurists held the view that transformation in appropriate cases could be effected by "judicial recognition". Once the latter view gained favour, the question then was how to identify an appropriate case.

Thirdly, in 1977, Lord Denning MR cut through all the discussion that took place previously and reinvigorated the doctrine of automatic incorporation, subject to proof and consistency.

To show how this occurred, the principal cases will be examined.

## THE PRINCIPAL CASES

### *1. R v Keyn*[64]

Those who deny that international law is automatically incorporated into the common law often cite Cockburn CJ in *R v Keyn*.[65] In this case, the captain of a foreign ship was charged in England for manslaughter committed within three miles of the English coast. The issue was whether English courts had jurisdiction over foreign ships within the three-mile

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Melbourne) 121-123; Malanczuk P, Akehurst's Modern Introduction to International Law (1997, 7th edition, Routledge, London) 68-71; Harris DJ, Cases and Materials on International Law (1998, 5th edition, Sweet & Maxwell, London) 74-83; Flynn, "Genocide: it's a crime everywhere, but not in Australia", (2000) 29 Western Australian Law Review 59, 68; Mitchell, "Genocide: human rights implementation and the relationship between international and domestic law: Nulyarimma v Thompson", (2000) 24 Melbourne University Law Review 15.

[64] (1876) 2 Exchequer Division 63.

[65] Ibid. In this case, Pollock B and Field J agreed with Cockburn CJ. See also Brierly, "International law in England", (1935) 51 Law Quarterly Review 24, 31; Holdsworth, "The relation of English law to international law" in Goodhart AL and anor (editors), Essays in Law and History (1946, Clarendon Press, Oxford) 267.

territorial belt. Since there was a rule of international law that States had no jurisdiction over foreign ships on the high seas, which had long been adopted by the English law, the question was whether the definition of "high seas" had changed.[66]

During Lord Talbot's day, opinions were accepted as a binding source of law.[67] On the other hand, after noting the lack of consensus among jurists, Cockburn CJ held that even if there were unanimity in opinion, it was not sufficient.[68] Strictly, Cockburn CJ was correct because opinions are not equal to international law.[69] Cockburn CJ observed[70] that the mere acquiescence or unanimous assent of other nations would not suffice because this merely invited the State to take on a new jurisdiction.[71]

Cockburn CJ therefore stated that before holding a person liable he would have to ask the following:[72]

> [F]irst, what proof there is of such assent as here asserted; and secondly, to what extent has such assent been carried? a question of infinite importance, when, undirected by legislation, we are called upon to apply the law on the strength of such assent.

It was open for Cockburn CJ to find, as he did, that Lord Talbot's rule was not attracted because the cited opinions were not international law.[73] After noting the rule of international law that States could not legislate for foreigners beyond its territorial jurisdiction, Cockburn CJ stated:[74]

> This rule must, however, be taken subject to this qualification, namely, that if the legislature of a particular country should think fit by express enactment to render foreigners subject to its law with reference to

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[66] R v Keyn (1876) 2 Exchequer Division 63, 160. However, this is subject to any contrary legislation.
[67] Mansfield LC relied on juristic writings in Triquet v Bath (1764) 3 Burr 1478, 1479.
[68] R v Keyn (1876) 2 Exchequer Division 63, 193, 202-203.
[69] Ibid 202. See Article 38(1)(d) of the Statute of the International Court of Justice, which refers to "subsidiary sources of law".
[70] Ibid 193, 203.
[71] Ibid 207, 229-230.
[72] Ibid 203.
[73] Article 38(1)(c) of the Statute of the International Court of Justice was not contemplated at this time.
[74] R v Keyn (1876) 2 Exchequer Division 63, 160.

> offences committed beyond the limits of its territory, it would be incumbent on the Courts of such country to give effect to such enactment, leaving it to the State to settle the question of international law with the governments of other nations.

On the power of municipal courts, Cockburn CJ stated:[75]

> The question is whether, acting judicially, we can treat the power of Parliament to legislate as making up for the absence of actual legislation. I am clearly of the opinion that we cannot, and that it is only in the instances in which foreigners on the high seas have been made specifically liable to our law by statutory enactment that that law can be applied to them.

Three points may be distilled from the above statements:

1. it must be proven that the purported rule has attained customary international law status;[76]
2. the purported rule must be "binding" rather than merely "permissive" or acquiescence to States taking or exercising additional jurisdiction;[77] and
3. only the legislature can take, disavow or waive state jurisdiction, whether pursuant or contrary to international law.[78]

While Cockburn CJ insisted upon the legislative transformation of international law, this was only in cases where the area of England's jurisdictional competence or imperium was challenged internally. He refused to exercise jurisdiction in an area that England had not claimed for itself. Further, on the limits of England's imperium, Lush J explained in the same case that "only an Act can expand the area of our municipal law".[79]

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[75] Ibid. See also Companhia de Mocambique v British South Africa Co [1892] 2 Queen's Bench 358, 394 (on appeal, the House of Lords affirmed the judgment of Lord Esher MR); The Schooner Exchange v M'Fadden (1812) 7 Cranch 116.

[76] Asylum Case (Columbia v Peru) [950] International Court of Justice Reports 266; SS Lotus (France v Turkey) [1927] Permanent Court of International Justice Reports, Series A, No 10, p 18-19.

[77] This reconciles Lord Talbot's rule with sovereignty: see The Schooner Exchange v M'Fadden (1812) 7 Cranch 116.

[78] R v Keyn (1876) 2 Exchequer Division 63, 193, 198, 203, 207. This is consistent with Companhia de Mocambique v British South Africa Co [1892] 2 Queen's Bench 358.

[79] At 238-239.

Thus, *R v Keyn*[80] may not properly be regarded as having rejected Lord Talbot's rule. It confirmed only that Lord Talbot's rule was not attracted in state jurisdiction cases for two reasons. First, the purported rule was merely permissive. Secondly, the taking, disavowing or waiving of state jurisdiction had long been the exclusive province of the legislature.[81] In other words, the case merely confirmed that the common law courts could only apply the "law of the land" and they were not permitted to expand the area of the State's jurisdiction or sovereignty.

### 2. *West Rand Central Gold Mining Co v R*[82]

The suppliant in this case sought to invoke Lord Talbot's rule but the court found that the purported rule on the liability of a conquering State for the liabilities of its predecessor did not exist in international law.[83] Although Lord Alverstone CJ's opinion in this case was *obiter dicta*, nonetheless, it was illustrative. He stated:[84]

> It is quite true that whatever has received the common assent of civilised nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such it will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant.

While this passage suggests that English courts would apply Lord Talbot's rule without proof of it being strictly *binding* international law, it should be read together with what followed:[85]

> But any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must,

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[80] (1876) 2 Exchequer Division 63.
[81] Ibid 169, 203, 207; Blackstone's Commentaries, Book IV (1809, 15th edition, A Strahan, London) 67; The Schooner Exchange v M'Fadden (1812) 7 Cranch 116; Emperor of Austria v Day (1861) 30 Law Journal Chancery (NS) 690, 702 (reversed on appeal on other grounds).
[82] [1905] 2 King's Bench 391.
[83] Ibid 406-408.
[84] Ibid 407.
[85] Ibid.

> like anything else, be proved by satisfactory evidence, which must show either that the particular proposition put forward has been recognised and acted upon by our own country, or that it is of such a nature that it can hardly be supposed that any civilised State would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognised, are not in themselves sufficient.

The above statements are consistent with the proposal that *R v Keyn*[86] did not reject Lord Talbot's rule. It merely required proof of the State either consenting to the purported rule as "strict" and "binding" international law, or accepting the offer of additional imperium. Furthermore, if the rejection of Lord Talbot's rule is argued inferentially, the inferences should be limited to the facts, namely, the area of the State's territorial jurisdiction.

Lord Alverstone CJ introduced a rudimentary common law consistency test by cautioning against adopting the mere opinions of text-writers, *"a fortiori,* if they are contrary to the principles of [the State's] laws [as] declared by her Courts."[87] However, the following passage is intriguing:[88]

> [T]he expressions used by Lord Mansfield when dealing with the particular and recognised rule of international law on this subject, that the law of nations forms part of the law of England, ought not to be construed so as to include...opinions of text-writers...

It suggests that Lord Talbot's rule is an international law rule rather than a common law rule. On this basis, Lord Talbot's rule would be self-defeating without proof of having attained the status of customary international law.

### *3. In re Piracy Jure Gentium*[89]

In this case, the Judicial Committee of the Privy Council was called upon to determine if a frustrated attempt to commit a piratical robbery amounted to piracy according to international law or *piracy jure gentium.*[90] A number

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[86] (1876) 2 Exchequer Division 63.
[87] West Rand Central Gold Mining Co v R [1905] 2 King's Bench 391, 408.
[88] Ibid.
[89] In re Piracy Jure Gentium [1934] Appeal Cases 586.
[90] By an Order in Council, "Special Reference" made under the (UK) 1833 Judicial Committee Act: Kavanagh, "The law of contemporary sea piracy" [1999] Australian International Law Journal 127.

of armed Chinese nationals had pursued and attacked a Chinese cargo junk. Subsequently, they were repelled by two merchant ships and captured by a British naval vessel. The attackers were convicted at first instance, subject to a question of law on whether actual robbery was required to support a conviction for the crime of piracy on the high seas. The Full Court of Hong Kong determined that robbery was a necessary element of the crime, which later became the subject matter of a Special Reference to the Privy Council.

Prior to the (UK) 1536 Acte for the Punysshement of Pyrotes and Robbers of the Sea,[91] an Act of King Henry VIII, the trial and punishment of piracy on the high seas were undertaken by the High Court of Admiralty under quaint rules.[92] However, this Act provided that "all treasons, felonies, robberies...committed in or upon the sea...shall be tried according to the common law...under the King's Commission".[93] In this respect, the Privy Council adopted with approval the following statement by Lord Coke:[94]

> The statute did not alter the offence of piracy or make the offence felony, but leaveth the offence as it was before this Act, viz., felony only by way of civil law, but giveth a mean of triall by the common law and inflicteth such pains of death as if they had been attainted of any felony etc. done upon the land.[95]

Following a survey of the applicable international law, the Privy Council ultimately concluded that *piracy jure gentium* did not require actual robbery.[96] However, the Privy Council said nothing to suggest that the common law courts required a statutory vesting of jurisdiction in order to try and punish territorial offences under the common law. Nor did the Privy

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[91] (1536) 28 Henry VIII, c 15.

[92] In re Piracy Jure Gentium [1934] Appeal Cases 586, 589-590.

[93] Blackstone wrote: "Formerly it was only cognizible by the admiralty courts, which proceed by the civil law. But it being inconsistent with the liberties of the nation, that any man's life should be taken away, unles *(sic)* by the judgment of his peers, or the common law of the land [28 Hen. VIII. C. 15] established a new jurisdiction for this purpose, which proceeds according to the course of the common law": Blackstone's Commentaries, Book IV (1809, 15th edition, A Strahan, London) 71-72.

[94] In re Piracy Jure Gentium [1934] Appeal Cases 586, 590.

[95] Refer Coke E, Institutes of the Laws of England, Part 3 (1809 edition, W Clarke & Sons, London; reprinted 1979, Garland Publishers, New York) 112.

[96] The Privy Council held that it could consult a wider range of "authority" including municipal legislation, court opinions, treaties and the opinions of jurisconsults: In re Piracy Jure Gentium [1934] Appeal Cases 586, 588.

Council find that piracy was a common law offence. Instead, it advised that by virtue of the Act of Henry VIII[97] and subsequent enactments the ordinary courts had a statutory permit to try and punish piracy as if it were a common law offence committed within the realm.[98] More importantly, the Privy Council confirmed the following:[99]

> With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes, and the trial and punishment of criminals, are left to the municipal law of each country.

The Privy Council thus confirmed that crimes under international law were not punished "as such" municipally, but instead, a corresponding crime was recognised and punished under the municipal law.[100] This poses two questions:

1. Under what municipal law is the conduct criminalised?
2. Under what municipal law do the courts obtain jurisdiction?

*R v Keyn*[101] showed that piracy on the high seas could not become a common law crime because the ordinary courts could not take jurisdiction over the extraterritorial conduct of non-nationals.[102] Hence, the municipal crime of piracy on the high seas was recognised by the civil law of England, and the Act of King Henry VIII permitted the ordinary courts to try and punish piracy as if it were a common law offence committed within the realm.[103] However, conduct within the realm presented a fundamentally different case. To the extent that a crime under international law occurred within the realm, the common law recognised the crime as a municipal common law offence punishable in the jurisdiction of ordinary courts.[104]

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[97] Blackstone's Commentaries, Book IV (1809, 15th edition, A Strahan, London) 71-72.
[98] In re Piracy Jure Gentium [1934] Appeal Cases 586, 589-590.
[99] Ibid 589.
[100] Ibid 589-590.
[101] (1876) 2 Exchequer Division 63.
[102] Butler TRF and anor (editors), Archbold: Criminal Pleading, Evidence and Practice (1969, 37th edition, Sweet & Maxwell, London) § 82; In re Piracy Jure Gentium [1934] Appeal Cases 586, 587.
[103] Ibid 589.
[104] Ibid.

*In re Piracy Jure Gentium*[105] removed any doubt that, at least with respect to conduct occurring in English territory, crimes under international law produced corresponding common law crimes in respect of which the ordinary courts had jurisdiction. The (UK) 1967 Tokyo Convention Act[106] should allay any lingering doubts because, as TFR Butler and M Garsia usefully observe,[107] section 4 of that Act provides as follows:

> For the avoidance of doubt, it is hereby declared for the purposes of any proceedings before a court in the United Kingdom in respect of piracy, [the High Seas Convention[108]] shall be treated as constituting part of the law of nations; and any such court having jurisdiction in respect of piracy committed on the high seas shall have jurisdiction in respect of piracy committed by or against an aircraft wherever that piracy is committed.

It therefore seems that, like the Act of King Henry VIII, the 1967 Act did not create the municipal crime of air piracy. On the contrary, it accepted that the (non-statutory) municipal law automatically created the crime (on land, it was the common law; elsewhere, it was the legislature) upon proof of it being a crime under international law.

### *4. Chung Chi Chueng v R*[109]

In this case, the appellant murdered the British captain of a Chinese armed public ship while in Hong Kong territorial waters. The Hong Kong police went aboard the ship and arrested the appellant at the invitation of the Chinese government. The issue was not whether a crime was committed, but whether British courts had jurisdiction over the appellant. In the opinion of the Privy Council:[110]

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[105] [1934] Appeal Cases 586.

[106] This Act gave effect to the 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, 704 United Nations Treaty Series 219.

[107] Butler TRF and anor (editors), Archbold: Criminal Pleading, Evidence and Practice (1969, 37th edition, Sweet & Maxwell, London) §3051.

[108] Namely, the 1958 Geneva Convention on the High Seas, signed on 29 April 1958, 450 United Nations Treaty Series 82.

[109] Chung Chi Cheung v R (1938) 4 All England Reports 786.

[110] Ibid 790 per Lord Atkin.

> [i]t 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 principles are accepted and adopted by our own domestic law. There is no external power that imposes its rule upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it, they will treat it as incorporated into the domestic law, so far as it not inconsistent with rules enacted by statutes or finally declared by their tribunals.

The above statement is consistent with the "realistic" account of the relationship between international law and municipal law, especially since the Privy Council had adopted[111] the following statement of Marshall CJ in *The Schooner Exchange v M'Fadden:*[112]

> The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself.

The above paragraph confirms that Lord Talbot's rule operates within the confines of state sovereignty and parliamentary supremacy. Since States are not susceptible to any limitation not imposed by them, they are free to determine whether to accept, disavow or waive any jurisdiction that is challenged internally.[113] While municipal courts cannot themselves take, disavow or waive state jurisdiction,[114] the legislature may do this expressly or impliedly, and such legislation would be conclusive despite any conflict with international law.[115]

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[111] Ibid.
[112] (1812) 7 Cranch 116 136.
[113] (1938) 4 All England Reports 786, 790, 795.
[114] The Schooner Exchange v M'Fadden (The Exchange) (1812) 7 Cranch 116; Mortensen v Peters (1906) 8 Fraser (Justiciary) 93 (Scotland); Chung Chi Cheung v R (1938) 4 All England Reports 786.
[115] United States v Ferreira (1851) 54 United States 40; Chung Chi Cheung v R (1938) 4 All England Reports 786, 790; Polites v Commonwealth (1945) 70 Commonwealth Law Reports 60.

Therefore, it follows that Lord Talbot's rule cannot alter the area in which the law operates, namely, the jurisdiction of the State, because this requires legislation. Nevertheless, it should be noted that Lord Atkin reiterated an important qualification to Lord Talbot's rule, namely, that an international law rule cannot become part of the common law unless it is consistent with existing legislation and binding precedent.[116]

### 5. *Wright v Cantrell*[117]

While it has been suggested that the Australian authorities are ambivalent or ambiguous on the relationship between customary international law and the common law,[118] evidently Jordan CJ embraced Lord Talbot's rule in *Wright v Cantrell.*[119] In this case, a defamation claim was brought against a visiting member of the United States Armed Forces in Australia who claimed that, by virtue of a rule of international law, he was entitled to immunity from the jurisdiction of municipal courts. Before finding that international law conferred no such immunity, Jordan CJ expressed his *(obiter)* views on the relationship between international law and municipal law. He held:[120]

> By the law of England and of this State, international law is recognised as part of the local law save to the extent to which it is inconsistent with that law.

Since Jordan CJ acknowledged the separate legal orders and the caveat of internal consistency, there is nothing to suggest that he subscribed to the redundant "monist" concept or overlooked the reality of state sovereignty. Instead, the Court of Appeal was trying simply to discern and apply the common law. Jordan CJ's approach is consistent with the following highly regarded statement by Lord Dunedin in *Mortensen v Peters:*[121]

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[116] Chung Chi Cheung v R (1938) 4 All England Reports 786, 790.
[117] (1943) 44 State Reports (New South Wales) 45.
[118] Mason, "International law as a source of domestic law" in Opeskin BR and anor (editors), International Law and Australian Federalism (1997, Melbourne University Press, Melbourne) 215.
[119] (1943) 44 State Reports (New South Wales) 45, Maxwell and Roper JJ concurring.
[120] Ibid 46-47.
[121] (1906) 8 Fraser (Justiciary) 93 (Scotland), adopted in Wright v Cantrell (1943) 44 State Reports (New South Wales) 45, 47.

> It is a trite observation that there is no such thing as a standard of international law extraneous to the domestic law of a kingdom, to which appeal may be made. International law, so far as this Court is concerned, is the body of doctrine regarding international rights and duties of States which has been adopted and made part of the law of Scotland.

Given that mutually independent systems can determine what is valid in so far as they are concerned, it follows that a municipal system can resolve to apply the rules of another system.[122] Thus, England and hence New South Wales resolved by using Lord Talbot's rule that, subject to internal consistency, the terms of external rules had the force of municipal law.[123]

Further, it followed that the expression "international law forms part of the common law" was a simple way of saying that the municipal law had certain rules that were identical to international law rules. This was not a radical concept because Australian courts applied originally English laws as if they were Australian laws.[124] Moreover, as stated above, Australian courts had acted under statutory warrant by virtue of section 24 of the imperial 1928 Australian Courts Act.

### 6. *Polites v Commonwealth*[125]

In this case, two Greek nationals challenged statutory conscription in Australia claiming it contravened international law.[126] Lord Talbot's rule was irrelevant in this case because the purported (inconsistent) rule of international law conflicted with existing legislation. Since the purported rule could not have *become* part of the common law under Lord Talbot's rule, the appellants failed to invoke international law "as such"[127] before a municipal court on the basis that it prevailed over a statute.[128]

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[122] Fitzmaurice, "The general principles of law considered from the standpoint of the rule of law", (1957-II) 92 Recueil des Cours 5, 69.

[123] See R v Keyn (1876) 2 Exchequer Division 63; Chung Chi Cheung v R (1938) 4 All England Reports 786; Mortensen v Peters (1906) 8 Fraser (Justiciary) 93 (Scotland).

[124] R v Wedge [1976] 1 New South Wales Law Reports 581, 585; Mabo v Queensland [No 2] (1991) 175 Commonwealth Law Reports 1, 38.

[125] (1945) 70 Commonwealth Law Reports 60.

[126] Ibid 75.

[127] Refer Latham CJ in Chow Hung Ching v R (1948) 77 Commonwealth Law Reports 449 (discussed below).

[128] Potter v Broken Hill Proprietary Company Limited (1906) 3 Commonwealth Law

Consistently with *Chung Chi Cheung v R*,[129] Williams J observed the following in *Polites v Commonwealth*:[130]

> It is clear that such a rule [of international law], when it has been proved to the satisfaction of the courts, is recognised and acted upon as part of English municipal law so far as it is not inconsistent with rules enacted by statutes or finally declared by the courts.

The above statement suggests that Lord Talbot's rule was alive and well in Australia, subject only to proof and internal consistency.

### 7. *Chow Hung Ching v R*[131]

In this case, two Chinese Army labourers were sent to New Guinea where they assaulted a native. The Supreme Court of New Guinea convicted them for the assault. The issue in the High Court of Australia was whether the appellants were immune from the local jurisdiction of New Guinea. Since the Court decided that the appellants did not qualify for the purported immunity,[132] its subsequent remarks were gratuitous. Latham CJ took the following view:[133]

> International law is not *as such* part of the law of Australia, but a universally recognised principle of international law would be applied by our courts. *(emphasis added)*

The true meaning of this passage depends on the meaning that is given to the phrase, "as such".[134]

One reading suggests that Latham CJ endorsed Lord Talbot's rule subject to proof and internal consistency as pre-requisites. Thus, in cases where Lord Talbot's rule was attracted and satisfied, municipal courts would not apply international law "as such", but would apply municipal law (namely,

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Reports 479, 498-507.

[129] (1938) 4 All England Reports 786, 790.

[130] (1945) 70 Commonwealth Law Reports 60, 80-81.

[131] (1948) 77 Commonwealth Law Reports 449.

[132] Ibid 468, 474, 484, 486, 489.

[133] Ibid 462.

[134] Mason, "International law as a source of domestic law" in Opeskin BR and anor (editors), International Law and Australian Federalism (1997, Melbourne University Press, Melbourne) 215.

the common law) expressed in terms identical to international law. This construction was consistent with Latham CJ's reference to *Polites v Commonwealth*[135] because the appellants relied on international law "as such" in that case.[136] Yet, municipal courts should decide cases according to the municipal law. By way of analogy, the Permanent Court of International Justice in *Jurisdiction of the Courts of Danzig*[137] stated:[138]

> It may be readily admitted that, according to a well-established principle of international law, the [impugned agreement], being an international agreement, cannot, as such, create direct rights and obligations for private individuals.

The Permanent Court then observed, from the municipal law perspective that the agreement's general tenor was such that it created private rights on the municipal plane. Hence, it held that international law did not apply "as such" on the municipal plane.[139] This approach was consistent with Latham CJ's treatment of Lord Talbot's rule that each system applied its own law.

However, on another reading, it is arguable that Latham CJ had rejected Lord Talbot's rule.[140] In this respect, Latham CJ could have formed the view that international law did not automatically become part of the municipal law but instead was a source that could be drawn upon in order to develop the municipal law. This possible construction will be examined below in the light of Dixon J's judgment in *Chow Hung Ching v R.*[141]

Sir Anthony Mason, former Chief Justice of the High Court of Australia,[142] suggests that Dixon J had rejected the "automatic incorporation" theory on account of the latter's following statement in *Chow Hung Ching v R.*:[143]

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[135] (1945) 70 Commonwealth Law Reports 60.
[136] Chow Hung Ching v R (1948) 77 Commonwealth Law Reports 469.
[137] (Advisory Opinion) [1928] Permanent Court of International Justice Series B, No 15.
[138] Ibid 17-18.
[139] Ibid.
[140] Mason, "International law as a source of domestic law" in Opeskin BR and anor (editors), International Law and Australian Federalism (1997, Melbourne University Press, Melbourne) 215.
[141] (1948) 77 Commonwealth Law Reports 449, 462, 477.
[142] Mason, "International law as a source of domestic law" in Opeskin BR and anor (editors), International Law and Australian Federalism (1997, Melbourne University Press, Melbourne) 215.
[143] (1948) 77 Commonwealth Law Reports 449, 462, 477.

> It is a mistake to treat the question of the extent of the immunity as one depending upon the recognition by Great Britain of a rule of international law. In the first place, [Lord Talbot's rule] is now regarded as without foundation. The true view, it is held, is 'that international law is not a part, but is one of the sources, of English law'.[144] 'In each case in which the question arises the court must consider whether the particular rule of international law has been received into, and so become a source of, English law'.[145]

Three points may be made in relation to the above statement by Dixon J:

First, some external rules necessarily stood outside Lord Talbot's rule because they were merely permissive offers of state jurisdiction. While Cockburn CJ insisted upon "legislative transformation" in *R v Keyn,*[146] this requirement should be limited to its proper context, namely, offers of additional state jurisdiction.[147] In this respect, even Sir William Blackstone had insisted that the area of jurisdiction could only be altered by the legislature because the municipal law was no longer amenable to change by exercise of the Royal Prerogative.[148] Putting aside external offers of imperium, legislation was not logically required to transform binding customary international law into municipal law, and Lord Talbot's rule achieved this within the existing area of the State's jurisdiction.

Secondly, as Professor Geoffrey Sawyer observed, Dixon J endorsed the Brierly-Holdsworth proposition that "international law applies by virtue of the Common Law, not by virtue of any supposedly exterior and superior system".[149] While this proposition was correct, it did not defeat the doctrine

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[144] Brierly, "International law in England", (1935) 51 Law Quarterly Review 24, 31.
[145] Holdsworth, "The relation of English law to international law" in Goodhart AL and anor (editors), Essays in Law and History (1946, Clarendon Press, Oxford) 267.
[146] (1876) 2 Exchequer Division 63.
[147] Brierly, "International law in England", (1935) 51 Law Quarterly Review 24, 31; Holdsworth, "The relation of English law to international law" in Goodhart AL and anor (editors), Essays in Law and History (1946, Clarendon Press, Oxford) 267. See Sawyer, "Australian constitutional law in relation to international relations and international law" in O'Connell DP and anor (editors), International Law in Australia (1996, Law Book Company, Sydney) 50-51.
[148] Blackstone's Commentaries, Book IV (1809, 15th edition, A Strahan, London) 67.
[149] Sawyer, "Australian constitutional law in relation to international relations and international law" in O'Connell DP and anor (editors), International Law in Australia (1996, Law Book Company, Sydney) 51.

of automatic incorporation. The Brierly-Holdsworth-Dixon school seemed to reject automatic incorporation on the ground that it was monistic, but this conflated two discrete questions:

1. Why do certain rules form part of the common law?
2. Lord Talbot's rule refers to what international law?

The above answers appear inter-related. Lord Talbot's rule is inherently dualistic in approach because it *gives* certain external rules (namely, *strict* and *binding* international law) force of municipal law.[150] This is consistent with the dualistic premise that external rules must become municipal rules in order to have legal effect on the municipal plane. It transforms automatically certain external rules into municipal rules by giving them the force of the common law, subject to proof and internal consistency.[151] Thus, Lord Talbot's rule became an entrenched constitutional principle that permitted the ambulatory amendment of the common law.[152] However, it did not alter the area of the municipal law and neither did it mean that international law operated "as such" on the municipal plane.

Further, the source and incorporation theories are not mutually exclusive. The incorporationists believe that external rules became part of the common law, and source theorists consider that rules that had been received into the English law were a source of English law.[153] Therefore, since an external rule should be received into the common law before it can form part of the common law, the terms "received into" and "incorporated" are interchangeable.

Nevertheless, a heretical source theory has gained favour among some jurists who suggest that international law is simply a rich cache from which

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[150] R v Keyn (1876) 2 Exchequer Division 63; In re Piracy Jure Gentium [1934] Appeal Cases 586, 589; Chung Chi Cheung v R (1938) 4 All England Reports 786; Fitzmaurice, "The general principles of law considered from the standpoint of the rule of law", (1957-II) 92 Recueil des Cours 5, 69-73.

[151] Mason, "International law as a source of domestic law" in Opeskin BR and anor (editors), International Law and Australian Federalism (1997, Melbourne University Press, Melbourne) 215.

[152] For example, Australia has the Corporations Law scheme; see Capital Duplicators Pty Ltd v ACT [No1] (1993) 177 Commonwealth Law Reports 248, 265; Gould v Brown (1998) 193 Commonwealth Law Reports 346, 437.

[153] Brownlie I, Principles of Public International Law (1998, 5th edition, Oxford University Press, Oxford) 41, 44-46.

they pick and choose in order to fill a lacuna in the common law.[154] This proposition is contrived because Dixon J's judgment indicates that rules that satisfy Lord Talbot's rule are received by the common law, and hence they constitute a source of municipal law, similar to constitutional rules, statutes, regulations and so on.[155]

### *8. Bonser v La Macchia*[156]

The appellants in this case were prosecuted under a Commonwealth statute for using a trawl-net that was too small in waters beyond the territorial limits of Australia, some six nautical miles off-shore. The relevant issue was whether international law restricted the power in section 51(x) of the (Cth) Constitution on "Fisheries in Australian waters beyond territorial limits" to waters within three nautical miles of the coastline or otherwise.[157] While Windeyer J dissented, the following passage stated the view of the High Court:[158]

> [T]he present case must be decided by the law of Australia, not by recourse to doctrines of international law, except so far as they have been taken into and become a part of the law of the land.

### *9. New South Wales v Commonwealth (Seas and Submerged Lands Case)*[159]

The main issue in this case was whether a Commonwealth Act that claimed sovereignty in respect of the territorial sea, the airspace above, and the seabed and subsoil below was supported by section 51(xxix) of the (Cth) Constitution on the federal government's external affairs power.[160]

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[154] Cachia v Hanes (1991) 23 New South Wales Law Reports 304, 313; Kirby, "The Australian use of international human rights norms: from Bangalore to Balliol – a view from the Antipodes", (1993) 16:2 University of New South Wales Law Journal 363, 368, 372-373.

[155] Sawyer, "Australian constitutional law in relation to international relations and international law" in O'Connell DP and anor (editors), International Law in Australia (1996, Law Book Company, Sydney) 50-51.

[156] Bonser v La Macchia (1969) 122 Commonwealth Law Reports 177.

[157] Ibid 181.

[158] Ibid 214.

[159] New South Wales v Commonwealth (Seas and Submerged Lands case) (1975) 135 Commonwealth Law Reports 337.

[160] (Cth) 1973 Seas and Submerged Lands Act.

Answering this question in the affirmative, the High Court confirmed that the acceptance of new areas of national sovereignty was a matter for the federal Parliament. It endorsed the principle in *R v Keyn*[161] and held:[162]

> The colonists inherited the common law: but it operated only in the realm which ended at the low water mark. This was decided in *R v Keyn.*

The High Court's approach confirmed that mere offers of jurisdiction did not attract Lord Talbot's rule because new areas of imperium should be accepted by the legislature in order to alter the municipal law.[163]

### *10. Minister for Immigration and Ethnic Affairs v Teoh*[164]

In this case, Teoh challenged a decision that refused his application for permanent resident status.[165] The decision was challenged on the following grounds, *inter alia:* (1) the refusal had been contrary to Article 3.1 of the 1989 United Nations Convention on the Rights of the Child;[166] and (2) the decision-maker had failed to make the interests of children "a primary consideration".[167] Although the High Court rejected these grounds, the majority ultimately quashed the decision on the basis of procedural unfairness and the applicant's "legitimate expectations" that he could remain in Australia based on his children's paramount interest.[168]

On the relationship between treaties and municipal law, Mason CJ and Deane J held jointly that:[169]

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[161] (1876) 2 Exchequer Division 63.
[162] (1975) 135 Commonwealth Law Reports 337, 368 per Barwick CJ; see also McTiernan J at 378; Mason J at 466, 469; Jacobs J at 486; Murphy J at 501. Two other judges distinguished between ownership (dominium) and criminal jurisdiction (imperium): Gibbs J at 395-397, 400, 427; Stephen J at 429-430.
[163] Refer R v Keyn (1876) 2 Exchequer Division 63, 169, 203, 207; In re Piracy Jure Gentium [1934] Appeal Cases 586, 589; Blackstone's Commentaries, Book IV (1809, 15th edition, A Strahan, London) 67.
[164] (1995) 190 Commonwealth Law Reports 1.
[165] Ibid 278-280 where Mason CJ and Deane J recited the relevant facts.
[166] UNGA Doc A/RES/44/25, 12 December 1989.
[167] For the history of the case, see (1995) 190 Commonwealth Law Reports 1, 281-283 per Mason CJ and Deane J.
[168] Ibid 315-316 per McHugh J dissenting.
[169] Ibid 286-287.

> the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute.

The High Court was unanimous on this point,[170] which accorded with the decision in *The Parlement Belge.*[171] In that case, it was held that while the Royal Prerogative included the power to make treaties, this could not have municipal effect without legislation because the King could not alter the municipal law. In *Minister for Immigration and Ethnic Affairs v Teoh*[172] the High Court confirmed the parliamentary supremacy principle that legislation prevailed over inconsistent international law.[173]

This case should not be authority for the proposition that customary international law should always be transformed legislatively in order to become municipal law. The case only required the legislative transformation of agreements made voluntarily by the Executive. Also, the case confirmed that unincorporated treaties were not inconsequential for Australian law because they could influence the construction of ambiguous legislation, give rise to a legitimate expectation, and assist with the development of the common law.[174]

### *11. Trendtex Trading Corporation v Central Bank of Nigeria*[175]

The issue in this case was whether the Central Bank of Nigeria was immune from civil suit in English courts. Since the majority found that international law recognised no immunity with respect to the ordinary commercial transactions of government departments, Lord Talbot's rule

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[170] On this point, Toohey J agreed at 298 (save for treaties that terminate a state of war); Gaudron J at 303; and McHugh J at 315.

[171] (1879) 4 Probate Division 129. See also Walker v Baird [1892] Appeal Cases 491, 497; Maclaine Watson v Department of Trade [1989] 3 All England Reports 523, 544-545.

[172] (1995) 190 Commonwealth Law Reports 1.

[173] Chow Hung Ching v R (1948) 77 Commonwealth Law Reports 449, 462, 478; Bradley v Commonwealth (1973) 128 Commonwealth Law Reports 557, 582; Simsek v McPhee (1982) 148 Commonwealth Law Reports 636, 641-642; Koowarta v Bjelke-Petersen (1982) 153 Commonwealth Law Reports 168, 211-212, 224-225; Kio v West (1985) 159 Commonwealth Law Reports 550, 570; JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 Appeal Cases 418, 500; Dietrich v R (1992) 177 Commonwealth Law Reports 292, 305.

[174] (1995) 190 Commonwealth Law Reports 1, 287-288, 298, 314-315.

[175] [1977] 1 Queen's Bench 529.

was not attracted.[176] Lord Denning MR observed the following on the incorporation-transformation controversy (Shaw LJ agreeing):[177]

> As between these two schools of thought, I now believe that the doctrine of incorporation is correct. ...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 was suggested prior to this case that Lord Atkin's caveat on the consistency with "rules...finally declared by their tribunals"[178] had made Lord Talbot's rule subject to *stare decisis.*[179] Therefore, it was argued in *Trendtex Trading Corporation v Central Bank of Nigeria*[180] that the courts had to apply the rules of international law declared previously by the House of Lords even if they had ceased to be rules of international law. Lord Denning described this phenomenon as "petrification".[181]

While Stephenson LJ felt constrained by the rule of *stare decisis,* he suggested that this controversy was "more apparent than real", the real issue being proof.[182] He insisted upon proof that England had accepted the rule, or that it was "so widely and generally accepted that no civilised country...could be presumed to repudiate it".[183]

The Court of Appeal in this case seemed to have overlooked a crucial point in the submissions of counsel that the purported rule on restrictive immunity was merely permissive. As such, it needed legislative adoption or transformation because it challenged the extent of the State's domestic jurisdiction or the area of the law.[184]

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[176] Ibid 556-557, 570, 576.
[177] Ibid 554.
[178] Chung Chi Cheung v R (1938) 4 All England Reports 449, 786, 790.
[179] Thai-Europe Tapioca Service v Government of Pakistan [1975] 1 Weekly Law Reports 1485, 1493.
[180] [1977] 1 Queen's Bench 529.
[181] Ibid 554, 579.
[182] Ibid 571-572.
[183] Ibid 570. Note also West Rand Central Gold Mining Co v R [1905] 2 King's Bench 391, 406-408.
[184] Refer Williams, "Venue and the ambit of criminal law" (1965) 81 Law Quarterly Review 279, 395-417 where he questions the existence of extraterritorial common law

### *12. Foster v Neilson*[185]

In this American case, the question was whether a 1819 treaty between Spain and the United States created rights that were directly enforceable in American municipal courts. Article 8 of the treaty's English text provided that "all grants of land...shall be ratified and confirmed to the persons in possession of the land". After noting that Article VI of the United States Constitution made treaties part of the "law of the land", Marshall CJ declared for the Supreme Court that:[186]

> [W]hen the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court.

Marshall CJ went on to hold that the provision did not create private rights because it did not say that the "grants are hereby confirmed. Had such been its language, it would have acted directly on the subject".[187] Since there was no logical reason why these principles should not apply to customary international law also, it followed that Lord Talbot's rule could not apply to executory rules of customary international law in the context of mere invitations, promises or agreements between States on whether to act.

### *13. United States v Percheman*[188]

Shortly after *Foster v Neilson,*[189] the same court heard *United States v Percheman.*[190] Here, the authentic Spanish text of the same treaty provision was in issue. It used the words "shall remain ratified and confirmed".[191]

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crimes, and the confusion of extraterritorial crimes and extraterritorial jurisdiction. In particular, he shows that while the Parliament may create an extraterritorial crime, it may fail to provide any court with jurisdiction over such crimes. When this happens, jurisdictional lacunae are created because the courts cannot confer jurisdiction upon themselves.

[185] (1829) 27 United States 253.

[186] Ibid 314-315.

[187] Ibid.

[188] (1833) 32 United States 51.

[189] (1829) 27 United States 253.

[190] (1833) 32 United States 51.

[191] See generally Buergenthal, "Self executing and non self-executing treaties in national and international law", (1992-IV) 235 Receuil des Cours 307, 370-380.

Reading the English and Spanish texts together, Marshall CJ held that ratification and confirmation were achieved "by force of the instrument itself".[192] The impugned treaty provision was therefore found to be self-executing and enforceable directly on the municipal plane. In other words, it was not merely an executory contract addressed to the political arms of government.[193]

Since, in a sense, Article VI of the United States Constitution is a derivative of Lord Talbot's rule, the cases discussed above justify Latham CJ's statement in *Chow Hung Ching v R*[194] that international law is not "as such" part of the law of Australia.[195] While international law is frequently referred to in United States legal proceedings, the courts there do not apply international law "as such". On the contrary, they apply the law of the land as defined by their Constitution.[196]

The House of Lords made a similar point in *R v Bow Street Magistrate; Ex parte Pinochet*[197] where Lord Lloyd stated the following:[198]

> [W]e apply customary international law as part of the common law, ...but we are not an international court.

Hence, English, American and Australian courts do not sit as international tribunals, nor do they apply international law "as such". They sit only as municipal courts, and they apply their municipal law only. Further, by virtue of Lord Talbot's rule or express constitutional provision, the municipal law includes certain rules of international law.

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[192] Ibid 89.

[193] For a critical analysis, see Bishop, "General course of international law", (1965-II) 115 Recueil des Cours 151, 203; Buergenthal, "Self-executing and non-self-executing treaties in national and international law", (1992-IV) 235 Recueil des Cours 313, 372-376.

[194] (1948) 77 Commonwealth Law Reports 449.

[195] Ibid 462.

[196] See generally Shearer IA (editor), Starke's International Law (1994, 11th edition, Butterworths, London) 74-76.

[197] [1998] 4 All England Reports 897 ("Pinochet (No 1)").

[198] Ibid 934. While Lord Lloyd joined Lord Slynn in the minority, this was on account of their Lordships' disagreement on the content of international law. They did not agree that customary international law removed immunity rationes materiae and rationes personae.

***Summary***

Returning to Lord Talbot's rule, the legal principles may be summarised as follows:

1. By virtue of Lord Talbot's rule that was duly received in Australia, the Australian common law includes rules that correspond with rules of international law.
2. Mere juristic opinions do not attract Lord Talbot's rule because they strictly are not international law.
3. The unanimous assent of States to a permissive rule will not attract Lord Talbot's rule because States are not obliged to accept such offers – hence legislative incorporation is required.
4. Treaties necessarily stand outside Lord Talbot's rule because they are entered into voluntarily, and the sovereign cannot alter or suspend the operation of the municipal law.
5. Lord Talbot's rule is only attracted by "self-executing" rules of customary international law, namely, those that are expressed in terms that directly affect private individuals.
6. To satisfy Lord Talbot's rule, the purported rule must be consistent with the existing statutory and common law rules in Australia as declared by its final superior courts.

While Lord Talbot's rule is plainly subject to conditions precedent and qualifications, there is no persuasive legal reason to deny its continuing validity. Those who hold the contrary view, that *R v Keyn*[199] displaced Lord Talbot's rule, have failed to notice that the Court of Crown Cases Reserved in that case, including the courts in subsequent cases, had refused to accept an external offer to exercise extra-territorial jurisdiction when there was no statutory permit. Therefore, the exegetic analysis of the cases above helps to place *Nulyarimma v Thompson*[200] in perspective and provides the background to the approach taken by the full Federal Court of Australia on whether genocide is a crime in Australia.

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[199] (1876) 2 Exchequer Division 63.
[200] (1999) 165 Australian Law Reports 621.

## *NULYARIMMA V THOMPSON*[201]

The full Federal Court decided two cases in *Nulyarimma v Thompson.*[202]

One was an appeal from Crispin J's decision[203] to uphold the Registrar's refusal at first instance to allow a private prosecution for the offence of genocide to be brought against four politicians.[204] The other began in the Federal Court at first instance[205] as an application against the Commonwealth and two Ministers[206] for a mandatory injunction compelling the respondents to include certain Aboriginal lands on the World Heritage list. The applicants claimed that the respondents' failure to proceed with such listing constituted genocide. In reply, the respondents filed a "strike-out" motion on grounds that the application disclosed no reasonable cause of action.[207]

According to Whitlam J in this case, the appellants' argument could be reduced to this: genocide was a crime under international law that was punishable in municipal courts because customary international law permitted the punishment.[208] However, Wilcox and Whitlam JJ swiftly rejected this argument on the basis that Australian courts could not exercise a new jurisdiction that was offered by international law unless a municipal statute permitted it.[209]

Before analysing the Court's reasoning it is necessary to survey the crime of genocide under international law.

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[201] Ibid.
[202] Ibid.
[203] Re Thompson; Ex parte Nulyarimma v Thompson (1998) 148 Federal Law Reports 285.
[204] They were Prime Minister John Howard, Deputy Prime Minister Tim Fischer, Senator Brian Harradine and Pauline Hanson (a Member of the House of Representatives).
[205] Refer judgment of O'Loughlin J in Buzzacott v Hill (unreported, Federal Court of Australia, 10 May 1999, No S23).
[206] They were Environment Minister Robert Hill and Foreign Affairs Minister Alexander Downer.
[207] In this article, the merits of the plaintiffs' (Nulyarimma and Buzzacott) claims will not be discussed because the claims do not add to the discussion on whether genocide is a crime under Australian law: see Nulyarimma v Thompson, Application for Special Leave to Appeal (Transcript, High Court of Australia, per Gummow, Kirby and Haynes JJ, C18/1999, 4 August 2000), especially Gummow J's reasons.
[208] 165 Australian Law Reports 621 at [36], [53].
[209] Ibid per Wilcox J at [32]; Whitlam J at [49].

### *The Crime of Genocide under International Law*

According to its originator, Raphael Lemkin, the word "genocide" is "intended to signify a coordinated plan of different actions aiming at the destruction of essential foundations of life of national groups, with the aim of annihilating the groups themselves".[210] The word derives from the Greek word *genos* = race or tribe, and the Latin word *cide* = killing.[211]

It is arguable that genocide was a crime under international law when the Armenian massacres occurred in 1915.[212] Alternatively, given General Assembly Resolution 96 (I), it is arguable that genocide was a crime under customary international law in 1946.[213] However, at the very latest, genocide was a crime under customary international law when the 1948 United Nations Convention for the Prevention and Punishment of the Crime of Genocide entered into force on 12 January 1951.[214]

Generally speaking, the Convention declares that genocide is *jus cogens* under customary international law,[215] resulting in two principles:

1. the international law on genocide binds all States, whether or not they are parties to the Genocide Convention;[216] and

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[210] Lemkin R, Axis Rule in Occupied Europe (1944, Carnegie Endowment, Washington) 79.

[211] Kuper L, The Prevention of Genocide (1985, Yale University Press, New Haven) 9.

[212] Tatz C, Genocide in Australia, Discussion Paper No 8 (1999, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra) 4-5.

[213] Resolution 96(I), 11 December 1946, [1946-1947] Yearbook of the United Nations 255; Commonwealth, Senate Legal and Constitutional References Committee, Report on the (Cth) 1999 Anti-Genocide Bill (2000, Australian Government Printing Service, Canberra) paras 2.3-2.4.

[214] The convention was adopted unanimously pursuant to Resolution 260A (III), 9 December 1948, UNGAOR Doc A/810; (1948) 78 United Nations Treaty Series 277 ("Genocide Convention").

[215] Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) [1951] International Court of Justice Reports 15, 23; Kelsen H, Principles of International Law (1952, Reinhart, New York) 408-438; Bassiouni MC, Crimes Against Humanity in International Criminal Law (1999, 2nd revised edition, Kluwer Law, The Hague) 211. On jus cogens generally, see Christenson, "Jus cogens: guarding interests fundamental to international society", (1988) 28 Virginia Journal of International Law 558. See also Barcelona Traction case (Judgment) [1970] International Court of Justice Reports 1 on the "erga omnes" status of genocide.

[216] North Sea Continental Shelf Cases [1969] International Court of Justice Reports 3 para 71.

2. no State can derogate from its terms whether by treaty or as a persistent objector.[217]

Thus, the following provisions from the Genocide Convention reflect the customary international law on genocide:

> *Article I*
> [G]enocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish.
>
> *Article II*
> [G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.
>
> *Article III*
> The following acts shall be punishable:
> (a) Genocide;
> (b) Conspiracy to commit genocide;
> (c) Direct and public incitement to commit genocide;
> (d) Attempt to commit genocide;
> (e) Complicity in genocide.
>
> *Article IV*
> Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials, or private individuals.

In addition, Article V obliges States to enact legislation that may be necessary to give effect to the Genocide Convention. Article VI provides

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[217] Article 53 of the 1969 Vienna Convention on the Law of Treaties; North Sea Continental Shelf Cases [1969] International Court of Justice Reports 3 per Lachs J.

that persons charged with offences listed in Article III shall be tried by a competent tribunal at the situs of the offence or by such international penal tribunals as may have jurisdiction. In this light, the international law on genocide should be given three normative aspects. They are the following:

1. The *permissive* aspect confirms that States will not violate international law if they take steps to prevent and punish those who commit genocide. Some jurists argue that States would not violate international law if they exercise extraterritorial jurisdiction over non-nationals by relying on universal jurisdiction.[218] Since the alleged permission is not express, it rests on the absence of any prohibition.[219]
2. The *obligatory* aspect requires States to enact appropriate legislation and to prosecute and punish, or extradite persons in their territory. Consistently with *R v Keyn,*[220] it would be necessary to enact legislation for the extradition or prosecution of extra-territorial genocide. Some jurists argue that in view of their obligations to prevent and punish genocide States are permitted to enact retrospective legislation to this end.[221]
3. The *prohibitive* aspect is addressed to individuals who commit genocide or the other offences listed in Article III. If so, they commit a crime under international law.[222]

### *The Reasoning in Nulyarimma v Thompson*[223]

Consistently with *Minister for Immigration and Ethnic Affairs v Teoh*[224] it was accepted generally that Australia's ratification of the Genocide Convention did not make genocide a crime under Australian law, and neither did the (Cth) 1969 Genocide Act. The Act merely gave legislative

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[218] See SS Lotus (France v Turkey) [1927] Permanent Court of International Justice Reports, Series A, No 10, p 18-19; Attorney-General (Israel) v Eichmann (1968) 36 International Law Reports 5, 283-287, 313; Stone J, Of Law and Nations: Between Power, Politics and Human Hopes (1974, William S Hein, New York) 289-290.

[219] Attorney-General (Israel) v Eichmann (1968) 36 International Law Reports 5, 313.

[220] (1876) 2 Exchequer Division 63; Pinochet (No 1) at 913.

[221] Stone J, Of Law and Nations: Between Power, Politics and Human Hopes (1974, William S Hein, New York) 290-292.

[222] See Attorney-General (Israel) v Eichmann (1968) 36 International Law Reports 5, 283-287.

[223] (1999) 165 Australian Law Reports 621.

[224] (1995) 190 Commonwealth Law Reports 1.

approval to such ratification.[225] The area of dispute in *Nulyarimma v Thompson*[226] was therefore narrowed to whether, in view of genocide being a crime under customary international law, it had become a crime under Australian law without a legislative act.

Thus, *Nulyarimma v Thompson*[227] presented the Federal Court with a golden opportunity to examine the relationship between customary international law and the Australian common law. Nevertheless, Wilcox and Whitlam JJ considered the incorporation-transformation debate to be strictly academic because the purported rule of customary international law, as they construed it, ran against *R v Keyn,*[228] in that it merely invited the court to exercise a novel jurisdiction.[229] However, it appears that the majority misconstrued the purported rule, and hence their decision was based on a wrong premise. In addition, even Merkel J's judgment ran against the authorities.

**(i) Justice Wilcox**

While Wilcox J admitted openly that he could not point to much authority. Even if it were possible, they were inapt. First of all, he referred to *Polyukhovich v Commonwealth,*[230] presumably to show that even if international law permitted Australian courts to apply international law, the courts could only apply Australian law in so far as Australia was concerned.[231] While this point is incontrovertible, in all other respects *Polyukhovich v Commonwealth*[232] was not authoritative because it challenged Australia's jurisdictional competence over "past" extraterritorial events. Further, this had fallen exclusively within the legislature and the (Cth) Constitution.[233]

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[225] Ibid per Merkel J. See also Kruger v Commonwealth (1997) 190 Commonwealth Law Reports 1, 70-71.
[226] (1999) 165 Australian Law Reports 621.
[227] Ibid.
[228] (1876) 2 Exchequer Division 63.
[229] Ibid per Wilcox and Whitlam JJ.
[230] (1991) 172 Commonwealth Law Reports 501.
[231] Brownlie I, Principles of Public International Law (1998, 5th edition, Oxford University Press, Oxford) 565.
[232] (1991) 172 Commonwealth Law Reports 501.
[233] See section 51(xxix) of the (Cth) Constitution; R v Keyn (1876) 2 Exchequer Division 63; Polyukhovich v Commonwealth (1991) 172 Commonwealth Law Reports 501.

On the other hand, *Nulyarimma v Thompson*[234] was fundamentally a different case. The appellants had asked the court to apply the Australian common law, the law of the land, to actors and events occurring within Australia. Thus, extraterritorial jurisdiction in this case was not an issue.

Secondly, Wilcox J referred to the absence of argument in *R v Bow Street Magistrate; Ex parte Pinochet (No 3)*[235] that torture was an offence in England. He concluded as follows:[236]

> The only explanation of this omission can be that those arguing for extradition accepted that torture was not a triable offence in the United Kingdom until implementing legislation was enacted.

There was sound reason why counsel in the case did not argue that it was a common law offence to commit torture in England. To pass the double criminality test, the applicants had to show that the crime or "it" in the extradition proceedings (in this case, extraterritorial torture) existed in England also when "it" was committed in Chile.[237] As the facts in *Pinochet (No 1)* show, the case turned on what "it" meant.[238] Spain had sought Pinochet's extradition from England alleging that he had caused torture to Spanish subjects in Chile. In Spain, legislation permitted its courts to punish certain extraterritorial crimes (including torture) against its subjects anywhere.

In this case, Pinochet had been charged with extraterritorial torture, not territorial torture. The difference is crucial because the double criminality test in *Pinochet (No 3)* became this: was "it" a crime in England when it was committed?[239] Since the test thus rendered challenged the "area" of England's jurisdictional competence, the answer laid with English legislation.[240] Conversely, if Spain had charged Pinochet with territorial torture, it would have been relevant and possible to argue that it was a common law offence in England to commit torture within that jurisdiction. Wilcox J's judgment relied heavily upon *Attorney-General (Israel) v*

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[234] (1999) 165 Australian Law Reports 621.
[235] [1999] 2 All England Reports 97 ("Pinochet (No 3)").
[236] (1999) 165 Australian Law Reports 621 at [29].
[237] Pinochet (No 3) at 105.
[238] Pinochet (No 1) at 903.
[239] Pinochet (No 3) at 105.
[240] Ibid 100. Refer also R v Keyn (1876) 2 Exchequer Division 63.

*Eichmann.*[241] Consequently, Wilcox J's judgment will be considered together with Whitlam J's judgment below.

**(ii) Justice Whitlam**

Whitlam J rejected firmly Lord Millett's dissenting opinion in *Pinochet (No 3).*[242] He held:

> Customary international law is part of the common law, and accordingly I consider that English courts have and always have had extraterritorial criminal jurisdiction in respect of crimes of universal jurisdiction.

Although none of their Lordships in *Pinochet (No 3)* nor in the first appeal[243] doubted that customary international law was part of the English common law,[244] they rejected Lord Millett's view on extraterritorial common law jurisdiction because it ran against *R v Keyn.*[245]

Whitlam J observed in relation to *Attorney-General (Israel) v Eichmann*[246] that the extraterritorial jurisdiction asserted by Israeli courts did not rely on an external or "universal" source.[247] Consistently with *R v Keyn,*[248] the courts were exercising a jurisdiction that was granted by the Knesset in Israel that prevailed over inconsistent international law, namely, the 1950 Nazi and Nazi Collaborators (Punishment) Law.[249] Even though the trial in *Attorney-General (Israel) v Eichmann*[250] was permitted by statute, the Israeli courts had been keen to show that it was consistent with international law, albeit only incidentally.[251]

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[241] (1968) 36 International Law Reports 5, 313.
[242] At 177.
[243] Pinochet (No 1) at 911, 934.
[244] Pinochet (No 3) at 117, 177.
[245] Ibid 100; R v Keyn (1876) 2 Exchequer Division 63.
[246] (1968) 36 International Law Reports 5.
[247] (1999) 165 Australian Law Reports 621 at [42].
[248] (1876) 2 Exchequer Division 63.
[249] Attorney-General (Israel) v Eichmann (1968) 36 International Law Reports 5, 280-281.
[250] Ibid.
[251] Stone J, Of Law and Nations: Between Power, Politics and Human Hopes (1974, William S Hein, New York) 289. See also Attorney-General (Israel) v Eichmann (1968) 36 International Law Reports 277, 287.

This raised two points of international law, retrospectivity and extra-territorial jurisdiction.[252] Strictly, it was not correct to say, as Whitlam J did,[253] that *Attorney-General (Israel) v Eichmann*[254] concerned only a statute since it concerned also, once again albeit incidentally, the relationship between international law and the unwritten law of Israel.[255] The last point is significant because the 1950 Nazi and Nazi Collaborators (Punishment) Law could not criminalise genocide retrospectively if it was an offence under the unwritten law of Israel before the statute was enacted.[256]

After Whitlam J reviewed several authorities including *Polyukhovich v Commonwealth,*[257] *Re Demanjuk*[258] and *Demanjuk v Petrovsk,*[259] he said:[260]

> Even if it be accepted that customary international law is part of the common law, no one has identified a rule of customary international law to this effect: that courts in common law countries have jurisdiction in respect of those international crimes over which States may exercise universal jurisdiction. That is hardly surprising. Universal jurisdiction conferred by the principles of international law is a component of sovereignty,[261] and the way in which it is exercised will depend on each common law country's peculiar constitutional arrangements.

While Whitlam J's statement was correct,[262] it is irrelevant because the issue in *Nulyarimma v Thompson*[263] was not whether Australia had accepted universal jurisdiction over the extraterritorial conduct of non-nationals. Thus, it seems that the Federal Court had failed to observe the

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[252] Ibid.
[253] (1999) 165 Australian Law Reports 621 per Whitlam J at [44].
[254] Attorney-General (Israel) v Eichmann (1968) 36 International Law Reports 5.
[255] Ibid 280.
[256] Ibid 281-282. See also R v Kidman (1915) 20 Commonwealth Law Reports 425, 436; Polyukhovich v Commonwealth (1991) 172 Commonwealth Law Reports 501, 554.
[257] Ibid.
[258] (1985) 603 Federal Supplement 1468 (ND Ohio).
[259] (1985) 776 Federal 2nd Series 571 (6th Circuit).
[260] (1999) 165 Australian Law Reports 621 at [52].
[261] Refer Polyukhovich v Commonwealth (1991) 172 Commonwealth Law Reports 501, 661 per Toohey J.
[262] Refer Pinochet (No 1) at 913; Pinochet (No 3) at 116.
[263] (1999) 165 Australian Law Reports 621.

crucial point in *R v Keyn*,[264] *Polyukhovich v Commonwealth*,[265] *Pinochet (No 1)* and *Pinochet (No 3)* that a statutory vesting of jurisdiction was required since they were cases of extraterritorial conduct by non-nationals.

However, *Nulyarimma v Thompson*[266] was a "territorial" case and the question was whether it was a common law offence in Australia to commit genocide in Australia. Framed thus, the relationship between international law and the common law would be far from being merely academic in nature.[267] The majority in this case had confused two discrete issues, jurisdiction and illegality, which is made apparent in the following statement by Whitlam J:[268]

> It is accepted by all parties that under customary international law there is an international crime of genocide, which has acquired the status of *jus cogens* or a peremptory norm. This means that States may exercise universal jurisdiction over such a crime. Counsel for the appellants submit, therefore, that courts in all countries have jurisdiction over genocide.

This statement requires five points to be made in response:

1. All three judges in this case had accepted that a peremptory norm of customary international law *(jus cogens)* prohibits genocide.[269]
2. They noted that the "prohibitive norm" is addressed to individuals.
3. Although States cannot breach international law when exercising extraterritorial jurisdiction over genocide, common law courts cannot accept offers of extraterritorial jurisdiction. Instead, this must be done by legislation. Consequently, the common law as part of the law of the land relates only to offences within the State's territorial jurisdiction.[270]

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[264] (1876) 2 Exchequer Division 63.
[265] (1991) 172 Commonwealth Law Reports 501.
[266] (1999) 165 Australian Law Reports 621.
[267] Ibid per Wilcox J at [24]; Whitlam J at [52].
[268] Ibid per Whitlam J at [36].
[269] Ibid per Wilcox J at [18]; Whitlam J at [36]; and Merkel J at [81]. The terms "peremptory" and "jus cogens" are used interchangeably.
[270] In re Piracy Jure Gentium [1934] Appeal Cases 586, 589-590; R v Olney [1996] 1 Queensland Reports 187; Jones v Commonwealth [1999] 2 Queensland Reports 385; Hinton and anor, "Territorial application of criminal law – when crime is not local", (1999) 23:5 Criminal Law Journal 285.

4. When a State prosecutes and punishes a *genocidiare,* the court applies municipal law whether consistently with international law or not. In doing so, the court does not exercise a jurisdiction conferred by international law and it does not punish "as such" a breach of international law.[271]
5. More significantly, the fact that genocide is a *jus cogens* offence does not only mean that States can take universal jurisdiction. It means also that by virtue of Lord Talbot's rule and the "prohibitive norm" it is a common law offence to commit genocide in Australia.

**(iii) Justice Merkel**

In the minority, Merkel J held that there is a "universal crime" of genocide under the Australian common law.[272] However, he needed only to decide whether it was an offence in Australia to commit genocide in Australia, and as such, his views on "universal crimes" were gratuitous. He focussed on three issues, which will be considered next. They are:

1. the incorporation/transformation controversy;
2. extraterritorial jurisdiction; and
3. consistency with the existing municipal law.

Regarding the first issue, Merkel J accepted that the Brierly-Holdsworth-Dixon school had effectively displaced the doctrine of automatic incorporation. He then propounded an alternative scheme of "principled judicial adoption".[273] On this basis, Merkel J decided that Australian courts do not have discretion but are obliged to adopt or transform peremptory norms of customary international law into the common law, provided they do not conflict with the existing law.[274]

There is no essential difference between "automatic incorporation" and "principled judicial adoption" since both schemes are mandatory and

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[271] Refer Nulyarimma v Thompson (1999) 165 Australian Law Reports 621, 633; Flynn, "Genocide: it's a crime everywhere, but not in Australia", (2000) 29 Western Australian Law Review 59, 68; cf Mitchell, "Genocide: human rights implementation and the relationship between international and domestic law: Nulyarimma v Thompson", (2000) 24 Melbourne University Law Review 15.
[272] (1999) 165 Australian Law Reports 621 at [186].
[273] Ibid at [132].
[274] Ibid at [156].

subject to the same conditions. In the former scheme, changes in binding customary international law are reflected *ipso facto* in the common law, subject to internal consistency. In the latter, the purported change would have no internal effect until a judge adopted the new rule. As Stephenson LJ noted in *Trendtex Trading Corporation v Central Bank of Nigeria,*[275] the apparent difference is illusory since both require the change in customary international law to be proven, in a sense.[276] Hence, Merkel J had no compelling reason to forsake the "automatic incorporation" doctrine except in state jurisdiction cases. In addition, his reasoning appears to have gone against the principles in *R v Keyn.*[277]

The second issue, on the court's jurisdiction, Merkel J drew a distinction between ordinary customary international law offences and those that had attained *jus cogens* status. He stated:[278]

> In common law jurisdictions, in the former instance a statutory vesting of jurisdiction in municipal courts is essential as there is no vesting of jurisdiction in those courts under international law which, as such, does not authorise extraterritorial jurisdiction in all states other than in the case of universal crimes. The reverse is the situation in respect of universal crimes where there is a vesting of extraterritorial jurisdiction under international law which, as such, authorises the adoption of that law by all states under their municipal law.

Five points may be made with respect to Merkel J's statement above.

1. As indicated in *R v Keyn,*[279] including the cases that followed thereafter, there should be a statutory vesting of extraterritorial jurisdiction. Recently, the High Court illustrated this point in *Re Wakim; Ex parte McNally*[280] where Gummow and Hayne JJ held that while one polity may purport to vest its jurisdiction in another polity, to be effective, this must be permitted by the laws of the latter polity.[281]

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[275] [1977] 1 Queen's Bench 529.
[276] Ibid 571-572.
[277] (1876) 2 Exchequer Division 63.
[278] (1999) 165 Australian Law Reports 621 at [145].
[279] (1876) 2 Exchequer Division 63.
[280] (1999) 198 Commonwealth Law Reports 511.
[281] Ibid 573 especially.

2. This point follows from the first. Merkel J was wrong to suggest that universal jurisdiction is vested by or "under" international law because it is the legislature and Constitution that determine whether or not a State accepts extraterritorial jurisdiction.[282] Although he cited *Attorney-General (Israel) v Eichmann*[283] and Lord Millet in *Pinochet (No 3)*[284] in support, it should be recalled from the discussion above that Lord Millett's judgment clashed with *R v Keyn.*[285] Further, in *Attorney-General (Israel) v Eichmann*[286] the Israeli courts had a statutory permit to exercise universal jurisdiction and it was not customary international law that provided an independent source of jurisdiction.
3. While Merkel J cited the implicit support of Brennan J's judgment in *Polyukhovich v Commonwealth,*[287] Brennan J had actually insisted upon a statutory vesting of jurisdiction.[288]
4. It is misleading to refer to genocide as a universal crime. It is more accurate and appropriate to say that genocide is a crime under international law in respect of which international law does not prohibit States from taking universal jurisdiction.
5. Although permissive jurisdictional norms do not attract Lord Talbot's rule, the same does not apply to the "prohibitive norm" on genocide because it refers to actors and events within Australia.

Having argued thus far that the prohibitive norm of customary international law regarding genocide attracts Lord Talbot's rule to the extent that it refers to conduct within Australia, the third and final requirement is consistency with existing municipal law. This is considered next.

***Consistency with Municipal Law***

The Federal Court in *Nulyarimma v Thompson*[289] agreed that a rule of customary international law could not become part of the common law if it

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[282] SS Lotus (France v Turkey) [1927] Permanent Court of International Justice Reports, Series A, No 10, p 18-19.
[283] (1968) 36 International Law Reports 5, 281-283.
[284] (1999) 165 Australian Law Reports 621 at [151]-[154].
[285] (1876) 2 Exchequer Division 63.
[286] (1968) 36 International Law Reports 5.
[287] (1991) 172 Commonwealth Law Reports 501.
[288] Ibid 576.
[289] (1999) 165 Australian Law Reports 621.

was inconsistent with the existing municipal law. The majority in the court considered that there was inconsistency[290] whereas Merkel J held that there was none.[291] The resulting controversy entails an examination of the available types of "municipal law" and the meaning of "inconsistency".

Two questions arise:

1. Does the municipal law permit or require the commission of genocide?
2. Does the municipal law preclude the incorporation of the common law offence of genocide?

These questions will be considered below in turn.

The municipal law of Australia[292] comes from three sources: the Constitutions, other legislation and subordinate rules, and common law rules. It is evident that an external norm cannot become a part of the common law if it is inconsistent with the (Cth) Constitution or the Constitution of a State[293] where incorporation is proposed.[294] However, there is no inconsistency here and the reason is this: while the Australian Constitutions might empower genocidal legislation, they do not expressly allow nor do they require positively the commission of genocide.[295]

With respect to legislative consistency, the Privy Council confirmed that Lord Talbot's rule could only incorporate norms that did not collide with existing statutory rules.[296] However, this extreme stance is tempered by the cardinal rule of statutory construction that legislation should, wherever possible, be interpreted so as to conform to international law.[297] Since genocide is not clearly and expressly permitted by Australian legislation,

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[290] Ibid per Wilcox J at [25]-[26]; Whitlam J at [53].
[291] Ibid at [181].
[292] This includes the law of the Territories and States of Australia.
[293] In this discussion, the Australian Territories will be considered together with the Australian States.
[294] Kruger v Commonwealth (1997) 190 Common Law Reports 1, 70-73; Butler, "Comparative approaches to international law", (1985-I) 190 Recueil des Cours 17, 51.
[295] Ibid.
[296] Chung Chi Cheung v R (1938) 4 All England Reports 786, 790.
[297] In Minister for Immigration and Ethnic Affairs v Teoh (1995) 190 Commonwealth Law Reports 1; Salomon v Commissioners of Customs and Excise [1967] 2 Queen's Bench 116, 143.

its prohibition under the common law causes no direct conflict. Moreover, while there is some *dicta* that genocide is not prohibited in Australia, there are no judicial pronouncements to the effect that genocide is authorised or required by the common law.[298]

Hence, the remaining question is whether the existing Australian law precludes the incorporation of the common law offence of genocide. Since the various Constitutions in Australia are silent on the point, they do not preclude the incorporation of customary international law. Therefore, it is arguable that Lord Talbot's rule exists as an unwritten constitutional principle, similar to that in the United States. If correct, this would maintain the equilibrium between the common law and customary international law,[299] thus preserving "the majestic stream of the common law, united with international law".[300]

However, there are instances of legislative preclusion in the so-called Griffith-Code jurisdictions in Australia.[301] The criminal statute law in Western Australia, Northern Territory, Queensland and Tasmania provides that there are no crimes save for those in their respective Crimes Acts or other Acts.[302] While the Commonwealth Criminal Code also takes the Griffith-Code approach, this is of little moment because genocide is not intrinsically "Commonwealth" in nature.[303]

Conversely, the criminal legislation in the common law or non-Code jurisdictions (Australian Capital Territory, New South Wales, Victoria and South Australia) relies on the continuing existence of common law offences. For example, the (NSW) 1900 Crimes Act creates new statutory

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[298] Refer Nulyarimma v Thompson (1999) 165 Australian Law Reports 621; Thorpe v Kennett [1999] Victoria Supreme Court 442 (Unreported, Supreme Court of Victoria, Warren J, 15 November 1999).

[299] The Paquete Habana (1900) 175 United States 677, 700; Shearer IA (editor), Starke's International Law (1994, 11th edition, Butterworths, London) 74.

[300] SS Lotus (France v Turkey) [1927] Permanent Court of International Justice Reports, Series A, No 10, p 75 per Moore J.

[301] Whitney KL and ors, The Criminal Codes (1997, 5th edition, Sweet & Maxwell, Sydney).

[302] See sections 2, 5 and 8 of the (Qld) 1899 Criminal Code Act; sections 2, 4 and 7 of the (WA) 1913 Criminal Code Act Compilation Act; (NT) 1983 Criminal Code Act; (Tas) 1924 Criminal Code Act.

[303] Section 1.1 of the (Cth) 1995 Criminal Code; Nulyarimma v Thompson (1999) 165 Australian Law Reports 621 at [163].

offences and also provides statutory penalties for common law offences.[304] Thus, while Whitlam J observed that common law offences are "anathema in the so-called Griffith Code jurisdictions",[305] the same cannot be said for the non-Code States. Hence, there is no legislative bar to incorporating the common law offence of genocide in the non-Code States. Nonetheless, while the majority in *Nulyarimma v Thompson*[306] could not find any common law precedent to bar incorporation of genocide, they declined to recognise the offence for policy reasons. In doing so, they implicitly adopted Professor Sawyer's view that:[307]

> there must exist a judicial discretion in the Australian (and English) Courts to ignore international law rules not so far "received" on some ground of their inconsistency with general policies of our law, or lack of logical congruence with its principles.

The majority relied primarily on *Knuller (Publishing, Printing and Promotions) Ltd v Director of Public Prosecutions*[308] to show that the courts no longer have the power to make punishable conduct hitherto not subject to punishment.[309] However, this statement on the court's function is wrong when applying Lord Talbot's rule. Genocide became an offence under the common law as soon as it was proscribed by customary international law and the court's role is investigative rather than legislative. While Wilcox J expressed doubts in *Nulyarimma v Thompson,*[310] the automatic incorporation of genocide into the common law conforms to the principles of *nullum crimen sine lege* (no crime without a law) and *nulla poena sine lege* (no punishment without a crime).[311]

It should be noted here that the non-Code States have refrained from repealing common law offences and the New South Wales Court of Appeal

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[304] See (NSW) 1900 Crimes Act section 61 (on assault); section 117 (on larceny); and sections 431-432.
[305] (1999) 165 Australian Law Reports 621 per Whitlam J at [57].
[306] Ibid.
[307] Sawyer, "Australian constitutional law in relation to international relations and international law" in O'Connell DP and anor (editors), International Law in Australia (1996, Law Book Company, Sydney) 50.
[308] [1973] Appeal Cases 435.
[309] Ibid 457-458, 464-465, 496.
[310] (1999) 165 Australian Law Reports 621 at [26].
[311] Bassiouni MC, Crimes Against Humanity in International Criminal Law (1999, 2nd revised edition, Kluwer Law, The Hague) 123 et seq.

endorsed strongly Lord Talbot's rule in *Wright v Cantrell,*[312] well before international law confirmed genocide as a crime.[313] Therefore, since neither judicial authority nor statutes in the non-Code States have dislodged Lord Talbot's rule, genocide has been a common law crime in Australia since its recognition in the Genocide Convention. This approach is consistent with *Nuremberg Trials,*[314] *Control Council Trials,*[315] and *Attorney-General (Israel) v Eichmann.*[316] Furthermore, the Commonwealth has consistently maintained that the acts that constitute genocide are criminal offences under the common law and the criminal codes of the States and Territories.[317] These assurances render the Commonwealth's defences in *Nulyarimma v Thompson*[318] all the more untenable.[319]

In the light of the preceding paragraph, it seems that a *genocidiare* can only feign surprise that genocide is a crime punishable in Australia. Such claims of surprise were set aside in the Nuremberg trials. While Lord Morris in *Knuller's case*[320] noted that "those who skate on thin ice can hardly expect to find a sign that will denote the precise spot where they may fall in",[321] the crime of genocide has long been posted with flashing neon signs. Moreover, it seems highly inappropriate to equate genocide with the mere publication of advertisements that invite homosexual activity as in *Knuller's case.*[322] Genocide is not, in any sense, a borderline case; it goes

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[312] (1943) 44 State Reports (New South Wales) 45.
[313] Note that Wright v Cantrell was reported in 1943 while the Genocide Convention was signed on 9 December 1948.
[314] Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg (1946), Misc No 12, (1946, HM Stationery Office, London) 41; refer also Ex parte Quirin, (1942) 317 United States 1.
[315] For example, see United States v Wilhelm von Leeb (1950) XI Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No 10, p 246; Bassiouni MC, Crimes Against Humanity in International Criminal Law (1999, 2nd revised edition, Kluwer Law, The Hague) 155-156.
[316] (1968) 36 International Law Reports 5, 281-283.
[317] Commonwealth, Submissions to Senate Legal and Constitutional References Committee: Inquiry into the Anti-Genocide Bill 1999, Volume I at 90 (letter from the Attorney-General's Office to Amnesty International dated 15 September 1999).
[318] (1999) 165 Australian Law Reports 621.
[319] In fact, Merkel J observed that the Commonwealth rested its defence on grounds, inter alia, that there was no crime of genocide known in Australian law: ibid para [160].
[320] [1973] Appeal Cases 435.
[321] Ibid 463.
[322] [1973] Appeal Cases 435.

well beyond merely offending sensibilities or corrupting public morals. It is an odious scourge that actually destroys population groups.[323]

The majority in *Nulyarimma v Thompson* held that:[324]

> it would be absurd if the common law countenanced the selective exercise by municipal courts of a universal jurisdiction under international law.

However, there was no call for universal jurisdiction nor was there judicial selectivity. Ever since the Griffith-Code States abrogated the common law, their courts have had no say in the matter. As a result, since the incorporation of genocide would not fragment the Australian common law by this method, the majority apparently took the analogical approach that failed to persuade the High Court recently in *Esso Australia Resources Ltd v Federal Commissioner for Taxation.*[325]

In addition, the majority in *Nulyarimma v Thompson*[326] had considered the lack of punishment and procedural rules to be an insurmountable problem.[327] Wilcox J held:[328]

> In the case of serious criminal conduct, ground rules are needed. Which courts are to have jurisdiction to try the accused person? What procedures will govern the trial? What punishment may be imposed? These matters need to be resolved before a person is put on trial for an offence as horrendous as genocide.

The Federal Court could have answered each of the questions more favourably for the accused. In other words, it could have taken a line of least resistance. For example, assuming a more substantial genocide case is presented in future, perhaps the crime of genocide could be punished as a common law misdemeanour.[329] The Supreme Court would be the

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[323] See Preamble para 3 of the Genocide Convention.
[324] (1999) 165 Australian Law Reports 621 per Whitlam J at [57], Wilcox J at [19-20].
[325] (1999) 168 Australian Law Reports 123, 130-131.
[326] (1999) 165 Australian Law Reports 621.
[327] Ibid per Whitlam J at [53-57]; Wilcox J at [26].
[328] Ibid per Wilcox J at [26]. See also Flynn "Genocide: it's a crime everywhere, but not in Australia", (2000) 29 Western Australian Law Review 59, 68.
[329] For example, see section 432(1) of the (NSW) 1900 Crimes Act.

appropriate forum and the trial procedures could be the same as for murder. If the legislature became dissatisfied with any of the court's answers, this could provide the catalyst for the enactment of legislation. Finally, if difficulties, perceived or otherwise, occurred, it would only be experienced the first time around. Thereafter, precedent would guide subsequent courts.

It therefore seems that nothing much has changed since the late Professor Julius Stone wrote in relation to the Eichmann trial:[330]

> A Rip Van Winkle who fell asleep in 1930 and awakened just before *[Nulyarimma]* would have rubbed his eyes at a most striking paradox. This paradox is that the most persistent vocal protests surrounding this case have been protests against the trial, rather than the fact that such hideous crimes were possible or that the accused was innocent.

## CONCLUSION

If Australian lawyers have forsaken the common law, it would be a shame. In 1735, Lord Talbot realised the need to maintain a state of equilibrium between the international and municipal legal orders. If anything, this need has increased. Further, a close examination reveals that Lord Talbot's rule is perfectly consonant with the *realistic* account of dualism as it operates within the confines of mutual independence, with the municipal system permitting certain external rules to have the force of municipal law. Further, the subsequent emphasis on parliamentary supremacy did not overturn Lord Talbot's rule. Instead, it merely introduced requirements of proof and internal consistency.

Cockburn CJ's judgment in *Keyn's case*[331] seemed to be the beginning of a Dark Age and the genesis of confusion. Henceforth, lawyers embarked on a descriptive analysis and they forgot to ask why. After observing a string of cases in which the courts had refused to apply a rule of international law without a statutory permit, lawyers deduced a universal truth, namely, that legislative incorporation is required in all cases. The correct deduction ought to have been this: notwithstanding Lord Talbot's rule, legislation is required in all cases of the kind identified.

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[330] Stone J, Of Law and Nations: Between Power, Politics and Human Hopes (1974, William S Hein, New York) 286.
[331] (1876) 2 Exchequer Division 63.

The exegetic analysis of the cases above has revealed two points. First, some rules of international law do not attract Lord Talbot's rule because they challenge the jurisdiction of the State, they are merely permissive, or they are treaties. Secondly, while customary international law does not operate "as" such" on the municipal plane, Lord Talbot's rule gives some of its rules the force of municipal law.

*Nulyarimma v Thompson*[332] presented the full Federal Court with a rare opportunity to consider carefully the relationship between customary international law and the Australian common law. This tack was not adopted and the case was decided on the principal basis that there could be no such thing as an extraterritorial offence under the law of the land, known otherwise as the common law.

Although the court in *Nulyarimma v Thompson*[333] agreed that genocide was prohibited by a *jus cogens* norm of customary international law, it failed to apply the prohibitive norm to Lord Talbot's rule. The judicial treatment of *Pinochet (No 1), Pinochet (No 3)* and *Attorney-General (Israel) v Eichmann*[334] highlights the Court's confusion with extraterritoriality and criminality as concepts. It is paradoxical that the full Federal Court refused to recognise genocide as an offence because it was too abhorrent. It is disconcerting that at least one subsequent court has embraced *Nulyarimma v Thompson*[335] without question.[336] Furthermore, the Senate Legal and Constitutional References Committee has accepted that "genocide is not a crime in Australia at the present time".[337]

The High Court of Australia declined recently to allow special leave to appeal *Nulyarimma v Thompson*[338] because of its slender prospects on the merits.[339] Nevertheless, it is worth mentioning that Gummow J noted

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[332] (1999) 165 Australian Law Reports 621.
[333] Ibid.
[334] (1968) 36 International Law Reports 5.
[335] (1999) 165 Australian Law Reports 621.
[336] Thorpe v Kennett [1999] Victoria Supreme Court 442 (Unreported, Supreme Court of Victoria, per Warren J, 15 November 1999).
[337] (Commonwealth) Senate Legal and Constitutional Report on the (Cth) 1999 Anti-Genocide Bill (2000, Australian Government Printing Service, Canberra) Chapter 5 para 5.4.
[338] (1999) 165 Australian Law Reports 621.
[339] See especially Gummow J's reasons in Nulyarimma v Thompson, Application for Special Leave to Appeal (Transcript, High Court of Australia, C18/1999, 4 August 2000

carefully that the High Court was not expressing its opinion on whether genocide was a common law offence in Australia.[340] There may be a long wait until the relationship between customary international law and the common law falls for scrutiny again in a superior court. In the meantime, however, Sir Robert Menzies' assurance is ringing hollow:[341]

> Of course the crime of genocide was not peculiar to Germany; I am not without my suspicions, nor are honourable members, that it is still going on in some parts of the civilised world, and for all I know may be going on in countries which are signatories to this convention... Persecution of the kind against which the convention is directed must never be tolerated...and *I am perfectly certain that it will never be tolerated here*. However, the last thing I should dream of doing would be to speak or vote in such a way as to cast any doubt on the proposition that *in Australia we abominate the crime of genocide. No body has ever doubted it. (emphases added)*

As Cesare Beccaria wrote in 1764:[342]

> [I]f by defending the rights of man and the unconquerable truth, I should help to save from the spasm and agonies of death some wretched victim of tyranny or of no less fatal ignorance, the thanks and tears of one innocent mortal in his transports of joy would console me for the contempt of all mankind.

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per Gummow, Kirby and Haynes JJ).

[340] Ibid.

[341] Cited by Senator Greig, 2nd Reading Speech – Information Package on the Anti-Genocide Bill 1999, Senate Legal and Constitutional References Committee (2000, Australian Government Printing Service, Canberra) at Item 2.

[342] Beccaria C, Of Crimes and Punishment, cited by Robertson G, Crimes Against Humanity: The Struggle for Global Justice (1999, Penguin Press, London) 6.