Comment

Judicial Treatment of International Law in *Yarmirr*

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Introduction

A number of theories have been developed to explain the circumstances in which judges will consider it legitimate to employ international law in a domestic case. The first typology, a distinction between monism, dualism and harmonisation, describes the appropriate relationship between international and domestic law.[1] Monism views international law and domestic law as a single system of universal principles in which international law usually holds the superior position as the source of domestic legal sovereignty. Dualism treats domestic and international law as independent sovereign systems within their respective spheres. International law has domestic effect only through domestic implementation. Harmonisation, describes the judicial role as the enhancement of consonance between international and domestic law rules but recognises that in the domestic sphere, constitutionalism dictates that domestic law prevails where an inconsistency is unresolvable.[2]

The second typology, transformation and incorporation, distinguishes between the circumstances in which international law can have domestic effect.[3] Transformation is a working out of the dualist view, requiring domestic implementation of international law to give it domestic effect. Incorporation, aligned with a monist perspective, allows for direct applicability of

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1 I A Shearer, 'The Relationship between International Law and Domestic Law' in B R Opeskin and D R Rothwell (eds), *International Law and Australian Federalism* (1997) 34, 36-8; R Balkin, 'International Law and Domestic Law' in R P S Blay and B M Tsamenyi (eds) *Public International Law: An Australian Perspective* (1997), 119-121.

2 K Walker, 'Treaties and the Internationalisation of Australian Law' in C Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 214, 230.

3 A Mason, 'International Law as a Source of Domestic Law' in Opeskin and Rothwell (eds), above n 1, 212-14; G Triggs, 'Customary International Law and Australian Law' in M P Ellinghaus, A J Bradbrook and A J Duggan (eds), *The Emergence of Australian Law* (1989) 377, 381-84.

international law in the domestic sphere. This typology has been subject to criticism and Walker[4] identifies a four-part continuum, which distinguishes between strong and weak (or hard and soft[5]) incorporation based on whether the international rule, once automatically adopted, will be subject to both common law and statute (weak/soft), or conflicting statute only (hard/strong). Weak incorporation has also been termed 'qualified incorporation'.[6] Strong and weak transformation differ on the act which will be sufficient to adopt the international law rule: either a judicial decision or legislation (weak/soft), or legislation only (strong/hard). It is also possible to understand soft transformation as involving a discretion reposed in the judge where no prior decision has adopted the rule.[7]

A further possible characterisation is based on the effect or operation given to the international law rule once adopted. This can be a direct or indirect operation, or no operation.[8] Examples of indirect operations include the application of an international law principle to the construction of a statute, the legitimate expectation that a decision-maker will act in accordance with international obligations, and the development of the common law in line with international principles.[9] No operation may result where there is an inconsistent statutory or common law rule considered more fundamental or more authoritative domestically than the international law rule.

There is a lack of clarity and predictability in the judicial approach to international law in Australia.[10] Most commentators consider some kind of transformation approach to be dominant,[11] although Merkel J in *Nulyarimma* considered that the 'sources' approach applies.[12] That doctrine is itself unclear[13] but probably leans more towards incorporation, perhaps a qualified incorporation. Part of the difficulty is the absence of a theoretical framework in judgments, a lack of familiarity with international law method on the part of judges, and the small number of cases in which international law is directly

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4 Walker, above n 2, 228.

5 As termed by A D Mitchell, 'Genocide, Human Rights Implementation and the Relationship Between International and Domestic Law: *Nulyarimma v Thompson*' (2000) 24 *Melbourne University Law Review* 15, 27.

6 D Guilfoyle, '*Nulyarimma v Thompson*: Is Genocide a Crime at Common Law in Australia?' (2001) 29 *Federal Law Review* 1, 12-13.

7 Ibid 16.

8 Walker, above n 2, 232.

9 Ibid 209. See *Mabo v Queensland [No2]* (1992) 175 CLR 1 (*Mabo*), *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (*Teoh*).

10 Eg J Crawford and W Edeson, 'International Law and Australian Law' in K Ryan (ed), *International Law in Australia* (1984), 77-79; Walker, above n 2, 231; Guilfoyle, above n 6, 17-20; Merkel J in N*ulyarimma v Thompson* (1999) 96 FCR 153 (*Nulyarimma*), 189 [131].

11 Balkin, above n 1, 122; Mason, above n 3, 216.

12 *Nulyarimma v Thompson* (1999) 96 FCR 153, 189-191 [132] (Merkel J), associated with Dixon J in *Chow Hung Ching v R* (1949) 77 CLR 449, 477: 'The true view, it is held, is "that international law is not a part, but is one of the sources, of English law".'

13 Mitchell, above n 5, 30, with reference to Mason, above n 3, 215.

considered, particularly outside the human rights context.[14] Indeed, it has been suggested that Brennan J's oft-cited statement in *Mabo* that international law is a 'legitimate influence' on the common law[15] can be considered the dominant theoretical approach.[16] This uncertainty, coupled with problems in the theoretical characterisations themselves, leads to a low predictive power for the existing analytical frameworks. It is perhaps more instructive to examine the legitimate influence of international law in a common law context by analysing the kind of factors judges find persuasive in adopting and applying international law.[17] .

The High Court's decision in *Commonwealth v Yarmirr*[18] provides an opportunity to undertake such an examination in terms of the employment of customary and conventional international law in native title jurisprudence where international law has already been accepted as a legitimate influence. The case involves the intersection of international law, municipal law and indigenous customary law in relation to the territorial sea, which was the subject of a native title claim under the Native Title Act 1993 (Cth).[19]

This comment is not a critique of the application of international law by judges as a matter of policy, although it is assumed that international law will be both relevant and useful in many cases.[20] The purpose of this comment is to examine the explanatory power of existing characterisations of judicial handling of international law and to attempt to describe the factors that supported 'legitimate' judicial employment of international law in *Yarmirr* and may be of value for future submissions.

The Significance of *Yarmirr* for Native Title Jurisprudence

The particular significance of *Yarmirr* is that it is the first application for a determination of native title in relation to an area of sea territory.[21] It was also the first application for a determination under the Native Title Act, lodged in 1994 shortly after the Act came into force.[22] The area claimed is in the vicinity

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14 Balkin, above n 1, 123.

15 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 42 (Brennan J).

16 Guilfoyle, above n 6, 18-19, 23.

17 Walker, above n 2, 231.

18 *Commonwealth v Yarmirr* (2001) 208 CLR 1 (High Court); *Commonwealth v Yarmirr* (1999) 101 FCR 171 (Full Federal Court); *Yarmirr v the Northern Territory* (1998) 82 FCR 533 (Olney J). The case will be referred to generally as *Yarmirr*.

19 *Yarmirr* 101 FCR 171, 270 [417] (Merkel J).

20 For an excellent defence of judicial application of international law, see S Monks, 'In Defence of the Use of Public International Law by Australian Courts' (2002) 22 *Aust YBIL* 201.

21 Previously *Mason v Tritton* (1994) 34 NSWLR 572 and *Sutton v Derschaw* (unreported, 15 August 1995, Supreme Court of Western Australia) had considered native title fishing rights as a defence to infringements of fishing regulations, but *Yarmirr* was the first application for a substantive determination.

22 Although the Act was amended after *Wik*, it was common ground that the amendments did not apply in *Yarmirr*: *Yarmirr* 208 CLR 1, 34 [5] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

of Croker Island off the coast of the Northern Territory. Five Aboriginal clans together claimed rights of exclusive 'possession, occupation, use and enjoyment of the waters'[23] including control of access (to the exclusion of the public) and a right to trade in the resources of the waters (which include the seabed and subsoil below the water).[24] The claimed area is wholly located on the landward side of the outer limits of the territorial sea[25] offshore from the Northern Territory (within 12 nautical miles of the coastal baselines drawn in accordance with international law).

The application for an offshore determination raised two threshold questions. The first was whether the Native Title Act provides a statutory basis for recognition of offshore native title.

This question required a construction of the Act itself and other statutes and declarations relating to the legislative competence and intention of the Commonwealth. Section 6 of the Native Title Act clearly purports to apply the Act offshore:

> This Act extends to each external Territory, to the coastal sea of Australia and of each external Territory, and to any waters over which Australia asserts sovereign rights under the Seas and Submerged Lands Act 1973.

The area of application is supported by a definition of native title in section 223(1) which in part provides:

> The expression 'native title'… means the communal, group or individual rights or interests of Aboriginal peoples … in relation to land *or waters*, where:
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> (c) the rights and interests are recognised by the common law of Australia. (emphasis added)

The second question, in relation to the requirement in section 223(1)(c) of common law recognition, is whether the common law must apply to the claimed area as a precondition to recognition under the Act. This question presents a difficulty only in terms of offshore native title claims because of the precedent of *R v Keyn*,[26] applied in *New South Wales v Commonwealth (Seas and Submerged Lands Act Case*),[27] which decided that the common law does not apply in Australia beyond the low-water mark.

The Commonwealth's main contention was that section 223(1)(c) operates as a limitation on statutory recognition of native title such that because the common law does not apply of its own force beyond the low-water mark, a claim for native title offshore cannot meet the definition in the Act.[28] The common law has been applied to three nautical miles by Northern Territory statute,[29] however, this statute provides no basis for recognition of native title

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23 *Yarmirr* 82 FCR 533, 536 [4] (Olney J).
24 In accordance with the definition of 'waters' in the Native Title Act (s 253(b)).
25 *Yarmirr* 82 FCR 533, 547 [31] (Olney J).
26 (1876) 2 Ex D 63; hereinafter *Keyn*.
27 (1975) 135 CLR 337 (*SSLA Case*).
28 Commonwealth written submissions to the High Court in D7 of 2000 (filed 3 November 2000), [2.6]ff. (Copies of all submissions referred to are on file with the author.)
29 Offshore Waters (Application of Territory Laws) Act 1985 (NT).

because it was passed subsequent to the vesting of title to offshore areas in the Northern Territory, which could not be subject to native title rights because they were not supported by the common law prior to statutory extension.[30]

If, contrary to these arguments, native title were recognised offshore, the Commonwealth contended that the relevant rights and interests cannot amount to exclusive possession because native title must be subject to the international law right of innocent passage through the territorial sea and the common law public rights of navigation and fishing in the area.[31]

At first instance, Olney J answered both questions in favour of the claimants and made a determination[32] of non-exclusive offshore native title under which the relevant rights and interests were: free access to the sea and seabed of the claimed area for the purposes of travel, and in terms of resources, for non-commercial fishing, hunting and gathering. In addition, there was a right of access for cultural purposes: the observation of traditional and spiritual laws and customs, visitation and protection of places of cultural and spiritual importance and safeguarding of cultural and spiritual knowledge. The determination also included findings that the native title rights recognised were subject to any inconsistent grants of interest by the Commonwealth or Northern Territory, that no right to trade in the resources of the claimed area had been made out and that the Crown had appropriated to itself an interest in the minerals of the seabed that extinguished any beneficial native title to such resources. The determination was similar to *Wik*[33] in that the native title rights were held to co-exist with grants of other interests, in this case commercial fishing licenses and a pearling license.[34]

Both the claimants and the Commonwealth appealed to the full Federal Court, essentially reasserting their main contentions.[35] In addition, the Commonwealth contended that the rights recognised by Olney J were equivalent to public rights of navigation and fishing and were not separate native title rights.

The full Federal Court dismissed the appeal of the Commonwealth and by a majority (Beaumont and von Doussa JJ) dismissed the appeal of the claimants. Merkel J dissented and would have allowed the claimants' appeal in relation to an exclusive fishery and remitted the matter for further hearing by Olney J.[36]

The appeal to the High Court essentially turned on the same issues. The claimants accepted that an exclusive native title right to the sea could not be

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30 Commonwealth written submissions to the High Court in D7 of 2000 (filed 3 November 2000), Part 3.

31 Commonwealth written submissions to the High Court in D9 of 2000 (filed 4 December 2000), Part 3.

32 *Yarmirr* 82 FCR 533, 602 [162] (Olney J).

33 *The Wik Peoples v Queensland* (1996) 187 CLR 1.

34 N Henwood, 'The *Croker Island* case – a landmark decision in native title' (1998) 10 *Native Title News* 146, 146.

35 Summary of reasons issued by Full Federal Court upon delivering judgment in appeal reproduced at 168 ALR 426, 427.

36 Ibid.

exercised in a manner that would constitute a substantial impediment to the rights of innocent passage or public right of navigation or the right to fish under a validly granted license.[37] They nevertheless claimed that in all other respects the determination of native title should be for possession, occupation, use and enjoyment of the sea and seabed to the exclusion of all others.[38] The High Court dismissed both appeals by a majority. Five judges (Gleeson CJ, Gaudron, Gummow, Hayne and Kirby JJ) dismissed the Commonwealth's appeal and all of the Justices other than Kirby J dismissed the appeal of the claimants. This result confirms that determinations can be made under the Act for offshore native title.[39]

The High Court's decision in *Yarmirr* received attention for the particular development that it represented in the extension of native title recognition and early indications of the Court's interpretation of the Native Title Act.[40] Unsurprisingly, initial comment focused on the implications of the decision for some 120 applications involving claims for native title to the sea and the necessary adjustments for industry.[41] During 2002, however, a series of native title decisions of the High Court directed attention to other outstanding substantive issues in native title jurisprudence, including the nature of native title as a bundle of rights, the doctrine of extinguishment and the status of various kinds of leases.[42]

Apart from recognition of the outcome in *Yarmirr* little attention has been given to the wider implications of the reasoning employed by the Justices of the High Court. Although it has been argued that native title jurisprudence has

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37 *Yarmirr* 208 CLR 1, 67 [95] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

38 Ibid [269], [271] (Kirby J).

39 B Haslem and P Toohey, 'Native title legislation confirmed seaworthy' *The Australian* (12 October 2001) 8.

40 For a helpful discussion of *Yarmirr's* place in the native title jurisprudence of the High Court see R French, 'The Role of the High Court in the Recognition of Native Title' (2002) 30 *University of Western Australia Law Review* 129, esp 163.

41 See eg W Oxby and S MacGregor, 'Offshore native title – the Croker Island case' (2002) 16 *Australian Property Law Bulletin* 37; J Morris, 'Sea Country: The Croker Island Case' (2002) 5 *Indigenous Law Bulletin* 18; and see *Risk v Northern Territory of Australia* (2002) 76 ALJR 845, [2002] HCA 23, [78] (Gummow J); *Yarmirr* has been applied substantively in the Federal Court decisions of *Daniel v State of Western Australia* [2003] FCA 666 and *The Lardil Peoples v State of Queensland* [2004] FCA 298 (delivered 23 March 2004); see 'Aborigines, industry welcome native title decision' *Australian Financial Review* (25 March 2004) 10.

42 *Western Australia v Ward* (2002) 76 ALJR 1098, (2002) 191 ALR 1; *Wilson v Anderson* (2002) 76 ALJR 1306, [2002] HCA 29; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 77 ALJR 356, [2002] HCA 58. See eg J Clarke, 'Native Title after *Ward* and *Wilson*' (2002) Occasional Paper, Centre for International and Public Law, Faculty of Law, Australian National University; M Dodson, 'Native Title on the Precipice: The Implications of the High Court's Judgment on the Ward Case' Presentation to the ANU Institute for Indigenous Australia, Canberra, 17 October 2002; S Brennan, 'Ward, Wilson and Yorta Yorta: The High Court, Native Title and the Constitution a Decade after Mabo' Gilbert & Tobin Centre of Public Law 2003 Constitutional Law Conference, Sydney, 21 February 2003.

ended its useful life,[43] other contexts exist for the possible application of international law and the judgments in *Yarmirr* indicate some of the ways it may be given effect.

Federal Court

The judgments of Olney J at first instance and of the majority of the Full Court of the Federal Court (Beaumont and von Doussa JJ) are sufficiently similar to that of the joint judgment in the High Court not to require separate attention in a comment of this scope. Justice Merkel's judgment, however, warrants brief consideration for his Honour's distinctive approach.

Justice Merkel: full Federal Court (minority)

The recognition of developments in international law is crucial to the reasoning of Merkel J. His Honour acknowledges that a central issue in *Yarmirr* is the intersection of the international and municipal laws of the territorial sea with rights and interests under native title.[44] Justice Merkel extensively reviews the changes in international law, as adopted by the common law, since *Keyn* to demonstrate that the case no longer represents the Australian common law position.[45] Instead, judicial decisions in common law countries and legislative and executive acts in Australia have adopted a position of sovereignty over the territorial sea that renders it part of the territory of Australia and therefore subject to the common law.[46]

Consistently with his judgment in *Nulyarimma*, Merkel J articulates a 'source' approach to the adoption of international law by the common law.[47] This approach requires a rule to have attained a general acceptance or been assented to by nations as international law, 'evidenced by international treaties and conventions, authoritative textbooks, practice and judicial decisions'.[48] The application of a rule satisfying these criteria is dependent on that rule constituting a source for, or having been received into, Australian law. Status as a source will be tested first by prior acceptance and then by consistency with statute and the general principles underlying the common law. If no inconsistency is found, the rule is automatically applicable.[49]

As Guilfoyle notes, Merkel J's approach initially appears to be one of transformation because his method involves examining municipal law for acts adopting international law rules, however it seems clear that rules must be received even without such acts, subject to consistency with common law

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43 Dodson, above n 42.
44 *Yarmirr* 101 FCR 171, 270 [417].
45 Ibid 269 [411]ff.
46 Ibid 278-279 [456].
47 See above n 12.
48 *Yarmirr* 101 FCR 171, 278-279 [456] citing *Compania Naviena Vascongado v SS Christine* [1938] AC 485, 497 (Lord MacMillan).
49 *Nulyarimma* 96 FCR 153, 189-190 [132] cited in *Yarmirr* 101 FCR 171, 279 [457].

principles and statute.[50] Justice Merkel's description of the requirement of common law consistency – that a rule must not conflict with the 'general policies' of the common law, but may conflict with specific rules (which will be amended by the reception of an international rule) – places his Honour's approach somewhere between soft and hard incorporation. Walker refers to weak incorporation as subjecting the international rule to 'settled rules of the common law'.[51] Justice Merkel's 'source' principles may be closest to that approach.

Mitchell suggests, commenting on the judgments in *Nulyarimma*, that the better approach to analysis of judicial adoption of international law is to commence with a distinction between customary and conventional law, determine which of the four incorporation/transformation approaches is used and then consider the operativeness of the rule.[52] In *Yarmirr*, when considering customary international law (distance of the territorial sea to 1930 and the right of innocent passage prior to the Conventions), Merkel J applied a soft transformation approach so that international law has been adopted into municipal law where judicial decisions, executive acts and a high level of international acceptance of the rule exist. International law in this regard was given a direct operation in that the principles of sovereignty over the territorial sea governed the territorial limits of the common law and the right of innocent passage was considered a skeletal principle of Australian law from which no domestic law could derogate.

As for conventional law, Merkel J takes a more dualist transformation approach, requiring at least quasi-incorporation by legislation for rule adoption. Again, however, he gives direct operation to these rules as with customary international law. Justice Merkel's 'source' approach involves a process for adoption of a rule that in practice, accords with transformation (although in theory can be qualified incorporation), but an application of that rule that because of its high operativeness, is suggestive of strong incorporation. Focusing on the criteria for adoption separately from the domestic effect to be given to an international law rule (consistently with Mitchell's proposed approach) it is clear that the two involve different considerations and a continuum that describes either incorporation/transformation or direct/indirect operativeness alone will be inadequate to explain judicial decisions. Justice Merkel's judgment also demonstrates that the distinction between incorporation and transformation may be a futile one.[53] In most cases there will be some act or acts by one or more of the three branches of government affording recognition to a well-established international rule.[54]

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50 Guilfoyle, above n 6, 31.
51 Walker, above n 2, 229.
52 Mitchell, above n 5, 28.
53 See, eg, Guilfoyle, above n 6, 10.
54 A norm of *jus cogens* considered in *Nulyarimma* might be the only exception.

High Court

Chief Justice Gleeson, Justices Gaudron, Gummow and Hayne (majority joint judgment)

Consistently with the issue addressed by Olney J and the majority in the Federal Court, the High Court majority joint judgment also dealt with international law in respect of the sovereignty issue raised by the area of application of the Native Title Act and the possible qualification of the right of innocent passage.

The majority took an historical approach to the content of sovereignty at international law and commenced by citing a late nineteenth century criminal law text for the proposition that 'the critical question for a municipal court is what reach the Sovereign claims for *itself*, not what reach other Sovereigns may concede to it'.[55] Further texts from the same period were employed to highlight the distinction between ownership and sovereignty. The majority then looked at the history of the concept of sovereignty over the territorial sea. Their main source was Jacobs J in the *SSLA Case* where he distinguished between international and internal sovereignty but concluded that the essence of sovereignty was 'the right and power to govern that part of the globe'.[56]

The majority found that the assertion of sovereignty by Great Britain in 1824, over what is now the Northern Territory, included a territorial sea, but did not include any assertion of ownership or radical title to the sea. This conclusion is supported by *Keyn* in which it was held that although subject to British sovereignty, offshore areas were not part of the territory of England and could be governed only by legislative acts.[57]

The right of innocent passage similarly restricts the possibility for sovereign ownership of waters.[58] The majority traced the history of this concept in customary international law from statements in *Keyn* and cases contemporary to it as well as statements of Jacobs J in *SSLA* doubting the existence of the right by 1824.[59] They concluded (in accordance with *SSLA*) that the acquisition of sovereignty over the territorial sea had occurred by the operation of international law, and that whether or not the right of innocent passage was customary international law at that time, later assertions of sovereignty had been made consistent with the existence of that right so that it qualified the Crown's sovereignty and made it something less than ownership of the sea.[60] The content of the sovereignty asserted over the territorial sea is relevant to the extent of native title, which the common law can recognise offshore. The absence of Crown ownership or radical title to the sea means that the

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55 *Yarmirr* 208 CLR 1, 52 [51]. This approach is in contrast to that of the Commonwealth and the judges of the Federal Court who addressed the issue in terms of what international law concedes to the state: Commonwealth submissions to the High Court in D7 of 2000 (filed 3 November 2000), [3.36].

56 *Yarmirr* 208 CLR 1, 52-53 [52].

57 Ibid 54 [55]. They therefore do not support the conclusion of Merkel J.

58 Ibid 54-55 [57].

59 Ibid 54-55 [57]-[58].

60 Ibid 55-56 [59]-[61], 60 [75].

continuation of traditional rights is consistent with the common law, but the right of innocent passage is an integral part of the sovereignty asserted, and therefore prevents the recognition of exclusive native title rights to the sea.[61]

It is not clear from the majority's analysis whether they consider themselves to be applying international law per se or the common law as it has received international law into the domestic corpus. The source material is confined predominantly to very early texts and cases on sovereignty and precedents from within the common law system: specifically *Keyn* and its contemporaries and the *SSLA Case*. Only one modern text is cited[62] and this is in relation to the state of international law in the seventeenth and eighteenth centuries. This historical focus on the development of sovereignty over the sea is understandable in that the majority were concerned originally with the content of the sovereignty asserted over the territorial sea at the time of acquisition of sovereignty over the Northern Territory (1824). However, this basis is undermined by later statements that even if the right of innocent passage had not existed by 1824, later assertions of sovereignty must have occurred consistent with the preservation of that right.[63] Those later assertions are the 1990 extension of the territorial sea from three to 12 nautical miles, and the Northern Territory legislation, which applied its laws offshore.[64] At no point does the majority examine the content of the right of innocent passage under the United Nations (UN) Convention on the Law of the Sea[65] or the Territorial Sea Convention[66] which are the bases for the enactment of the Seas and Submerged Lands Act.

This methodology of looking primarily to common law precedent suggests that the majority are employing only so much of international law as has been 'transformed' into common law rather than the standard inquiry into the state of international law itself, which would involve consideration of international conventions, custom, general principles, judicial decisions and the opinion of publicists.[67] Although the majority appear to be investigating customary international law[68] they do not look closely at state practice or *opinio juris* other than conclusions recorded in *Keyn* and the *SSLA Case*.[69]

One distinction usually made between the incorporation and transformation approaches to customary international law is that incorporation, as employed by Denning MR in *Trendtex*,[70] allows the common law to take account of changes

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61 Ibid 68 [98].
62 Ibid 55 [58], fn 253.
63 Ibid 60 [75].
64 Ibid 57-58 [65]-[66], 60 [74]-[75].
65 (10 December 1982), 1833 UNTS 397 (hereinafter UNCLOS).
66 Convention on the Territorial Sea and the Contiguous Zone (29 April 1958), 516 UNTS 205, art 1.
67 Art 38(1), Statute of the International Court of Justice (26 June 1945), 156 UNTS 77.
68 *Yarmirr* 208 CLR 1 at [58].
69 Ibid 54-55 [56]-[58].
70 *Trendtex Trading v Central Bank of Nigeria* [1977] 1 QB 529.

in the content of international law.[71] When discussing *Keyn* their Honours take account of the contemporary state of international law as a way of confining the principle in *Keyn* to the issue in that case, namely the availability of coastal state criminal jurisdiction over a foreign vessel in the territorial sea. Although the majority refer only in passing to the changes in the international law of the sea,[72] they make two observations: 'acquisition of sovereignty over the territorial sea can be understood as occurring by operation of *international* law'[73] and 'the area of the territorial sea claimed by Australia has changed since Great Britain first acquired the territorial sea in the area in 1824'.[74]

When viewed together these statements must constitute some recognition of change in international law, albeit that the impact of such change is monitored through domestic legislative and executive acts.

Another distinction is that the incorporation approach involves an obligatory rather than discretionary application of international law to a legal question.[75] Again, the method of the majority does not make it clear whether they are applying international law or common law precedent. The most that can be said of the majority's approach is that their foray into the meaning of sovereignty over water at international law indicates a belief that international law must be applied where it is relevant. This approach is perhaps most consistent with the concept of a 'legitimate influence', the legitimacy on this occasion arising from the direct question of native title consistency with competing qualifications on offshore sovereignty.

The methodology of the majority suggests that they may be pursuing a transformation approach, which recognises and applies only so much of international law as has been adopted by statute or precedent, although it is able to account for change in the international rule. One difficulty with this approach is that it does not provide a modern analysis of the state of the international law of the sea for the guidance of future judicial decisions. There is no discussion of the legitimacy or otherwise of employing international law in this context or whether the majority is engaged in developing the common law. In terms of the monist/dualist spectrum, the majority appears confused about whether international law is a function of state sovereignty or the reverse. Initially they identify the critical sovereignty question to be what reach the sovereign state has asserted[76] and cite with approval the statement of Lush J in *Keyn* that municipal law may be extended only by statute and is not affected in terms of its territorial reach by the operation of international law. Later, however, their Honours consider sovereignty over the territorial sea to have been acquired by international law through the concession of the international community.[77]

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71 Mason, above n 3, 215.
72 *Yarmirr* 208 CLR 1, 34 [6].
73 Ibid 55 [59].
74 Ibid 58 [66].
75 Mason, above n 3, 214; Walker, above n 2, 230.
76 *Yarmirr* 208 CLR 1, 52 [51].
77 Ibid 55 [59].

Of central importance is the conclusion of the majority that the right of innocent passage in international law operates as a qualification both on Crown sovereignty and on the continuation of traditional laws and customs. This result affords a direct operativeness to international norms and indicates that the High Court are prepared to apply settled principles of international law as limitations on Crown sovereignty and that they consider exercises of sovereignty by the Crown to be justiciable in the domestic sphere.

This indication of a more monist perspective (with international law as the superior system) may raise questions about the previously non-justiciable status of the prerogatives and executive conduct of international affairs in terms of conformity with international law.[78] In *Horta v Commonwealth* an application for judicial review of executive conduct of international affairs and a challenge to the validity of legislation later enacted to give effect to the international relationship were rejected on the basis that if either contravened international law, it was not a matter justiciable by the Court.[79] The challenges were brought in respect of sections 51(xxix) and 61 of the Constitution, although the Court's judgment focused particularly on the former.[80] The plaintiffs claimed that the grant of Commonwealth legislative and executive powers could not have been intended to encompass their exercise in contravention of international law and that a law made in pursuance of such contravention could not be a law relevantly 'with respect to' external affairs. In rejecting that submission the Court held that there was no basis for limiting the external affairs power to 'Australia's legislative competence as recognized by international law'.[81] The Native Title Act was not enacted under the external affairs power, and yet the majority were prepared to assess the limits of its capacity to empower the making of determinations of native title according to the qualifications on Australian sovereignty imposed by international law. It is not clear that a case such as *Horta* would be considered substantively in future, but some qualification of the definitive rejection of impact of international law on the executive and legislature may be necessary. The result in *Teoh* would also be relevant in this regard.[82]

Justice McHugh (dissenting on Commonwealth's appeal)

Justice McHugh concludes from his construction of the Act that the legislature intended for native title to be determined in line with the development of the common law and only where the common law was present in the territory over which a claim as made.[83] Relying on *Keyn* and the *SSLA Case* for the

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78 G Lindell, 'Judicial Review of International Affairs' in Opeskin and Rothwell, above n 1, 161-2.

79 *Horta v Commonwealth* (1994) 181 CLR 183 (*Horta*). B F Fitzgerald, '*Horta v Cth*: The Validity of the Timor Gap Treaty and its Domestic Implementation' (1995) 44 *International and Comparative Law Quarterly* 643.

80 *Horta* 181 CLR 183, 195.

81 Ibid.

82 *Teoh* above n 9.

83 *Yarmirr* 208 CLR 1, 77 [131].

proposition that the common law is confined to land territory,[84] his Honour does not need to consider the international law of the sea in detail.

Justice McHugh refers to international law in relation to the area of application of the Act. His Honour notes that section 6 of the Act applies it to all 'waters' over which Australia asserts sovereign rights[85] and that 'waters' is defined in section 253 as including the sea, seabed and subsoil. The combination of these two sections leads to the possibility that areas of the high seas, waters above the continental shelf over which Australia asserts sovereign rights, could fall within the area of application of the Act. It would be inconsistent with Australia's international obligations to claim that native title could exist over an area of the high seas, which are not susceptible to ownership or sovereignty. His Honour concludes:

> If I thought that it was possible to read the Act as declaring that native title existed over the high seas, I think it would be necessary to read the Act down to be consistent with Australia's obligations in international law.[86]

Although not explicitly stated, McHugh J is here employing a recognised presumption of statutory interpretation that Parliament does not intend to legislate inconsistently with its international obligations.[87] The application by McHugh J of the presumption of statutory interpretation is an example of judicial harmonisation. His Honour would be prepared to read down a statute to ensure it accords with Australia's international obligations.

Justice McHugh finds that the common law is not co-extensive with territorial sovereignty on two grounds. The first is the principle of the absence of the common law below the low-water mark as stated in *Keyn* and approved in the *SSLA Case*.[88] The second is that sovereignty over the territorial sea is a function of the concession of rights to a coastal state by international law and the right of innocent passage indicates the qualitative distinction between sovereignty over land and sea.[89] Sovereignty over waters cannot be exclusive, so that it cannot qualify as territory and the common law does not therefore apply offshore of its own force. Offshore areas are governed solely by statute; an insufficient basis for recognition of native title.[90]

His Honour considers that the content of a coastal state's sovereignty over the territorial sea will change with (and is subject to) developments in international law.[91] He rejects, however, the claim of Merkel J in the court below that a function of this change has been to extend the common law offshore (that is, to make the common law co-extensive with sovereignty). The basis for McHugh J's position is again *Keyn* and the *SSLA Case* and not a consideration of the present state of international law in relation to the

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84 Ibid 91-92 [179]-[181].
85 Ibid 76-77 [129].
86 Ibid.
87 Shearer, above n 1, 48; Balkin, above n 1, 133.
88 *Yarmirr* 208 CLR 1, 91-92 [179]-[181].
89 Ibid 103 [217].
90 Ibid 106-107 [231].
91 Ibid 103 [217].

territorial sea. One reason for this approach may be that McHugh J's analysis of the Act requires the presence of the common law at the critical date of acquisition of sovereignty in order to underpin native title (that is, for the radical title of the Crown to be burdened). His Honour is concerned with the content of sovereignty *in 1824*.[92] He concludes that even if he were to accept Merkel J's analysis, there would be a gap between the date of acquisition of sovereignty and the date of extension of the common law to the claimed area, which is fatal to the claim.[93]

Justice McHugh's final reference to international law is a brief criticism of the majority judgment that they would allow native title claims to the high seas.[94] This conclusion does not follow from the majority reasoning because insofar as recognition in the territorial sea is qualified by the right of innocent passage, it would follow that the international law principle of freedom of the high seas[95] would be inconsistent with *any* proprietary rights in that area and would preclude common law recognition of native title to the high seas.[96]

Justice McHugh's use of international law is difficult to characterise because there are a number of issues on which his prior reasoning in relation to construction of the Act and the common law precludes the influence of international law. For example, his Honour appears to reject the incorporation of changes in international sovereignty over the territorial sea, but for the mixed reasons that: 1) he does not consider any change to have taken place which would effect an extension of the common law (based on the *SSLA Case*);[97] 2) he considers the content of sovereignty as at 1824 to be the critical question (based on the role of the common law in the Act);[98] and 3) even examining international law, he does not believe Merkel J's acquisition of sovereignty date to be correct because Australia's statements at the 1930 League of Nations Conference did not amount to an assertion of sovereignty over the territorial sea.[99]

There are perhaps two useful indicators of McHugh J's position. In construing the Act, he applies the harmonisation approach through a presumption of statutory interpretation. This presumption, and the harmonisation approach itself, view international law as an important consideration, but retain the domestic law as superior in authority. The primary example is *Polites* [100] in which a clear legislative intention to breach

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92 Ibid 107-108 [234].

93 Ibid 106-107 [230]-[231]. This approach presumably accepts the Commonwealth's submission that discontinuity in the exercise of native title rights over the claimed area leads to an extinguishment prior to recognition: Commonwealth submissions to the High Court in D7 of 2000 (filed 3 November 2000), [3.51] [4.3].

94 *Yarmirr* 208 CLR 1, 107 [232].

95 Art 87 UNCLOS, above n 65.

96 This conclusion is supported by the analysis of Kirby J: *Yarmirr* 208 CLR 1, [276]-[277].

97 *Yarmirr* 208 CLR 1, 103 [218].

98 Ibid 87 [168], 107-108 [234].

99 Ibid 104 [220].

100 *Polites v Commonwealth* (1945) 70 CLR 60 (*Polites*).

international obligations was upheld by the High Court. In that case, two Greek nationals had received notices of compulsory service issued under regulations validly made, the power for which came from an amendment to the National Security Act 1939. The plaintiffs argued that the notices and the regulations were invalid because they authorised the conscription of aliens residing in the territory of a foreign power, in contravention of international law. Although strongly affirming the presumption that Parliament does not intend to legislate contrary to international law, their Honours rejected any limitation on the plenary empowerment of the Executive to deal with the conscription of aliens.[101] The clear words of the statute manifested an intention which must be given effect irrespective of the breach of international law. A 'faint' suggestion, similar to the submission in *Horta*, that the grants of legislative power might be subject to consonance with international law, was swiftly rejected.[102]

Justice McHugh's formulation of the presumption does not necessarily accord with *Polites* because he states his preparedness to read the legislation subject to the presumption even if it does not accord with the intention of Parliament.[103] His approach may go so far as to consider international law to be a limitation on the legislative power of the Commonwealth.

Another indication of his Honour's approach is the confinement of sources on the effect of the international law of sovereignty to citation of the leading precedents. He considers *Keyn* and the *SSLA Case* to be a complete answer to claims of changes in international law without further investigation. This approach is consistent with transformation that views domestic articulation of international law as binding rather than subject to external (international law) verification.[104] Justice McHugh's treatment of precedent highlights an internal illogicality in the transformation theory. His Honour appears to consider himself limited to the use of existing precedents adopting international rules, but this does not involve any consideration of how the rules came to be adopted in those cases. If judicial transformation is to be relied upon, no judge can first adopt a rule legitimately and any application of precedent must have involved an approach other than transformation.[105]

Justice Kirby (dissenting on claimants' appeal)

Justice Kirby has previously endorsed a robust role for international law in the Australian legal system both judicially[106] and extra-judicially.[107] His Honour's

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101 Ibid 69 (Latham CJ), 77 (Dixon J), 79 (McTiernan J), 81 (Williams J).

102 Ibid 69 (Latham CJ), 74 (Rich J), 75 (Starke J), 79 (McTiernan J), 81 (Williams J).

103 *Yarmirr* 208 CLR 1, 76-77 [129].

104 This approach is the opposite of the majority in the Full Federal Court: *Yarmirr* 101 FCR 171.

105 L Erades, *Interactions between International and Municipal Law - a comparative case study* (1993), 660; Walker, above n 2, 229; Crawford and Edeson, above n 10, 73.

106 *Cachia v Hanes* (1991) 23 NSWLR 304, 313; *Jago v District Court of New South Wales* (1988) 12 NSWLR 558, 569; *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 418-19 [167] (*Kartinyeri*).

107 Mason, above n 1, 223-24; M D Kirby, 'The Growing Rapprochement between

reasoning in *Yarmirr* is significantly influenced by principles of international law.

Unlike the other members of the Court, Kirby J does not employ international law to consider the validity of the area of application of the Act.[108] His Honour employs statutory construction principles to reject the Commonwealth's contention that the Act does not apply offshore and the connected proposition that the common law, as referred to in the Act, cannot recognise an offshore interest. This conclusion is supported by reference to decisions in the municipal courts of other countries and international reports.[109]

International law then becomes relevant in dealing with the claimants' appeal and the issue whether the 'qualified power of exclusion' claimed over the offshore area 'is recognised by law'.[110] The main international law principle that Kirby J brings to bear on the interpretation of the Act and the common law, is the same as that applied in *Mabo*: racial non-discrimination.[111] This principle influences his Honour's conclusion that the Act cannot be construed to allow the common law to operate in a discriminatory way by preventing the recognition of traditional rights to the sea.[112] Similarly, non-discrimination requires that, in making a determination of native title rights and interests, the assertion of such rights be considered in the context of the relevant traditional laws and customs rather than applying English common law notions of exclusion and enforcement.[113]

His Honour also employs two principles from the international law of the sea. The right of innocent passage prevents native title rights to the sea that exclude all others,[114] and the principle of the common heritage of humanity that governs the freedom of the high seas would prevent a proprietary claim in that area.[115] The claimants' concessions that their power of exclusion would not extend to any part of the high seas nor to substantial interference with the right of innocent passage in the territorial sea were thus rightly made.

In the application of both the right of innocent passage and non-discrimination, Kirby J points to the recognition of the rule in customary and conventional international law to which Australia is a party and the further

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International and National Law' in G Sturgess and A Anghie, *Visions of the Legal Order in the 21st Century, Essays to honour his Excellency Judge CJ Weeramantry*, cited in Submissions of the Mirimbiak Nations Aboriginal Corporation to the High Court in D7 of 2000 (filed 15 January 2001) [1.4].

108 Other than in a brief but not determinative reference: *Yarmirr* 208 CLR 1, 116 [259].

109 Ibid 118 [264].

110 Ibid 120 [271].

111 Ibid 131 [294]; the argument is contained in the Mirimbiak submissions, above n 106, [5.4] and was also raised by a HREOC intervention and accepted by his Honour in *Western Australia v Ward* (2002) 76 ALJR 1098, esp at 1213 [574]-[575].

112 *Yarmirr* 208 CLR 1, 134 [300].

113 Ibid 140-141 [317].

114 Ibid 121-122 [272]-[273].

115 Ibid 123-124 [277].

domestic recognition afforded by legislative implementation or acknowledgment. In the case of the right of innocent passage, Kirby J concludes that it qualifies Australia's sovereignty through the operation of customary international law, Australia's ratification of the UNCLOS, the enactment of the *SSLA* and the executive proclamation of a 12 nautical mile territorial sea.[116] In the case of non-discrimination, he gives content to this principle in the context of indigenous rights by reference to reports of the UN Human Rights Committee and domestic decisions employing the principle (such as *Mabo* and those which have recognised native rights to fish).[117]

Justice Kirby identifies three circumstances in which international law is a 'legitimate influence' on judicial reasoning.[118] The first is where there is a gap in the common law. This basis reflects his previous judgments such as in *Cachia v Hanes*, '[the proper approach] uses … statements of international law as a source for filling a lacuna in the common law of Australia'.[119]

The second is to resolve an ambiguity in legislation.[120] Justice Kirby extended the application of that principle to the Constitution in *Kartinyeri* dealing with the construction of the races power.[121]

Both preconditions for the influence of international law are available in the present case where his Honour is dealing with an ambiguity in legislation, which itself refers to common law recognition. In particular, for the task of resolving what recognition the common law will afford to an offshore exclusive claim, his Honour says, 'I regard international principles as an even more persuasive source … in the present context [than English common law]'. There are two reasons for the greater relevance and applicability of international norms over competing English common law precedent when judges are called upon to develop the common law in Australia. The first is that the common law rules were developed in a legal and social context vastly removed from the issues of recognition of traditional indigenous connection with land and waters and the second is that the international character of human rights law renders it more universal and therefore more likely to provide a just outcome.[122]

Justice Kirby defends the employment of international law over English common law precedent by reference to the step taken by the majority in *Mabo*.[123] It is unclear whether such an approach may extend beyond the development of the common law to re-open Australian precedent or settled principles where they are shown to be unjust or outdated in light of international law developments. *Mabo* itself demonstrates that the development of the common law to recognise a new right may conflict with pre-existing understandings of the common law, even contained in precedent. For example,

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116 Ibid 121 [272].
117 Ibid 118-119 [264], 131-132 [295].
118 Ibid 130 [292].
119 *Cachia v Hanes* (1991) 23 NSWLR 304, 313.
120 *Yarmirr* 208 CLR 1, 130 [292].
121 *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 418-419 [167].
122 *Yarmirr* 208 CLR 1, 132-133 [297]-[299].
123 Walker, above n 2, 213; *Yarmirr* 208 CLR 1, 130-131 [293].

his Honour's conclusion that the common law will recognise an exclusive fishery would be inconsistent with prior authority on the public right of fishing, which had not previously been qualified by native title rights.[124] Similarly, his Honour considers that a power of temporary exclusion of all navigation for cultural purposes could be recognised by the common law notwithstanding prior understandings of the absolute right of public navigation.[125] Such developments are not inconsistent with a clarified understanding of those common law rights as purposive rather than absolute.

In his conclusion, his Honour points again to the effect of *Mabo* on the sources available for the interpreting the common law. The underlying rationale for the change is the consequences of principles of international human rights law and a perception that Australia ought to exercise jurisprudential independence in areas of law that are peculiar and vital to the Australian situation such as native title.[126]

In the High Court, Kirby J is clearly the most inclined to employ international law in his reasoning. He is the only justice to articulate the basis on which international law is a legitimate influence on his decisions and considers international law more persuasive than English common law precedent where the subject matter of the decision is one more appropriately handled by universal principles expressed in international human rights covenants than by the application of rules 'likely to be affected by accidents of legal history that occurred on the other side of the world and long ago in completely different social and legal conditions'.[127]

Justice Kirby exhibits a monist approach in that he considers universal principles articulated in international law to be directly applicable (in the naturalist moral sense) in the domestic sphere. In the present case, he goes no further than the application of well-established norms that have received the clear acknowledgment of Parliament. His Honour's distinctive path is his preference for such norms over English common law precedent and by enabling those norms to develop the common law, requiring new understanding of established principles in the common law.

Justice Kirby's approach still requires the trigger of either common law uncertainty or legislative ambiguity for international law to become a legitimate influence. However, it may be that the lacuna can be created by the assertion of a new right, such as offshore native title in *Yarmirr*. This approach does not appear to fall within any of the categories suggested by Walker and demonstrates the weakness of the transformation/incorporation dichotomy. Justice Kirby's application only of principles that are established and to some extent 'transformed', places him towards the transformation end of the spectrum, but his view of international law as equal or superior to common law makes him a strong incorporationist. His Honour also takes the incorporationist

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124 Ibid 129 [290].
125 Ibid 125 [281].
126 Ibid 141 [318].
127 Ibid.

approach to source material, applying the most recent Conventions and articulation of international law. On the suggested three-stage analysis, his Honour's approach is weak transformation with a high degree of operativeness in respect of both customary and conventional law (although no distinction between the two was required in the present case because they were in accord).

Justice Callinan (dissenting on Commonwealth appeal)

Justice Callinan finds that the principles of international law in relation to the high seas have been incorporated into Australian common law by their reception in British common law in the decision in *Keyn*.[128] This is a clear example of the weak transformation approach because a prior judicial decision is sufficient basis for the application of international law and there is no accounting for any changes in international law which may have taken place since the precedent was decided. Callinan J (unlike Merkel J) does not consider whether the developments in international law since *Keyn* may have abrogated the previous understanding which did not equate sovereignty with ownership.

In considering overseas precedents from North America, his Honour refers to a connecting feature of the cases as 'an acknowledgement of the relevance and influence of international law and the history of international relations on the development of the concept of sovereignty over the territorial sea as part of the municipal law.'[129] This may indicate a willingness on the part of Callinan J to take account of the approach of other common law jurisdictions to international law principles sought to be applied in the Australian context. There is no suggestion, however, that his Honour would consider such 'parallel' decisions a sufficient basis for the incorporation of an international law rule. The basis of his application of the rule in *Keyn* is that at the time it was decided, British common law governed the common law in Australia.[130] In common with the other judges who place reliance on *Keyn*, his Honour does not consider the implications of accepting a previous judicial adoption of international law rather than engaging in examination of the present rule. This is particularly relevant when using English common law precedent because the incorporation approach has dominated in that jurisdiction.[131] Justice Callinan takes a dualist approach that allows for judicial transformation of international law.

Summary

The dominant approach to international law revealed in the judgments of Olney J and majority in the Federal and High Courts is a type of transformation. Each of these judgments applied international law to the issue of offshore sovereignty for the purpose of assessing either the validity of section 6 or the consonance between the area of application and the claimed area, and the impact of the right of innocent passage on common law recognition under the

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128 Ibid 158 [364].
129 Ibid 164 [382].
130 Ibid 158 [364].
131 Crawford and Edeson, above n 10; although not until 1977 in *Trendtex*.

Act. The approach taken to adoption of international law rules was weak transformation. Judicial precedent was relied on for the adoption of customary international law and statutory references (quasi-incorporation) were emphasised in the adoption of rules codified by international conventions. In each of these judgments, rules, once transformed or received were given a high degree of operativeness and a direct operation as qualifications on sovereignty and legislative reach. It is usually assumed that rules received under the transformation approach take their precedence or operativeness from their mode of reception: statute or judicial decision. Instead, the prevailing approach treated international law as an obstacle to common law development in a particular direction, and a limitation on legislative capacity. International law was arguably given a role more significant than a mere 'influence'.

Of those dissenting in the Federal and High Courts, Merkel J is the only one to adopt a qualified incorporation approach according to his 'source' principles as articulated in *Nulyarimma*. Nevertheless, his Honour's handling of international law in *Yarmirr* closely resembles transformation because it is possible to identify acts of reception in respect of the international rules sought to be applied in this case. It is submitted that in only very few cases will there be no such acts upon which the reception of a well-established international rule may be founded.

The process of adoption employed by Merkel J is not dissimilar to that employed by Kirby J in respect of customary and conventional international law, and indeed not dissimilar to that of the majority in their respective Courts. Both identify the relevant legislative and judicial acts. The difference is that Justices Merkel and Kirby, having affirmed the adoption of particular rules, engage in an investigation of the current status and content of that rule. The result is that their Honours affirm the possibility of offshore application of the common law and the compatibility of some exclusivity of native title with other rights under the international law of the sea. By contrast, the majority in each Court restricted itself to earlier domestic judicial articulations of the international rules. The approach of Justices Merkel and Kirby has the advantage of accounting for changes in international law without straying into what some might consider the illegitimacy of adoption without sufficient executive or legislative acknowledgment of a rule.

Justices McHugh and Callinan each take a more dualist transformation approach, but one that allows for reception of a rule through precedent as well as legislative enactment. There is a possible hint of a more robust, perhaps harmonization, approach from McHugh J in his Honour's references to statutory construction in accordance with international law. This indication suggests appropriately received rules might be given a direct operation.

Further Comments

Theoretical framework

The foregoing analyses demonstrate some of the limitations of the existing theoretical dichotomies: transformation/incorporation, direct/indirect operation.

Each is limited in its descriptive capacity because it focuses on only one aspect of the use of international law: adoption or effect. The analyses demonstrate that the incorporation/transformation continuum is itself directed at two separate concerns. Strong and weak incorporation, because it accepts the direct applicability of international norms, is distinguished according to the superiority of the rule in the domestic sphere, and strong and weak transformation focuses on the different acts that will be sufficient to transform a rule, questions of superiority then being decided by the method of transformation, that is, the domestic hierarchy of statute over common law. As the judgments indicate, there may be little meaningful distinction between the incorporation and transformation approaches where domestic adoptive acts exist and those adoptive acts are not always determinative of the effect to be given to a rule.

It is therefore necessary to approach both the analysis of judicial reasoning and the advocacy of international law applicability in three stages.[132] The first is to identify whether customary or conventional international law is being employed. The second is to define how the rule may enter the domestic sphere. This involves the application of the incorporation-transformation continuum as a method of plotting the sufficiency of various adoptive acts, such as previous judicial decisions, ratification or legislative implementation. The final stage is to consider the effect or 'operativeness' to be given to an international law rule that has been adopted. This stage is not limited to the direct or indirect operation afforded a rule, but also includes questions of the superiority of a rule over statute or the common law.

Influential factors for judicial adoption and application of international law

The judgments considered above indicate a number of factors that may influence the adoption and effect of an international rule.

Customary/conventional

The adoption of customary international law involves an evidentiary obstacle in that judges, influenced by the positivist tradition, have difficulty being convinced of the level of acceptance and clarity of a rule without codification.[133] The establishment of these elements (state practice and *opinio juris*) also requires the employment of international legal method. The legitimacy of applying customary international law without domestic legislative implementation or recognition was a concern in *Nulyarimma*. Justice Wilcox considered that it would be 'curious' for an international obligation incurred by custom to have greater domestic consequence than a convention ratified by the executive.[134] As Guilfoyle notes, particularly with respect to a norm of *jus*

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132 The following is a development of the framework proposed by Mitchell, above n 5, 28.

133 Ibid 31-32; Balkin, above n 1, 124; Mason, above n 1, 214; and see Guilfoyle, above n 6, 24.

134 *Nulyarimma* 96 FCR 153, 162 [20].

cogens, the proof of a rule of customary international law will involve more than mere executive assent and that it is not an obligation capable of being resisted by Australia except possibly pursuant to a persistent objection. The level of acceptance required and the obligatory force of customary international law renders it more, rather than less, apt for direct domestic application by the judiciary.[135]

Application of conventional international law will remain more acceptable to judges because they can point to ratification by the executive of a document that contains the rules and principles to be applied. *Yarmirr* was not a case in which the distinction between customary and conventional international law was especially prominent. Perhaps assisted by the confirmation of subsequent codification in multilateral conventions, their Honours displayed little reluctance to identify the relevant dates of international acceptance of the rule. The necessity for examination of customary international law also differed depending on the critical date identified for establishment of the claimed native title rights.

Method of adoption

Justice Merkel's reasons in *Nulyarimma* and *Yarmirr* indicate that an act of acknowledgment by the executive of a customary international law rule, and the extent to which near-universal acceptance of the content and effect of the rule can be established, will influence judicial employment of customary international law. The same concerns govern the employment of a Convention. The Convention must have been ratified by the Australian executive and the extent to which the Convention reflects 'universal principles of human rights'[136] will enhance its adoption. The application of a treaty that has been legislatively implemented is no more than the application of domestic law; however, quasi-incorporation or executive acts pursuant to the treaty will be considered a domestic acknowledgment of international obligations. A judicial precedent that applies or refers to the rule will also be influential – again because the effect is to allow for use of international principles simply by the application of domestic law. The handling of *Keyn* in the present case indicates that if the precedent applies an older form of the rule, or even misapplies the rule, this will be a significant obstacle to the adoption of the current norm.

The continuum of adoption probably stretches from a nascent or emerging principle to one which is well-established and universally accepted and from general acceptance by nations, through executive acknowledgment, previous judicial application, and quasi-incorporation, to full legislative implementation.

Successful advocacy for adoption, however, may depend not on positioning on the line, but the presentation of a matrix of domestic and international acts that warrant the conclusion that the rule has been, or should be, adopted. Rather than defining a judicial approach according to the sufficiency of the character or author of any particular act, it seems more likely that a collection of

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135 Guilfoyle, above n 6, 9, 24.
136 *Mabo* (1992) 175 CLR 1, 42 (Brennan J).

recognition events will interact with evidence of the level of international acceptance of a rule to influence judicial adoption. The character of the rule may also be influential. In *Yarmirr*, the justices were willing to recognise settled regulatory principles of the international law of the sea, but only Kirby J utilised what might be considered a value principle of racial non-discrimination even where the latter had arguably received greater domestic implementation than the former.

Effect or operativeness

There are many ways in which international law can impact on domestic law even once a rule has been adopted. It will be easier to argue for an indirect rather than direct operation of a rule because it is less likely to involve a perceived infringement of the separation of powers. In the present case, some of the applications of international law were direct in nature. In particular, the characterisation of the right of innocent passage as a skeletal principle of Australian law and a qualification on Australian sovereignty led to the conclusion that the common law could not recognise exclusive offshore rights. International law is applied in this way as a limitation on the development of the common law, rather than influencing the reconsideration of common law doctrines through a principle such as non-discrimination.[137] As common law recognition was an element of statutory determination of a native title claim, the international rule also qualified legislative capacity.

In terms of superiority, international law generally cannot override statute, but characterising the interaction of a statute with a universal principle of international law as an issue of construction may provide a path for indirect operation, which may have a substantive consequence. This is the effect of Kirby J's use of non-discrimination as a governing interpretive tool for recognition of traditional connection with land under the Native Title Act and common law. Although it is an unusual circumstance for a statutory provision to be predicated expressly on the common law, it is widely recognised that the common law may inform interpretation of statutes and the Constitution.[138] Development of the common law, legitimately influenced by international law may have an indirect impact on the interpretive process in addition to the existing presumption of statutory interpretation. Justice McHugh's dicta that he would not permit a statute to assert the existence of proprietary interests in the high seas as a matter of construction would, were the claim in relation to that

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137 *Mabo* supposedly involved an indirect operation of international law but the changing of settled common law is arguably something more than indirect: Walker, above n 2, 213.

138 Eg interpretation of the Uniform Evidence law often involves reference to common law predecessors (see *Papakosmas v R* (1999) 196 CLR 297) and s 9 of the Evidence Act 1995 (NSW) expressly preserves the operation of the common law wherever the Act does not expressly or impliedly exclude it. On the Constitution see M G Sexton, 'Constitutional Intersections: the Common Law and the Constitution' in J McMillan and J Jones (eds), *Public Law Intersections* (2003) 79; and A Stone, 'The Common Law and the Constitution: Comment' Annual Public Law Weekend, Canberra, 2-3 November 2001 (copy with author).

area, result in the denial of proprietary rights under Australian law. Again, perhaps an indirect operation, but with a substantive effect.

Although an extensive examination of the cases where international law has and has not been given effect in a domestic context is beyond the scope of this comment, it is possible that in line with dualist understandings of the separate spheres of operation of international law, courts are more prepared to give a direct operativeness to international law where it limits the conduct of government than where it would found a private right or obligation. For example, *Yarmirr* in terms of sovereignty over the sea, the extent to which *Teoh* controls executive action and reconsideration of sovereignty over land through the principle of racial non-discrimination in *Mabo* could be seen to allow international law an operation that governs the state. By contrast, cases that have sought to extend the common law in favour of the individual based directly on international law rights or obligations have met with greater judicial reservation.[139] If this characterisation is accurate, a case that argues for a limitation on some aspect of government through the operation of an international law principle may be more likely to succeed notwithstanding that the result may be to create individual or communal entitlements, for example, native title to land or sea, or a legitimate expectation in administrative decision-making.

Combination of factors

Yarmirr indicates that there is further advantage in seeking supporting material within the domestic legal corpus. For example, a reflection of an international legal principle in common law doctrine.[140] Insofar as judicial law-making is involved in developing the common law in line with international law, other factors such as policy considerations, changing societal values, cost-benefit analyses and the incremental nature of the development[141] will aid in confirming the legitimacy of the international law influence.

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139 *Nulyarimma* (1999) 96 FCR 153; *Dietrich v R* (1992) 177 CLR 292; see Guilfoyle, above n 6, 33-36.

140 *Dietrich* (1992) 177 CLR 292, 300 (Mason CJ), 307 (McHugh J); discussed in Walker, above n 2, 214.

141 See M H McHugh, 'The Judicial Method' (1999) 73 *Australian Law Journal* 37, esp 40-44.

Conclusion

Two limitations on the implications drawn from *Yarmirr* must be acknowledged. First, as discussed in relation to the judgment of Merkel J, the usual judicial abstinence from articulating a theory of adoption of international law means that conclusions drawn from actual applications of international law may not reflect the full scope of a judge's approach. Arguably, a focus on the practical handling of international law is more likely to result in understating rather than overstating a favourable judicial disposition towards international law.

The second related limitation is that this examination has focused predominantly on the application of international law in a single case. A number of factors may have influenced judicial willingness to apply international law and do so directly in *Yarmirr*. The aspects of the international law of the sea, which were relevant in this case, were well-settled in both custom, to which Australia had contributed both state practice and *opinio juris*, and multilateral conventions to which Australia was a party and which had received some legislative implementation. In *Yarmirr*, the content of the common law was made directly relevant by section 223(1)(c) of the Native Title Act. International law was thus able to influence not only common law development but also statutory interpretation in a substantive way. Finally, the Commonwealth appealed to international law as a factor qualifying the recognition of native title. It may be more appropriate to accede to a governmental request for the application of international law to its own statutes than where this is resisted. Unfortunately, the result was to use international law to limit the rights of indigenous peoples in an arguably discriminatory fashion.

Justice Kirby's judgment highlights the judicial discretion available in determining which international law influences the development of the common law. International law is not a single body of rules and principles the application of which always produces the same result. Theories of adoption, although serving different perceptions of the appropriateness of international law applicability per se, do not speak to the determination of which part of the corpus of international law will be relevant to any particular case. The value judgments involved in the exercise of that discretion are not revealed by an identification of previously successful factors. Other than constitutionalism, factors such as the floodgates principle may operate in individual rights cases and the highly politicised nature of cases such as *Horta* and *Nulyarimma* may better explain those decisions than a judicial concern about incorporation theory.

This comment has sought, however, to identify some of the factors that, when presented in submissions, may assist judges to make legitimate use of international law in the domestic context. By employing the three-stage approach outlined above, it may also be possible to address judicial reticence towards adoption of an international law rule for fear of the extent of operativeness it may entail as a result of the conflation of the process of adoption and application under existing models.

It is inevitable that the corpus and fields of international law will continue to grow and, as a result, the internationalisation of Australian law. Australian courts will increasingly be asked to perform the role of harmonisation between domestic and international law. It will be vital for practitioners to assist the court to identify legitimate means for doing so.