THE CANADIAN SUPREME COURT ON CUSTOMARY INTERNATIONAL LAW: LESSONS FOR AUSTRALIA

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This article discusses customary international law in Australia. It is the first article to take Canada as a comparative jurisdiction and consider the landmark decision of the Supreme Court of Canada in Nevsun Resources Ltd v Araya (2020) 443 DLR (4th) 183 ('Nevsun') from an Australian perspective. The argument advanced is that moving past old precedents on the relationship between customary international law and the common law is only a first step to Australian courts being able to give domestic effect to customary norms. The split in the Canadian Supreme Court in Nevsun points to further issues. These relate to proving custom before domestic courts and defining the boundaries of legitimate judicial function in receiving such norms. Possible solutions to these issues are discussed. This article also ties together recent cases in the High Court and Federal Court which have dealt with questions of customary international law.

I INTRODUCTION

On 28 February 2020, in *Nevsun Resources Ltd v Araya* ('*Nevsun*'),[1] a majority of the Supreme Court of Canada declined to strike out claims brought against a Canadian mining company for breaches of customary international law and stated: 'The fact that customary international law is part of our common law means that it must be treated with the same respect as any other law.' The same cannot be said of Australia, where the commonly accepted view is that customary international law is not part of the common law.[2] Framed by this basic contrast between Canada and Australia, this article has a simple purpose: to use the *Nevsun* decision to shine

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1 [2020] 1 SCR 166, 224 [95] (Abella J) ('*Nevsun*'), quoting Rosalyn Higgins, 'The Relationship between International and Regional Human Rights Norms and Domestic Law' (1992) 18(4) *Commonwealth Law Bulletin* 1268, 1273 <https://doi.org/10.1080/03050718.1992.9986225>.

2 *Australian Competition and Consumer Commission v PT Garuda Indonesia [No 9]* (2013) 212 FCR 406, 416 [41] (Perram J) ('*PT Garuda [No 9]*'). See also LexisNexis, *Halsbury's Laws of Australia* (online at 4 October 2021) 215 Foreign Relations, 'Relationship between Public International Law and Australian Law' [215-50].

new light on an area of Australian law characterised by much commentary and little progress.

The argument advanced in this article is that moving past existing precedents on the relationship between customary international law and the common law is only a first step to Australian courts being able to give domestic effect to customary norms. The split in the Canadian Supreme Court in *Nevsun* points to further issues. These relate to proving custom before domestic courts and defining the boundaries of legitimate judicial function in receiving such norms. Placing oneself in the shoes of an Australian judge asked to give domestic effect to a customary norm, the full breadth of the problem is plain to see: not only must they be satisfied that precedent does not stand in the way, but also that the content of the rule is proven and that it is appropriate that a judge (rather than Parliament) enforces the rule.

The scope of the argument in this article is thus both limited and practical. The Canadian experience is used to support my contention as to what steps an Australian judge would have to go through to give domestic effect to an international customary norm; or, from another perspective, what arguments a party in court should make to achieve this result. A necessary step in this process is to argue that it is *open*, as a matter of law, for this 'incorporation' to occur, or further, that the correct legal position is that customary international law *is* part of the Australian common law. The focus of this article is *not* the normative debate as to whether custom *should be* a part of Australian law or to comprehensively explore what this incorporated state of affairs might look like. Nonetheless, I outline the types of cases where customary principles can be useful and desirable in a domestic setting. On any view, the current state of the law in Australia is unsatisfactory and should be clarified.

This article has four substantive parts. Part II is a brief introduction to the intersection of international law with Australian law and the attractiveness of Canada as a comparative jurisdiction. In Part III, I show that the generally accepted position that custom is not part of Australian common law rests on weak precedent, and that it is open to courts to accept that customary norms are part of domestic law. I also outline the types of cases where such norms have a role to play. In Part IV, I look at the procedural question of 'proving' custom. I argue that although treating custom as a question of law (if convenient, under the idea of judicial notice) is a good starting position, this should not distract from the empirical (factual) inquiry needed to establish a customary rule. In Part V, I argue that giving effect to customary norms in Australian courts is legitimate on both an international and domestic understanding of judicial function.

This article is the first dedicated comparative study of the reception of customary international law in the common law of Australia and Canada. *Nevsun* is a landmark decision which warrants consideration by Australian lawyers. The key contribution of this article is using the Canadian experience to move the debate beyond the two principal cases which apparently stand for the proposition that customary international law is not part of Australian common law: *Chow Hung Ching v The King* ('*Chow*')[3] and *Nulyarimma v Thompson* ('*Nulyarimma*').[4] Further,

3 (1948) 77 CLR 449 ('*Chow*').
4 (1999) 96 FCR 153 ('*Nulyarimma*').

my discussion of proof has relevance beyond the question of whether custom is part of the common law. Parties before the court may need to demonstrate such rules in arguing for a particular statutory construction or the validity of legislation under the external affairs power, section 51(xxix), of the *Australian Constitution* (‘*Constitution*’).[5] Finally, this article is the first to gather together recent cases before the High Court and Federal Court[6] discussing customary international law.

II INTERNATIONAL LAW IN AUSTRALIA AND CANADA

Australian judges and lawyers have long spoken of the growing impact of international law on the domestic legal system.[7] Writing extra-curially in 1998, Michael Kirby said that the new millennium ‘will be a time when the reconciliation of the two systems of law – national and international – will be completed’.[8] Of Australia, he noted a ‘growing rapprochement’ between the two systems. However, the nature of this growth is elusive and has not necessarily retained momentum. Generalist texts published on international law in Australia focus on the Mason Court in the early 1990s,[9] which was characterised by a new openness to international law and landmark judgments in this area.[10] Contrary to Kirby’s hope

5 See, eg, Henry Burmester, ‘The Determination of Customary International Law in Australian Courts’ (2004) 4(1) *Non-State Actors and International Law* 39 <https://doi.org/10.1163/157180704323129430>, discussing *Polyukhovich v Commonwealth* (1991) 172 CLR 501 (‘*Polyukhovich*’).

6 See especially, *PT Garuda [No 9]* (n 2); *Ure v Commonwealth* (2015) 323 ALR 164 (‘*Ure Trial*’); *Ure v Commonwealth* (2016) 236 FCR 458 (‘*Ure Appeal*’); *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514 (‘*CPCF*’); *Taylor v A-G (Cth)* (2019) 268 CLR 224 (‘*Taylor*’); *Love v Commonwealth* (2020) 270 CLR 152 (‘*Love*’).

7 Sir Gerard Brennan, ‘Opening of Colloquium’ (Speech, 50th Anniversary of the International Court of Justice, 18 May 1996); Sir Anthony Mason, ‘The Influence of International and Transnational Law on Australian Municipal Law’ (1996) 7(1) *Public Law Review* 20; Justin Gleeson, ‘Australia’s Increasing Enmeshment in International Law Dispute Resolution: Implications for Sovereignty’ (2016) 34 *Australian Yearbook of International Law* 1 <https://doi.org/10.1163/26660229-034-01-900000002>; Justin Gleeson, ‘The Increasing Internationalisation of Australian Law’ (2017) 28(1) *Public Law Review* 25; Michael Kirby, ‘The Growing Impact of International Law on the Common Law’ (2012) 33(1) *Adelaide Law Review* 7 (‘The Growing Impact’); Robert French, ‘Australia and International Law’ (2020) 5 *Perth International Law Journal* 3.

8 Michael Kirby, ‘The Growing Rapprochement between International Law and National Law’ in Garry Sturgess and Antony Anghie (eds), *Visions of the Legal Order in the 21st Century: Essays to Honour His Excellency Judge CJ Weeramantry* (Kluwer Law International, 1998) 333, 354.

9 Martin Dixon, Robert McCorquodale and Sarah Williams, *Cases and Materials on International Law* (Oxford University Press, 6th ed, 2016) 125–9 <https://doi.org/10.1093/he/9780198727644.003.0002>; Gillian D Triggs, *International Law: Contemporary Principles and Practices* (LexisNexis Butterworths, 2nd ed, 2011) 178–82, 189–93; Annemarie Devereux and Sarah McCosker, ‘International Law and Australian Law’ in Emily Crawford and Donald R Rothwell (eds), *International Law in Australia* (Thomson Reuters, 3rd ed, 2017) 23.

10 Cheryl Saunders, ‘The Mason Court in Context’ in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996) 2, 2–4, citing *Dietrich v The Queen* (1992) 177 CLR 292 (‘*Dietrich*’), *Mabo v Queensland [No 2]* (1992) 175 CLR 1 (‘*Mabo*’) and *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (‘*Teoh*’). See also Michael Kirby, ‘The Common Law and International Law: A Dynamic Contemporary Dialogue’ (2010) 30(1) *Legal Studies* 30, 45 <https://doi.org/10.1111/j.1748-121X.2009.00138.x> (‘A Dynamic Contemporary Dialogue’).

for rapprochement, Hilary Charlesworth et al argue that the 'internationalisation of Australian life' has prompted a 'rise in anxiety about the international legal system', reflected in the judiciary, through a perception of international law as 'un-Australian, fanciful and chaotic'.[11] Might this anxiety be winning out?

The theory adopted in Australia is said to be 'dualism',[12] meaning that international law and domestic law are separate systems (with 'monism' considering them as the same system).[13] Treaties are not part of Australian law unless implemented by legislative act.[14] At present, customary international law also does not form part of domestic law.[15] It is the external affairs power in section 51(xxix) of the *Constitution* that empowers the Federal Parliament to implement treaties and customary norms.[16] The dualist theory limits international law's direct effect in Australia.

Nonetheless, international law has 'indirect' domestic effects.[17] First, provisions of a statute should, where the language permits, be interpreted to conform with Australia's international obligations[18] under treaty and custom.[19] Second, international law can be an 'influence on the development of the common law'.[20] This comes from *Mabo v Queensland [No 2]* ('*Mabo*'),[21] where Brennan J drew on the demise of the doctrine of terra nullius in international law (and Australia's accession to the *International Covenant on Civil and Political Rights*)[22] to discard the corresponding common law doctrine and recognise Aboriginal native title.

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11 Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25(4) *Sydney Law Review* 423, 424–5, 446–7.

12 Alice de Jonge, 'Australia' in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press, 2011) 23, 26 <https://doi.org/10.1093/acprof:oso/9780199694907.003.0002>. See also Sir Anthony Mason, 'International Law as a Source of Domestic Law' in Donald R Rothwell and Brian R Opeskin (eds), *International Law and Australian Federalism* (Melbourne University Press, 1997) 210, 210; French, 'Australia and International Law' (n 7) 21.

13 Triggs (n 9) 153–4 [4.3]–[4.4]; Devereux and McCosker (n 9) 24.

14 *Teoh* (n 10) 286–7 (Mason CJ and Deane J), 315 (McHugh J); *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298, 303–4 (Gummow J). See also *Tajjour v New South Wales* (2014) 254 CLR 508, 567 [96] (Hayne J) and the cases there cited.

15 Mason, 'International Law as a Source of Domestic Law' (n 12) 218; French, 'Australia and International Law' (n 7) 21–2. See *Chow* (n 3); *Nulyarimma* (n 4).

16 Re custom: see, eg, *Commonwealth v Tasmania* (1983) 158 CLR 1, 131 (Mason J), 258 (Deane J), 305 (Dawson J) ('*Tasmanian Dam Case*'); *Koowarta v Bjelke-Peterson* (1982) 153 CLR 168, 189 (Gibbs CJ), 212 (Stephen J), 224–5 (Mason J) ('*Koowarta*'); *Polyukhovich* (n 5) 528 (Mason CJ).

17 So termed, eg, in Mason, 'International Law as a Source of Domestic Law' (n 12) 220; Devereux and McCosker (n 9) 36. See generally Charlesworth et al (n 11) 446–7.

18 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363 (O'Connor J); *Polites v Commonwealth* (1945) 70 CLR 60, 77 (Dixon J) ('*Polites*'); *Teoh* (n 10) 287–8 (Mason CJ and Deane J); *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, 234 (Kiefel J).

19 See, eg, *Polites* (n 18) 77 (Dixon J); *Teoh* (n 10) 315 (McHugh J).

20 *Mabo* (n 10), 42.

21 Ibid 40–3, quoting *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12, 39.

22 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

However, this decision 30 years ago represents the high point of international law's developmental influence.[23]

Otherwise, Australian courts remain unwilling to use international law to interpret the *Constitution*.[24] Indeed, this possibility has been 'denied by twenty-one [High Court] Justices … and affirmed by only one'.[25] Further, the step taken in *Minister for Immigration and Ethnic Affairs v Teoh* ('*Teoh*')[26] that international treaty obligations may, through the notion of 'legitimate expectation', inform the content of procedural fairness in administrative decision-making is now 'seriously in doubt' if not obsolete.[27]

A Canada as a Comparative Jurisdiction

Formerly British dominions, Australia and Canada are now both 'democratic constitutional [monarchies] with a federal state system'.[28] As international law says little about how a State should internally implement its obligations, 'reception law is much more a branch of domestic constitutional law'.[29] Consequently, parallels between Australian and Canadian constitutional history have led to structural similarities in the domestic treatment of international law. Both constitutions were Acts of the British Imperial Parliament[30] and have 'exceptionally' sparse treatment of international law,[31] as it was assumed at the time of enactment that Britain would continue to be responsible for Commonwealth foreign relations.[32] Today, Australian and Canadian executive governments have exclusive power

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23 Devereux and McCosker (n 9) 37–8. Cf *Habib v Commonwealth* (2010) 183 FCR 62, 66–7 [7]–[13] (Black CJ).

24 French, 'Australia and International Law' (n 7) 18–20; *Al-Kateb v Godwin* (2004) 219 CLR 562, 589 [62] (McHugh J) ('*Al-Kateb*'); Michael Kirby, 'Municipal Courts and the International Interpretive Principle: *Al-Kateb v Godwin*' (2020) 43(3) *University of New South Wales Law Journal* 930 <https://doi.org/10.53637/JFVK4689> ('Municipal Courts and the International Interpretive Principle'). See also Noam Kolt, 'Cosmopolitan Originalism: Revisiting the Role of International Law in Constitutional Interpretation' (2017) 41(1) *Melbourne University Law Review* 182.

25 *Roach v Electoral Commissioner* (2007) 233 CLR 162, 224–5 [181] (Heydon J).

26 *Teoh* (n 10) 291 (Mason CJ and Deane J).

27 French, 'Australia and International Law' (n 7) 24–5. See *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 31–5 [97]–[105] (McHugh and Gummow JJ), 38 [121] (Hayne J); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 658 [65] (Gummow, Hayne, Crennan and Bell JJ).

28 de Jonge (n 12) 23.

29 Phillip M Saunders and Robert J Currie (eds), *Kindred's International Law: Chiefly as Interpreted and Applied in Canada* (Emond, 9th ed, 2019) 154. See also *Nulyarimma* (n 4) 169 [41], 172 [52] (Whitlam J), quoting *R v Bow Street Stipendiary Magistrate; Ex parte Pinochet [No 3]* [2000] 1 AC 147, 276 (Lord Millett) ('*Pinochet*'); *Nulyarimma* (n 4) 187 [122] (Merkel J).

30 Australia: *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, s 9. Canada: *Constitution Act 1867* (Imp), 30 & 31 Vict, c 3 ('*Constitution Act 1867*'); *Canada Act 1982* (UK) c 11, sch B ('*Constitution Act 1982*').

31 de Jonge (n 12) 24; Charlesworth et al (n 11) 428; Stéphane Beaulac and John H Currie, 'Canada' in Dinah Shelton (ed), *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion* (Oxford University Press, 2011) 116, 117 <https://doi.org/10.1093/acprof:oso/9780199694907.003.0005>.

32 de Jonge (n 12) 25; Gleeson, 'The Increasing Internationalisation of Australian Law' (n 7) 28; Beaulac and Currie (n 31) 116, 117.

over foreign relations, including entering into treaties.[33] And accordingly, the shared position that such international instruments do not form part of domestic law is derived from the separation of powers, namely that only Parliament can make law.[34] Thus, executive action in entering into treaties requires legislative change by Parliament to become law.

Both nations received English common law.[35] The absence of constitutional guidance meant that judge-made principles on international law continued to be applied.[36] Hence, courts in Canada have arrived at a similar presumption of conformity with international law when construing statutes.[37] Despite this, while the Australian attitude to international law has been marked by ongoing hesitance,[38] modern Canadian courts exhibit a clear openness to international law.[39] The Supreme Court has repeatedly affirmed that the 'values and principles of customary and conventional international law form part of the context in which Canadian laws are enacted'.[40] Given the shared constitutional history, but modern disparity in judicial attitudes, Canada is an attractive comparative jurisdiction when looking at this area of Australian law.

I note two differences between Australia and Canada. First, Australia has no national-level human rights instrument.[41] In contrast, a bill of rights was added to the Canadian Constitution in 1982: the *Charter of Rights and Freedoms* ('*Charter*').[42] Although not formally implementing international human rights law, Canadian courts use such material to undergird its content.[43] Second, unlike Australia, Canada is not uniformly a British-derived common law jurisdiction. The French-derived

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33 See *Australian Constitution* s 61; *Letters Patent Constituting the Office of Governor General of Canada*, RSC 1985, App II, No 31; Saunders and Currie (n 29) 154–5, citing *Canada (Prime Minister) v Khadr* [2010] 1 SCR 44. Cf Beaulac and Currie (n 31) 122–3, which notes that the province of Québec contests that the Canadian executive government has exclusive power over entering into treaties.

34 Australia: *Teoh* (n 10) 286–7 (Mason CJ and Deane J); *CPCF* (n 6) 643–4 [462] (Keane J). Canada: Saunders and Currie (n 29) 203; Beaulac and Currie (n 31) 126–7. See, eg, *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817, 860–2 [69]–[71] (L'Heureux-Dubé J), 865–6 [78]–[81] (Iacobucci J).

35 Mark Leeming, 'Common Law within Three Federations' (2007) 18(3) *Public Law Review* 186, 186. Cf Québec, treated below.

36 de Jonge (n 12) 23–4; Gib van Ert, 'The Domestic Application of International Law in Canada' in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press, 2019) 501, 501 <https://doi.org/10.1093/oxfordhb/9780190653330.013.28> ('Domestic Application').

37 See, eg, *R v Hape* [2007] 2 SCR 292, 323–4 [53]–[54] (LeBel J) ('*Hape*').

38 Charlesworth et al (n 11); Devereux and McCosker (n 9) 47, citing Hilary Charlesworth, 'Dangerous Liaisons: Globalisation and Australian Public Law' (1998) 20(1) *Adelaide Law Review* 57, 57; Kirby, 'A Dynamic Contemporary Dialogue' (n 10) 44.

39 Kirby, 'A Dynamic Contemporary Dialogue' (n 10) 34; van Ert, 'Domestic Application' (n 36) 501–2.

40 *B010 v Canada (Minister of Citizenship and Immigration)* [2015] 3 SCR 704, 725 [47] (McLachlin CJ), citing *Hape* (n 37) 323 [53] (LeBel J).

41 de Jonge (n 12) 25. See also RS French, 'Human Rights Protection in Australia and the United Kingdom: Contrasts and Comparisons' (Speech, Anglo-Australasian Lawyers Society and Constitutional and Administrative Law Bar Association, 5 July 2012).

42 *Constitution Act 1982* (n 30) pt I.

43 Beaulac and Currie (n 31) 151; *Hape* (n 37) 324–5 [55]–[56] (LeBel J), quoting *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038, 1056 (Dickson CJ), which in turn was quoting *Reference re Public Service Employee Relations Act (Alta)* [1987] 1 SCR 313, 349 (Dickson CJ).

Civil Code applies in Québec. However, this mixed legal background is of limited significance for present purposes because outside of Québec, the other provinces and territories have a 'single provincial common law'.[44] Also, 'public' common law principles, including unwritten aspects of the Canadian Constitution, apply in all jurisdictions.[45]

B Customary International Law

Article 38(1)(b) of the *Statute of the International Court of Justice* ('*ICJ Statute*') provides as one of the sources of international law, 'international custom, as evidence of a general practice accepted as law'. This contains the twin constituents of customary international law: sufficiently widespread State practice accompanied by *opinio juris sive necessitatis* ('*opinio juris*').[46] State practice refers to what States do, meaning acts carried out by 'the executive, legislative, judicial or other functions'.[47] *Opinio juris* requires that, carrying out such acts, States believe they are conforming to a legal obligation.[48] This aspect is 'psychological'[49] or 'subjective'.[50] Domestic courts in both Australia[51] and Canada[52] apply this two-part definition and follow the jurisprudence of the International Court of Justice ('ICJ'). Within customary rules, there are 'peremptory norms', termed *jus cogens*, which are so fundamental that no derogation from them is permitted[53] (eg, the prohibition of torture).[54] Despite increased treaty-making since World War II

44 Leeming (n 35) 190.

45 Beaulac and Currie (n 31) 116–17, citing *Prud'homme v Prud'homme* [2002] 4 SCR 663, 689 [46] (L'Heureux-Dubé and LeBel JJ).

46 *Asylum (Columbia v Peru) (Judgment)* [1950] ICJ Rep 266, 266–7; *North Sea Continental Shelf (Federal Republic of Germany v Denmark) (Merits)* [1969] ICJ Rep 3, 44 [77] ('*North Sea*'); *Continental Shelf (Libya v Malta) (Merits)* [1985] ICJ Rep 13, 29–30 [27]; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 97–8 [183] ('*Nicaragua*'); *Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (Judgment)* [2012] ICJ Rep 99, 122–3 [55] ('*Jurisdictional Immunities*'). See also International Law Commission, *Draft Conclusions on Identification of Customary International Law*, UN Doc A/73/10 (2018) 124–5 ('*ILC Draft Conclusions*').

47 *ILC Draft Conclusions* (n 46) 132.

48 *North Sea* (n 46) 44 [77]. See also, *SS Lotus (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10, 28 ('*Lotus*').

49 *North Sea* (n 46) 176 (Judge Tanaka).

50 *ILC Draft Conclusions* (n 46) 138.

51 See, eg, *Polyukhovich* (n 5) 559–60 (Brennan J), 657, 667, 672 (Toohey J); *Victoria v Commonwealth* (1996) 187 CLR 416, 545 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) ('*Industrial Relations Act Case*'); *Ure Trial* (n 6) 181–5 [85]–[100] (Yates J); *Ure Appeal* (n 6) 467–71 [28]–[41] (Perram, Robertson and Moshinsky JJ).

52 *Kazemi Estate v Iran* [2014] 3 SCR 176, 205–6 [38] (LeBel J) ('*Kazemi*'); *Nevsun* (n 1) 216–18 [77]–[84] (Abella J).

53 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 53 ('*Vienna Convention*'); *Jurisdictional Immunities* (n 46) 141 [95]; *Nevsun* (n 1) 218 [83]–[84] (Abella J).

54 *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Judgment)* [2012] ICJ Rep 422, 457 [99]. See further Dire Tladi, Special Rapporteur, *Fourth Report on Peremptory Norms of General International Law (Jus Cogens)*, UN Doc A/CN.4/727 (31 January 2019).

(‘WWII’) as well as objections to its conceptual coherence,[55] custom remains a vital source of international law, particularly regarding: State immunity,[56] international humanitarian law, human rights, as well as gap-filling in treaty regimes.[57]

Customary international law is an ideal axis of comparison between Australian and Canadian courts. The Canadian Supreme Court has embraced custom as a part of the common law.[58] In the landmark decision in *Nevsun*, the majority even allowed the possibility of a direct cause of action for breach of customary international law.[59] By comparison, it seems that custom is not part of the common law in Australia.[60] It is difficult to represent the current state of the law in any more precise terms, as there has been an ‘under-utilisation’[61] of customary principles by the courts and scant judicial analysis.[62] The position as stated is not beyond reproach: it is ‘unsettled’.[63] Courts in recent Australian cases have not found it necessary to address customary arguments made by the parties.[64] Australia is out of step with other Commonwealth[65] and non-Commonwealth jurisdictions.[66] And as said by de Jonge:

> Nor has the ability to use treaties as extrinsic evidence in the interpretation of ambiguous statutory language been enough to allow for a genuine analysis of the place of international law in Australian law. This has left jurisprudence uncertain, imposing a chilling effect on the pursuit of international legal rights through the Australian courts.[67]

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55 Curtis A Bradley, ‘Introduction: Custom’s Future’ in Curtis A Bradley (ed), *Custom’s Future: International Law in a Changing World* (Cambridge University Press, 2016) 1, 1–2 <https://doi.org/10.1017/CBO9781316014264.001>. See also Joel P Trachtman, ‘The Growing Obsolescence of Customary International Law’ in Curtis A Bradley (ed), *Custom’s Future: International Law in a Changing World* (Cambridge University Press, 2016) 172 <https://doi.org/10.1017/CBO9781316014264.008>; Omri Sender and Michael Wood, ‘Custom’s Bright Future: The Continuing Importance of Customary International Law’ in Curtis A Bradley (ed), *Custom’s Future: International Law in Changing World* (Cambridge University Press, 2016) 360 <https://doi.org/10.1017/CBO9781316014264.015>.

56 *Jurisdictional Immunities* (n 46). See also *Kazemi* (n 52); *Taylor* (n 6).

57 *Nevsun* (n 1) 214–15 [73] (Abella J); Henry Burmester and Susan Reye, ‘The Place of Customary International Law in Australian Law: Unfinished Business’ (2000) 21 *Australian Year Book of International Law* 39, 52 <https://doi.org/10.22145/aybil.21.3>; Julie Cassidy, ‘The Problematic Relationship between Customary International Law and the Domestic Courts’ [2009] (1) *Journal of Applied Law and Policy* 119; Sender and Wood (n 55) 364–5.

58 See especially *Hape* (n 37) 313–16 [34]–[39] (LeBel J). See also *Kazemi* (n 52).

59 *Nevsun* (n 1) 218–24 [85]–[95] (Abella J).

60 French, ‘Australia and International Law’ (n 7) 21–2; Triggs (n 9) 189 [4.58]–[4.59].

61 Devereux and McCosker (n 9) 46.

62 French, ‘Australia and International Law’ (n 7) 21.

63 Devereux and McCosker (n 9) 31, 33.

64 *CPCF* (n 6); *Taylor* (n 6).

65 Kirby, ‘A Dynamic Contemporary Dialogue’ (n 10) 32–4; Douglas Guilfoyle, ‘*Nulyarimma v Thompson*: Is Genocide a Crime at Common Law in Australia?’ (2001) 29(1) *Federal Law Review* 1, 20–1 <https://doi.org/10.1177/0067205X0102900101>.

66 *Nevsun* (n 1) 219–20 [86]–[88] (Abella J). See also Pierre-Hugues Verdier and Mila Versteeg, ‘International Law in National Legal Systems: An Empirical Investigation’ (2015) 109(3) *American Journal of International Law* 514, 528 <https://doi.org/10.5305/amerjintelaw.109.3.0514>.

67 de Jonge (n 12) 54.

On customary international law, Australian publications and judgments mention Canada in passing or not at all.[68] Australia often receives the same summary treatment in Canadian literature.[69] Hence, this article is the first in depth comparative study on the reception of custom in these two states. It is also the first article to consider the decision in *Nevsun* from an Australian perspective (noting further that *Nevsun* has not been the subject of judicial comment in Australia).[70] In this way, I contribute to the emerging field of 'comparative international law'[71] or 'comparative foreign relations law'.[72] This compares 'the domestic law of each nation that governs how that nation interacts with the rest of the world'.[73] Such inquiry is not novel, but its methodological properties are only now becoming explicit[74] along with a growing realisation of the place of national courts in an international system.[75]

III *NEVSUN* AND AUSTRALIAN CASES ON CUSTOM

In *Nevsun*, the plaintiffs were three former Eritrean nationals, granted refugee status in Canada. They sued Nevsun Resources Ltd, a Canadian mining company, for maltreatment they had suffered while working at the Bisha mine in Eritrea, operated jointly by the Eritrean National Mining Corporation and Nevsun (through subsidiaries). The plaintiffs sought damages in tort (conversion, battery, false imprisonment, conspiracy and negligence) and for breaches of customary international law (prohibitions against forced labour; slavery; cruel, inhuman

68 *Polyukhovich* (n 5) 585 (Brennan J), 630 (Deane J), 672–3 (Toohey J); *Nulyarimma* (n 4) 186–7 [118]–[122] (Merkel J). See, eg, Kirby, 'A Dynamic Contemporary Dialogue' (n 10) 34; Triggs (n 9) 189 [4.60].

69 See, eg, Stephen J Toope, 'The Uses of Metaphor: International Law and the Supreme Court of Canada' (2001) 80(1–2) *Canadian Bar Review* 534, 536; Gib van Ert, 'The Reception of International Law in Canada: Three Ways We Might Go Wrong' (Centre for International Governance Innovation: Canada in International Law at 150 and Beyond, Paper No 2, January 2018) 1 ('Three Ways').

70 Cf Akshaya Kamalnath, 'Transnational Corporations and Modern Slavery: *Nevsun* and Beyond' (2021) 21(2) *Journal of Corporate Law Studies* 491 <https://doi.org/10.1080/14735970.2021.1916186>.

71 Anthea Roberts, 'Comparative International Law? The Role of National Courts in Creating and Enforcing International Law' (2011) 60(1) *International and Comparative Law Quarterly* 57 <https://doi.org/10.1017/S0020589310000679>.

72 Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press, 2019) <https://doi.org/10.1093/oxfordhb/9780190653330.001.0001>.

73 Curtis A Bradley, 'What Is Foreign Relations Law?' in Curtis A Bradley (ed), *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford University Press, 2019) 3, 3–4 <https://doi.org/10.1093/oxfordhb/9780190653330.001.0001>.

74 Roberts (n 71) 60–1.

75 Verdier and Versteeg (n 66); Alex Mills and Tim Stephens, 'Challenging the Role of the Judges in Slaughter's Liberal Theory of International Law' (2005) 18(1) *Leiden Journal of International Law* 1 <https://doi.org/10.1017/S0922156504002328>; Andre Nollkaemper, *National Courts and the International Rule of Law* (Oxford University Press, 2011) <https://doi.org/10.1093/acprof:oso/9780199236671.001.0001>; Melissa A Waters, 'Creeping Monism: The Judicial Trend toward Interpretive Incorporation of Human Rights Treaties' (2007) 107(3) *Columbia Law Review* 628; Yuval Shany, 'How Supreme Is the Supreme Law of the Land: Comparative Analysis of the Influence of International Human Rights Treaties upon the Interpretation of Constitutional Texts by Domestic Courts' (2006) 31(2) *Brooklyn Journal of International Law* 341.

or degrading treatment; and crimes against humanity – the 'CIL claims').[76] The plaintiffs' pleadings on the CIL claims were 'broadly worded',[77] and sustained two interpretations: (i) a direct cause of action against Nevsun for breach of customary international law; or (ii) new domestic torts 'inspired' by custom (mirroring in substance the customary prohibitions).[78] The proceedings concerned a strike-out motion brought by Nevsun. It alleged that the entire claim was non-justiciable under the act of state doctrine as it required a finding that the Eritrean Government, in its management of the mine, committed the customary breaches in which Nevsun was complicit.[79] Also, it argued the CIL claims should be struck out as they had no reasonable prospect of success.[80]

A 5:4 majority of the Supreme Court upheld the decisions below to dismiss the strike-out motion. Seven of the judges agreed that the act of state doctrine was not part of Canadian law.[81] The CIL claims were more divisive. Abella J, for the five-judge majority, concluded that custom is 'fully integrated into, and form[s] part of, Canadian domestic common law, absent conflicting law' and 'must be treated with the same respect as any other law'.[82] It was not 'plain and obvious' that the Plaintiffs could not obtain a civil remedy against Nevsun for the CIL claims, noting that the customs relied on probably were *jus cogens*.[83] This was on either interpretation of the pleadings.[84] Dissenting on this point, Brown and Rowe JJ accepted that 'prohibitive rules of customary international law should be incorporated into domestic law' absent conflicting legislation.[85] However, they rejected that the customary prohibitions extended to make a corporation directly liable for their breach,[86] or that new domestic torts should be recognised in this case.[87] Côté J (Moldaver J agreeing) was of the same view,[88] and would have struck the entire claim on the act of state doctrine.[89] The parties subsequently settled confidentially.[90]

All judges in *Nevsun* therefore accepted the doctrine of incorporation regarding customary international law (termed the 'doctrine of adoption' in

76 *Nevsun* (n 1) 190–97 [1]–[26] (Abella J).
77 Ibid 236 [127] (Abella J). Cf 294–5 [261] (Brown and Rowe JJ).
78 Ibid 236–8 [127]–[129] (Abella J), 240–1 [137] (Brown and Rowe JJ).
79 Ibid 197 [27] (Abella J), 314–16 [310]–[312] (Côté J dissenting).
80 Ibid 191 [5], 211 [63] (Abella J).
81 Ibid 209 [58]–[59] (Abella J), 239–40 [135] (Brown and Rowe JJ dissenting in part), 307–8 [293] (Côté J dissenting).
82 Ibid 223–4 [94]–[95].
83 Ibid 226–39 [100]–[133].
84 Ibid 236–8 [127]–[129] (Abella J).
85 Ibid 247–8 [153], 252–7 [165]–[176], quoting *Hape* (n 37) 313–14 [34], 316 [39] (LeBel J).
86 *Nevsun* (n 1) 262–4 [188]–[191], 271–3 [210]–[213].
87 Ibid 288–94 [244]–[260].
88 Ibid 296–7 [267]–[269].
89 Ibid 315–16 [312]–[313].
90 Yvette Brend, 'Nevsun Resources Enters into a Settlement in a Lawsuit in Canada Alleging Torture and Slavery at Its Subsidiary's Eritrean Mine', *Business & Human Rights Resource Centre* (Article, 26 October 2020) <https://www.business-humanrights.org/en/latest-news/nevsun-resources-enters-into-a-settlement-in-a-lawsuit-in-canada-alleging-torture-slavery-at-its-subsidiarys-eritrean-mine/>.

Canada),[91] building on previous authority to this effect.[92] According to this doctrine, customary rules are automatically incorporated into domestic law to be applied by the courts unless they conflict with existing law. This is contrasted with the doctrine of transformation, according to which customary rules are not part of domestic law unless so adopted by legislative (or perhaps judicial) intervention.[93] The terms 'incorporation' and 'transformation' pervade, and even stifle,[94] debates on the relationship between custom and domestic law.[95] However, they remain a heuristic reference. The United Kingdom ('UK') also follows an incorporation tradition,[96] as do the United States ('US')[97] and New Zealand.[98] In Australia, the transformation approach 'holds sway'.[99] One theoretical clarification is that in the incorporation/transformation paradigm, these 'two terms' blend 'four concepts'.[100] Some authors, like Kristen Walker, envisage that the more accurate conceptual position resembles a spectrum: strong incorporation subordinates custom only to conflicting legislation; weak incorporation subordinates custom also to contrary common law principles; weak transformation permits the judiciary to choose to receive a given customary norm in the exercise of something like a discretion; finally, strong transformation reserves this competence to Parliament.[101]

In order for an Australian judge to give domestic effect to a customary norm, they must first be satisfied that as a matter of law such norms are a part of the common law. This part of the article argues that it is well open for this argument to be made and accepted. Specifically, I show that the general position that custom is not part of common law rests on weak precedent. This part has the following structure: first, I argue that judicial discussion of customary international law in Australia is stagnant; next, I examine the two principal cases used to resist incorporation alongside analogous Canadian authorities;[102] and I then demonstrate how Australian courts could construct an incorporation narrative like modern Canadian authorities. While

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91 *Nevsun* (n 1) 219 [86] (Abella J).

92 See especially *Hape* (n 37) 313–6 [34]–[39] (LeBel J); *Kazemi* (n 52).

93 *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529, 553–4 (Lord Denning MR) ('*Trendtex*').

94 Ibid 569 (Stephenson LJ).

95 Triggs (n 9) 183–8; Mason, 'International Law as a Source of Domestic Law' (n 12) 212–3; Kristen Walker, 'Treaties and the Internationalisation of Australian Law' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (Federation Press, 1996) 204, 227–31; Charlesworth et al (n 11) 451–2.

96 Kirby, 'A Dynamic Contemporary Dialogue' (n 10) 34–7 (referring also to South Africa and India at 33). See *Trendtex* (n 93); *Maclaine Watson & Co Ltd v International Tin Council [No 2]* [1989] 1 Ch 286. Cf *R v Jones (Margaret)* [2007] 1 AC 136, 155 [11] (Bingham LJ) ('*Margaret*').

97 Guilfoyle (n 65) 20; Triggs (n 9) 194 [4.63]; *The Paquete Habana* 175 US 677, 700 (1900).

98 See, eg, Treasa Dunworth, 'Hidden Anxieties: Customary International Law in New Zealand' (2004) 2(1) *New Zealand Journal of Public and International Law* 67; Kirby, 'A Dynamic Contemporary Dialogue' (n 10) 33, and the cases cited therein.

99 French, 'Australia and International Law' (n 7) 22, quoting Mason, 'International Law as a Source of Domestic Law' (n 12) 218.

100 Walker (n 95) 227–8.

101 Ibid 228–9.

102 *Reference as to Powers to Levy Rates on Foreign Legations* [1943] SCR 208 ('*Foreign Legations*'); *Reference as to whether Members of the United States of America Are Exempt from Criminal Proceedings in Canadian Criminal Courts* [1943] SCR 483 ('*US Exemption*').

not the focus of this article, this part concludes with a consideration of the types of cases where customary principles are useful and desirable.

A The Australian Position on Custom

The Australian position on custom is generally understood to be represented by two cases: *Chow* and *Nulyarimma*. *Chow* concerned the appeal of two Chinese nationals convicted of assault in Papua New Guinea, then an Australian territory. They claimed immunity under the 'law of nations' as members of the Chinese military present under Australia's consent. The Court dismissed the appeal and upheld the convictions. Dixon J stated that Blackstone's theory

> that 'the law of nations … is here adopted in its full extent by the common law, and is held to be a part of the law of the land' is now regarded as without foundation. The true view, it is held, is 'that international law is not part, but is one of the sources, of English law'.[103]

In *Nulyarimma*, a majority of the Full Federal Court held that the customary prohibition of genocide did not give rise to an equivalent common law crime without legislative intervention. These authorities have pervaded the Australian discussion on custom. In 1997, Sir Anthony Mason, writing extra-curially, noted that the transformation theory prevailed.[104] In 2020, Robert French cited Mason's article to suggest the same conclusion.[105] Both authors relied heavily on *Chow* and French also discussed *Nulyarimma*.[106] As the issue has not since been raised directly before the High Court,[107] *Chow* is still regarded as the 'leading authority'[108] and Dixon J's approach predominates.[109] Usually, commentators foreground these two cases and reach a conclusion of 'probably not' regarding whether customary norms are part of the common law.[110] They seem wary of the position left by *Chow* and *Nulyarimma*, describing the relationship between custom and domestic law

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103 *Chow* (n 3) 477, quoting William Blackstone, *Commentaries on the Laws of England* (1809) vol 4, 67; JL Brierly, 'International Law in England' (1935) 51(1) *Law Quarterly Review* 24.

104 Mason, 'International Law as a Source of Domestic Law' (n 12) 218.

105 French, 'Australia and International Law' (n 7) 22.

106 Ibid 22–3.

107 Devereux and McCosker (n 9) 33.

108 Kristen Walker and Andrew D Mitchell, 'A Stronger Role for Customary International Law in Domestic Law' in Hilary Charlesworth et al (eds), *The Fluid State: International Law and National Legal Systems* (Federation Press, 2005) 110, 125; IA Shearer, 'The Relationship between International Law and Domestic Law' in Donald R Rothwell and Brian R Opeskin (eds), *International Law and Australian Federalism* (Melbourne University Press, 1997) 34, 49.

109 Walker and Mitchell (n 108) 126. See further Devereux and McCosker (n 9) 33–4; Kirby, 'A Dynamic Contemporary Dialogue' (n 10) 45–6; French, 'Australia and International Law' (n 7) 21–2; Shearer (n 108) 49–50.

110 See, eg, French, 'Australia and International Law' (n 7) 23; Triggs (n 9) 189–93; Devereux and McCosker (n 9) 33–6; Charlesworth et al (n 11) 452–7; Shearer (n 108) 51.

as 'unsettled',[111] 'vexed and unpredictable',[112] 'unclear',[113] 'inconsistent'[114] and 'neglected'.[115] Different perspectives are rare.[116]

Recent cases exhibit a similar reluctance to disturb the status quo. In *Minister for Home Affairs v Zentai*,[117] French CJ said that articles 31–2 of the *Vienna Convention on the Law of Treaties* are consistent with the common law,[118] 'whether or not they are or have been adopted as part' thereof. The footnote deferred to *Chow* to explain 'the relationship between customary international law and the common law'. In *CPCF v Minister for Immigration and Border Protection* ('*CPCF*')[119] and *Taylor v Attorney-General (Cth)* ('*Taylor*'),[120] the High Court avoided deciding any issues on customary international law despite the parties putting considered arguments before the Court. In *CPCF*, the plaintiff submitted that the customary principle of non-refoulement was part of the common law.[121] The Commonwealth responded, 'the orthodox view is that customary international law obligations are not automatically incorporated into Australia's domestic law',[122] citing only *Nulyarimma*. In *Taylor* the plaintiff cited Dixon J in *Chow* on 'the difficult issue as to when customary international law might become part of the common law of Australia'.[123] Writing after *Nulyarimma*, Henry Burmester and Susan Reye predicted: 'A definitive statement by the High Court as to the place of customary international law seems unlikely in the near future.'[124] Twenty years on this prediction has proved correct.

Even if *Chow* and *Nulyarimma* convincingly place customary norms outside of the common law, which this article challenges, judges could still choose to adopt certain customary norms in the appropriate case (weak transformation). Justice Dixon's 'source view' in *Chow* has been interpreted to this effect.[125] Some commentators also rely on *Mabo* to contend that the High Court 'retains the discretion to give effect to a relevant customary principle in Australia'.[126] However, judges have not exercised their discretion to this effect.[127] In *Mabo*,

111 Devereux and McCosker (n 9) 31.
112 Triggs (n 9) 183.
113 Kirby, 'A Dynamic Contemporary Dialogue' (n 10) 32.
114 Charlesworth et al (n 11) 457.
115 Walker and Mitchell (n 108) 110.
116 Cf de Jonge (n 12) 43–7; Cassidy (n 57); Walker and Mitchell (n 108); Dunworth (n 98); Guilfoyle (n 65).
117 (2012) 246 CLR 213.
118 Ibid 223 [19]; *Vienna Convention* (n 53).
119 *CPCF* (n 6).
120 *Taylor* (n 6).
121 CPCF, 'Plaintiff's Submissions', Submission in *CPCF v Minister for Immigration and Border Protection*, S169/2014, 11 September 2014, [54]–[57] ('CPCF Plaintiff's Submissions').
122 Minister for Immigration and Border Protection, 'Submissions of the Defendants', Submission in *CPCF v Minister for Immigration and Border Protection*, S169/2014, 30 September 2014, [21] ('CPCF Defendants' Submissions').
123 Daniel Taylor, 'Annotated Plaintiff's Submissions', Submission in *Taylor v A-G (Cth)*, M36/2018, 7 June 2019, [36]–[37] ('Taylor Plaintiff's Submissions').
124 Burmester and Reye (n 57) 53.
125 Walker (n 95) 229.
126 de Jonge (n 12) 44–5.
127 Cf Ibid 47.

the Court was not asked to give domestic effect to a customary norm and it is perhaps unsurprising that the decision mentions international law as no more than a source for or influence on domestic law. While this developmental influence is apparently well settled, its nature remains 'unspecified'.[128] Although endorsed in the Mason Court,[129] discrete examples of judges drawing on international law[130] can be paired against justices of the High Court denying it any domestic role except as authorised by Parliament.[131] In a 1996 article, Mason said that once international law's domestic influence is recognised, 'there is no occasion to develop and apply a particular theory to govern [its] reception … into municipal law'.[132] However, this softer approach has not worked: its ambiguity has enabled judicial avoidance.

B Australian Precedent and Canadian Analogies

1 Chow Hung Ching v The King

In the shadow of WWII, judges in England, Australia and Canada all came to pronounce on the scope of state immunity from the court's jurisdiction, often in the context of foreign troops operating consensually in the territory. In the initial English case, *Chung Chi Cheung* ('*Chung*'), Lord Atkin said cryptically:

> 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 rules 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 is not inconsistent with rules enacted by statutes or finally declared by their tribunals.[133]

Other parts of his Lordship's judgment support incorporation.[134] However, amongst the five-judge bench of the High Court in *Chow*, tasked with interpreting Lord Atkin's ambiguous statement of principle, no clear approach prevailed. All justices found that the appellants were not military personnel and therefore not covered by any international law immunity.[135] For McTiernan and Williams JJ, it was therefore 'unnecessary to express an opinion on the question of the immunity

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128 Triggs (n 9) 193.

129 *Mabo* (n 10); *Dietrich* (n 10) 306 (Mason CJ and McHugh J), 321 (Brennan J), 360 (Toohey J); *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 499 (Mason CJ and Toohey J); *Western Australia v Commonwealth* (1995) 183 CLR 373, 486 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) ('*Native Title Act Case*'); *Teoh* (n 10) 288 (Mason CJ and Deane J).

130 See, eg, *Habib v Commonwealth* (2010) 183 FCR 62, 66–7 [7]–[13] (Black CJ); judicial officers: *Minogue v Williams* (2000) 60 ALD 366, 373 [24] (Ryan, Merkel and Goldberg JJ); *R v Stringer* (2000) 116 A Crim R 198, 217 [75] (Adams J), citing *Jago v District Court (NSW)* (1988) 12 NSWLR 558, 569 (Kirby P); *R v Granger* (2004) 88 SASR 453, 477 [97] (Perry J); *Tomasevic v Travaglini* (2007) 17 VR 100, 114 [73], 115 [76] (Bell J).

131 See, eg, *Western Australia v Ward* (2002) 213 CLR 1, 389–90 [957]–[959] (Callinan J); *CPCF* (n 6) 643–4 [462] (Keane J).

132 Mason, 'The Influence of International and Transnational Law on Australian Municipal Law' (n 7) 24.

133 *Chung Chi Cheung v The King* [1939] AC 160 (PC), 167–8 ('*Chung*').

134 Ibid 175.

135 *Chow* (n 3) 468 (Latham CJ), 473–4 (Starke J), 486–7 (Dixon J), 488 (McTiernan J), 488–9 (Williams J).

at common law of visiting troops sent by a friendly power',[136] which 'would only be *obiter dictum*'.[137] The remaining judges accepted that some immunity operated at common law. For Latham CJ, '[i]nternational 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'.[138] Ultimately, no such principle existed of the breadth argued by the appellants.[139] Like Lord Atkin's judgment in *Chung*, Latham CJ's words are internally inconsistent. Starke J, citing *Chung*, acknowledged the existence of 'certain immunities' in Australian law, but declined to go further as 'the appellants did not belong to any force entitled to any immunity'.[140] Finally, to Dixon J, the case seemed to not turn on international law at all.[141] Rather, the question was about the effect of Crown acts on the common law,[142] and again, there was no immunity to cover the appellants.[143] Together, the judgments gave no clear answer on the place of customary norms in the common law.[144] Consequently, the three main judgments (Latham CJ, Dixon and Starke JJ) have been taken to support either incorporation or transformation depending on the particular author's argument.[145] However, *Chow*'s ambiguity is unsurprising given that no international law-derived rule was applied by the Court. The discussion on the relationship between custom and the common law was obiter.

There are two analogous Canadian decisions. In *Reference as to Powers to Levy Rates on Foreign Legations* ('*Foreign Legations*'),[146] the Supreme Court was asked inter alia whether city councils could levy rates on properties occupied as legations by foreign governments under statute.[147] This engaged 'general principles' of the 'law of nations' as to the inviolability of a foreign state and its ministers in Canadian domestic jurisdiction.[148] The judgments, especially that of Duff CJ, tended to support such immunity, grounded in 'the usages of nations, which have come to be known as international law', as incorporated into Canadian common law.[149] However, any consensus was clouded by the Court's division over whether this principle should be applied to read down the taxing statute or only bar its enforcement.[150] Confusion was more evident in *Reference as to whether Members*

136 Ibid 488 (McTiernan J).
137 Ibid 489 (Williams J) (emphasis in original).
138 Ibid 462.
139 Ibid 465–6.
140 Ibid 471–3.
141 Ibid 477.
142 Ibid 478–9.
143 Ibid 481–7.
144 French, 'Australia and International Law' (n 7) 21–2.
145 Charles Henry Alexandrowicz, 'International Law in the Municipal Sphere According to Australian Decisions' (1964) 13(1) *International and Comparative Law Quarterly* 78, 81–2 <https://doi.org/10.1093/iclqaj/13.1.78>; Cassidy (n 57) 138–9; Guilfoyle (n 65) 17; Mason, 'International Law as a Source of Domestic Law' (n 12) 24.
146 *Foreign Legations* (n 102).
147 *Assessment Act*, RSO 1937, c 272.
148 *Foreign Legations* (n 102) 214 (Duff CJ).
149 Ibid 230–1 (Duff CJ), 232 (Rinfret J), 237–8 (Kerwin J), 243–5 (Hudson J), 249 (Taschereau J).
150 Ibid 231 (Duff CJ), 233 (Rinfret J), 249 (Taschereau J), which can be compared with 237–8 (Kerwin J), 245 (Hudson J); Jutta Brunnée and Stephen J Toope, 'A Hesitant Embrace: The Application of

of the Military or Naval Forces of the United States of America Are Exempt from Criminal Proceedings in Canadian Courts ('*US Exemption*').[151] Duff CJ found that the UK (and therefore Canada) 'has never assented to any rule of international law' which would so constrict their jurisdiction. This could be achieved 'only by the authority of Parliament', especially as the claimed immunity violated the Diceyan constitutional principle that a soldier should be treated as an ordinary citizen under law.[152] The other judgments recognised some immunity.[153]

Considered together, these authorities are of limited use in informing the modern relationship between customary norms and the common law.[154] The focus of the judges was on the English position which the relevant colony would be taken to receive. Dixon J stated:

> the whole question involves in the case of the British Commonwealth the authority of the Crown in the conduct of foreign relations. 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.[155]

Duff CJ in *Foreign Legations* spoke of 'principles of international law recognized by the law of England; and, consequently, by the law of Ontario'.[156] Therefore, the inquiry of the courts was directed to interpreting English (and American) authority on state immunity, a long-standing doctrine of international law.[157] A modern incorporation/transformation inquiry was largely irrelevant to the familiar examination of precedent undertaken. Charles Henry Alexandrowicz, writing in 1964, said that as Latham CJ, Starke and Dixon JJ considered (based on English law) that some form of customary immunity was 'directly operative' domestically, '[t]he question whether its operativeness means that it is part of the law of the land or a source of municipal law or incorporated or adopted, is not one of primary significance'.[158]

2 Nulyarimma v Thompson

In *Nulyarimma*, the question of custom's domestic status arose more squarely. The appeal involved two separate claims of genocide against senior ministers for policy decisions in the management of Aboriginal land,[159] said to contribute to the destruction of Aboriginal people.[160] All parties, and the Full Federal

International Law by Canadian Courts' (2002) 40 *Canadian Yearbook of International Law* 3, 41 <https://doi.org/10.1017/S0069005800007992>.

151 *US Exemption* (n 102).

152 Ibid 490–1, 496–7 (Duff CJ for Hudson J and Duff CJ).

153 Ibid 501–2, 508–10 (Kerwin J), 516–18 (Taschereau J), 524–6 (Rand J).

154 Saunders and Currie (n 29) 195.

155 *Chow* (n 3) 477. See also at 479.

156 *Foreign Legations* (n 102) 231 (Duff CJ). See also *Foreign Legations* (n 102) 214, 228 (Duff CJ), 232 (Rinfret J); *US Exemption* (n 102) 494, 496–7, 500 (Duff CJ, for Hudson J and Duff CJ).

157 See, eg, *Chow* (n 3) 461–4 (Latham CJ), 470–2 (Starke J), 479–81 (Dixon J); *Foreign Legations* (n 102) 214–21 (Duff CJ); *US Exemption* (n 102), 508–10 (Kerwin J); *Chung* (n 134); *Schooner Exchange v M'Faddon*, 11 US 116 (1812) (Marshall CJ).

158 Alexandrowicz (n 145) 92.

159 *Nulyarimma* (n 4) 157–8 [2]–[3] (Wilcox J).

160 Ibid 173 [60] (Merkel J).

Court, accepted the prohibition against genocide as *jus cogens*.[161] Therefore, the Court was asked solely whether, absent any treaty or implementing legislation, the crime of 'genocide forms part of the [common] law of Australia'.[162] Wilcox and Whitlam JJ found that it did not. After acknowledging the incorporation/ transformation debate,[163] Wilcox J saw the issue as a 'policy decision' which in a criminal case should be resolved against enforcing the international norm, while conceding, 'I am unable to point to much authority for my conclusion.'[164] Both judges principally relied on three authorities: first, *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet [No 3]* ('*Pinochet*'),[165] on the ground that no party argued that torture was a crime in English law prior to its enactment as such in legislation;[166] second, obiter remarks of Brennan J in *Polyukhovich v Commonwealth* ('*Polyukhovich*')[167] about 'statutory vesting' of international law;[168] third, the reasoning of the Supreme Court of Israel in *Attorney-General (Israel) v Eichmann* ('*Eichmann*').[169] These cases provide weak support for the majority's conclusion.[170] In *Pinochet* the point was not argued[171] and *Eichmann* is elsewhere interpreted to support incorporation.[172] *Polyukhovich* concerned the validity of war crimes legislation under the *Constitution* with custom relevant only insofar as it could support Commonwealth legislative power. There was no question of incorporation. Otherwise, both judges agreed with Merkel J's orders dismissing the relief sought.[173] I turn to Merkel J's different reasoning now.

Merkel J was of the view that the common law did recognise the customary crime of genocide.[174] His Honour was alone in carefully considering English and Australian authorities on the relationship between custom and the common law.[175] This led to the formulation of a 'common law adoption' approach, apparently congruent with Dixon J's 'source' view in *Chow*.[176] Here, a rule of customary international law, once established as such, 'will be' received into the domestic law so far as it does not conflict with statute or the common law, meaning

161 Ibid 161–2 [18] (Wilcox J), 166 [36] (Whitlam J), 176 [78], 177 [81] (Merkel J).

162 Ibid 166 [35] (Whitlam J). See also 163 [22] (Wilcox J), 176 [75], 177–8 [82] (Merkel J).

163 Ibid 163 [23] (Wilcox J).

164 Ibid 164 [26]–[27].

165 *Pinochet* (n 29).

166 *Nulyarimma* (n 4) 165 [29]–[30] (Wilcox J), 167 [38] (Whitlam J).

167 *Polyukhovich* (n 5).

168 *Nulyarimma* (n 4) 164–5 [27]–[28] (Wilcox J), 171–2 [49]–[51] (Whitlam J).

169 (1962) ILR 277; ibid 165 [30]–[31] (Wilcox J), 170 [42]–[44] (Wilcox J).

170 See further *Nulyarimma* (n 4) 199 [160] (Merkel J); Guilfoyle (n 65) 24–7; Cassidy (n 57) 140–142. Cf Burmester and Reye (n 57) 44–5, 53.

171 *Pinochet* (n 29) 189 (Browne-Wilkinson LJ). Cf *Pinochet* (n 29) 275–6 (Millett LJ). See also Roger O'Keefe, 'Customary International Crimes in English Courts' (2002) 72(1) *British Yearbook of International Law* 293 <https://doi.org/10.1093/bybil/72.1.293>.

172 *Pinochet* (n 29) 273–4 (Millett LJ); *Nulyarimma* (n 4) 196–7 [151] (Merkel J).

173 *Nulyarimma* (n 4) 166 [32]–[34] (Wilcox J), 173 [58]–[59] (Whitlam J), 205–16 [187]–[235] (Merkel J). One sufficient reason his Honour declined to grant the relief sought was that, on any view, the conduct complained of could not amount to the crime of genocide: see at 209 [202], 215 [231].

174 Ibid 205 [186].

175 Ibid 178–89 [83]–[129].

176 Ibid 189 [131].

inconsistency or incongruence with its general policies or principles.[177] Merkel J's decision was welcomed at the time as 'the best modern Australian judgment on the reception of custom'.[178] Nonetheless, it has its own ambiguity. 'Weak transformation' is distinguished from 'weak incorporation' as in the former the judge retains a discretion on whether to receive and apply the custom.[179] Merkel J blurs this distinction.[180] Nonetheless, it appears that the only fully reasoned judgment in *Nulyarimma* accepted custom's place in the common law. In any case, international criminal law is a poor basis from which to extrapolate any general principle on reception given the exceptional policy considerations which it attracts. Wilcox and Whitlam JJ were explicitly wary of this and, unlike Merkel J, reasoned partly on policy lines to curtail a full consideration of the issue. Illustratively, in *R v Jones (Margaret)*,[181] the House of Lords carved out an exception to the doctrine of incorporation for international crimes, stating only Parliament should create new offences given the unique impact on individual liberty.

C New Narratives

On the basis of the discussion in section B, I argue that the proposition that customary international law is not part of Australian common law has weak foundations. *Chow* consists of obiter consideration of English law by three High Court justices and *Nulyarimma* of a cautious policy decision of a Federal Court majority. As a result, even in arguing for the domestic operation of customary norms, it is misguided to comb over the judgments and try to stamp their words as either pro-incorporation or wrong.[182] Nor do these cases create an 'unsettled'[183] or 'vexed'[184] position, too fraught to disturb. Rather, and more simply, they do not support any general conclusion about the relationship between custom and the common law. They sustain no 'orthodox view'.[185] At this point, one possible response is to abandon any general idea of customary reception. For Wilcox J, 'it is difficult to make a general statement covering all the diverse rules of international customary law'.[186] However, opting for a fluid approach could perpetuate, rather than resolve, the uncertainty.[187] It is entirely coherent to talk of custom, generally, as part of the common law subject to inconsistency with existing principles and policy (eg, relating to crimes).[188] This has been done by modern Canadian authorities, illuminating a path open to Australian courts.

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177 Ibid 189–91 [132].

178 Guilfoyle (n 65) 31.

179 Ibid 10; Walker (n 95) 229–30; Mason, 'International Law as a Source of Domestic Law' (n 12) 215.

180 Guilfoyle (n 65) 31.

181 *Margaret* (n 96) 162 [29] (Bingham LJ), 170–1 [59]–[62] (Hoffman LJ).

182 Cf Guilfoyle (n 65); Cassidy (n 57).

183 Devereux and McCosker (n 9) 31.

184 Triggs (n 9) 183.

185 Cf CPCF Defendants' Submissions (n 122) [21].

186 *Nulyarimma* (n 4) 164 [25].

187 Cf Shearer (n 108) 51; Dunworth (n 98) 81–4.

188 See also James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 9th ed, 2019) 63–4 <https://doi.org/10.1093/he/9780198737445.001.0001>, quoting *Margaret* (n 96) 155 [11]

Before 2007, the Canadian position exhibited the same ambiguity as still prevails in Australia. Stephen Toope wrote that 'we do not know whether customary international law forms part of the law of Canada'.[189] And to Hugh Kindred, 'twentieth century Canadian courts shied away from international law' even showing 'exclusionary nationalism'.[190] One turning point was *Baker v Canada* (on the effect of international treaties on statutory interpretation and administrative decision-making)[191] but the treatment of custom waited until *R v Hape* ('*Hape*').[192] *Hape* turned on whether the *Charter* had extra-territorial application, as the accused argued for the exclusion of evidence obtained overseas. LeBel J, for the majority of the Supreme Court, first considered the domestic status of customary norms relevant to the *Charter*'s interpretation.[193] His Honour acknowledged that past cases were unclear or silent. Despite this, it appeared that 'the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation'.[194] Supporting this reasoning was a 'long line of cases' including Kerwin J in *US Exemption* and, generally, *Foreign Legations*.[195] The term 'prohibitive rules' has been interpreted to mean norms imposing an obligation (in contrast to permissive rules).[196] *Nevsun* is the apotheosis of the new Canadian narrative on custom, dispelling residual doubts from *Hape*.[197] The majority stated that customary norms are the same as other common law principles and might sustain private civil actions. It read the history of cases as an unequivocal endorsement of incorporation: citing Blackstone, quoting only the favourable part of Lord Atkin's statement in *Chung* and signalling out Taschereau J in *US Exemption*.[198] Ignoring past ambiguity, illustrated above, incorporation was lauded as a '250 year old legal truism'.[199]

In Australia, it is open to the High Court (or even lower courts) to move past *Chow* and *Nulyarimma* and follow modern Canadian jurisprudence onto surer ground, but perhaps without the ardency of the *Nevsun* majority. The argument that custom is part of the common law might proceed as follows; and each of these

(Bingham LJ) and *R (Freedom and Justice Party) v Secretary of State for Foreign and Commonwealth Affairs* [2016] EWHC 2010 (Admin), [166] (Lloyd-Jones LJ).

189 Toope (n 69) 536 (emphasis omitted).

190 Hugh M Kindred, 'The Use and Abuse of International Legal Sources by Canadian Courts: Searching for a Principled Approach' in Oonagh E Fitzgerald (ed), *The Globalized Rule of Law: Relationships between International and Domestic Law* (Irwin Law, 2006) 5, 17.

191 *Baker v Canada (Minister for Citizenship and Immigration)* [1999] 2 SCR 817. See ibid.

192 *Hape* (n 37).

193 Ibid 313–25 [34]–[46] (LeBel J for McLachlin CJ, LeBel J, Deschamps, Fish and Charron JJ).

194 Ibid 316 [39].

195 Ibid 314–6 [37]–[39].

196 See, further, *Nevsun* (n 1) 222–3 [92] (Abella J), 253–6 [168]–[172] (Brown and Rowe JJ); *Kazemi* (n 52) 215 [61] (LeBel J); John H Currie, 'Weaving a Tangled Web: *Hape* and the Obfuscation of the Canadian Reception Law' (2016) 45 *Canadian Yearbook of International Law* 55, 70 <https://doi.org/10.1017/S0069005800009280>; Louis LeBel, 'A Common Law of the World? The Reception of Customary International Law in the Canadian Common Law' (2014) 65 *University of New Brunswick Law Journal* 3, 15.

197 Currie (n 196). See especially at 62–71. Cf *Nevsun* (n 1) 257 [176] (Brown and Rowe JJ).

198 *Nevsun* (n 1) 219–20 [87]–[89] (Abella J).

199 Ibid 223–4 [94].

points could be drawn upon by a judge in accepting an incorporation approach to a given customary norm. First, several early judgments support this approach in passing.[200] In *Polites v Commonwealth* ('*Polites*'), Williams J stated:

> It is clear that such a [customary] rule, when it has been established to the satisfaction of the courts, is recognized 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 (*Chung Chi Cheung v The King*).[201]

Second, in *Chow*, Latham CJ, Starke and Dixon JJ accepted that some immunity could be directly operative in domestic law without legislative intervention (although Dixon J did not regard this as a question of international law).[202] Third, in *Nulyarimma*, Merkel J proposed a well-reasoned 'common law adoption' approach, arguably the only reasoned judgment in Australia on the issue. The reasoning of the majority in *Nulyarimma* could be put to one side as a policy decision in the circumstances of that case. Fourth, it is accepted that international law exerts an influence on the common law.[203] Expressly incorporating custom translates this amorphous influence into something more reliable.[204] Fifth, judges have adverted to the 'question'[205] or 'debate'[206] about whether custom is part of the common law but declined to express a view on what they regard as an open question. Finally, affording custom a place in the common law aligns Australia with the UK, US, Canada and New Zealand[207] – per *Hape*[208] – in 'the common law tradition'. This counts in favour of custom's incorporation as it might illustrate to an Australian judge that this idea is not novel in a common law system.

In *CPCF*, the plaintiff's submission to the High Court on the domestic operation of the customary norm of non-refoulement relied on the first, second and fourth points above, but was not addressed by the Court. The submission suggests that its operation could be by way of either transformation or incorporation, no doubt to allow the Court to adopt either approach. It is helpful to set out these submissions in full (with relevant footnotes included) to illustrate how this argument has been made in practice, noting that some of the nuances are beyond the scope of the current article:

> The customary international law principle of non-refoulement should be recognised by this Court as having transformed, or become incorporated into, the common law of Australia.

200 *Potter v Broken Hill Pty Co Ltd* (1906) 3 CLR 479, 495 (Griffith CJ), 506–7 (Barton J), 510 (O'Connor J); *Polites* (n 18) 80–1 (Williams J); *Wright v Cantrell* (1944) 44 SR (NSW) 45, 47 (Jordan CJ, Maxwell and Roper JJ). See also *Nulyarimma* (n 4) 187–9 [123]–[129] (Merkel J); de Jonge (n 12) 43–4.

201 *Polites* (n 18) 80–1 (Williams J).

202 Alexandrowicz (n 145) 87–8.

203 See recently *Love* (n 6) 245 [253], 249 [264], 254–57 [274]–[276] (Nettle J); *Mabo* (n 10) 42 (Brennan J); *Teoh* (n 10) 288 (Mason CJ and Deane J) and the authorities cited therein, including *Dietrich* (n 10) 321 (Brennan J), 360 (Toohey J). Cf *Native Title Act Case* (n 129) 486 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

204 Devereux and McCosker (n 9) 37–8; Triggs (n 9) 193; de Jonge (n 12) 54.

205 *Koowarta* (n 16) 203–4 (Gibbs CJ).

206 *PT Garuda [No 9]* (n 2) 416 [39] (Perram J).

207 *Nulyarimma* (n 4) 163 [23] (Wilcox J); Guilfoyle (n 65) 21.

208 *Hape* (n 37) 316 [39] (LeBel J). See also Crawford (n 188) 63–4.

> International law is a legitimate and important influence on [*Mabo*], or alternatively a source of [*Chow* per Dixon J], the common law of Australia. Australia's international law obligations may be transformed or incorporated into the common law of Australia in circumstances where: the relevant obligation is widely accepted as binding among nations [*Polites*; *Chow* per Latham J]; there is no rule in an Australian statute or in judge-made law in Australia contradicting the relevant obligation [*Chow* per Starke and Latham JJ]; and the relevant obligation relates to the rights or responsibilities of the sovereign, rather than individuals [cf *Nulyarimma*].
>
> The plaintiff submits that the above characteristics unite the international law principles that have previously been acknowledged by this court as a source of, or influence on, common law.
>
> The non-refoulement obligation is a widely accepted norm of customary international law (and indeed, although it is not necessary to prove it here, may have attained the status of a jus cogens norm); it relates to the conduct of the sovereign; there is no contrary rule of statute or judge-made law. Moreover, the non-refoulement obligation is enshrined in statute, with the Commonwealth thereby indicating a clear intention to be bound by and implement the obligations through the *Migration Act* (including the ICCPR and CAT nonrefoulement obligations through the complementary protection provisions). Assuming that to be so, the non-refoulement obligation plainly applied in relation to the Commonwealth ship.[209]

D The Function of Customary International Law in Australian Law

The focus of this article is to demonstrate what steps a judge in Australia would have to work through in order to accept that customary international law is incorporated into Australian domestic law. The focus is not on the normative position that such norms *should be* a part of Australian law, nor to fully explore what this 'incorporated' state of affairs might look like. Nonetheless, in order to give my argument consequence, it is important to illustrate the types of cases where such norms, operating in domestic law, might be useful and desirable. As a general statement, it seems likely that an Australian judge would opt for an approach of weak incorporation: this means that customary norms would be subject to inconsistency with statute *and* general law principles or policy. An approach which subjugates custom to both statute and general law seems more realisable in Australia and avoids some of the conceptual angst surrounding how such international norms might relate to precedent[210] or be ill-suited to operate in a domestic legal system.[211]

First and foremost, cases will arise where the direct application of customary norms could be dispositive. *Taylor*[212] illustrates this scenario. The plaintiff sought judicial review of the Attorney-General's decision to refuse consent to the domestic prosecution of Aung San Suu Kyi, the incumbent Foreign Minister of Myanmar,

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209 CPCF Plaintiff's Submissions (n 121) [54]–[57]. See also *Taylor* (n 6).

210 *Nulyarimma* (n 4) 190–1 [132] (Merkel J); Mason, 'International Law as a Source of Domestic Law' (n 12) 214–5. Cf *Trendtex* (n 93).

211 See, eg, Saunders and Currie (n 29) 186–95; *Nevsun* (n 1) 266–7 [197] (Browne and Rowe JJ) (cf 234 [121]–[122] (Abella J)). See also *Kazemi* (n 52) 249–50 [152]–[153] (LeBel J); Crawford (n 188) 64–5.

212 *Taylor* (n 6). See also Rawan Arraf, 'Before the High Court of Australia: The Case of Aung San Suu Kyi', *Opinio Juris* (online, 10 June 2019) <http://opiniojuris.org/2019/06/10/before-the-high-court-of-australia-the-case-of-aung-sang-suu-kyi/>.

for a crime against humanity.[213] The Attorney-General had communicated his refusal to the plaintiff, citing the immunity from jurisdiction enjoyed by incumbent foreign ministers under customary international law, and that consent would place Australia in breach of such obligations.[214] The High Court dismissed the proceedings on a preliminary issue. However, the parties made considered arguments on the applicable customary immunity. The plaintiff submitted that section 6 of the *Diplomatic Privileges and Immunities Act 1967* (Cth) excluded the operation of customary international law;[215] while to the defendant (the Commonwealth) the legislation incorporated only 'some' norms on immunity leaving others unincorporated, and apparently 'not enforceable in domestic courts'.[216] However, it seems desirable, contrary to the Commonwealth's position, for immunities under customary international law to gap-fill as part of the common law around the Commonwealth statutory regime.[217] Similar to how custom can sit around a treaty regime on the level of international law, customary principles can usefully fill 'lacuna' in domestic law.[218]

Another more ubiquitous manner in which customary principles could enter into Australian common law is through their enumeration of basic human rights (consonant with the increasing importance of the individual in international law).[219] In turn, once incorporated, customary principles would be relevant to the common law principle of legality and interpretation of the *Constitution*. Examples of such 'basic human rights' as customary norms include the *jus cogens* prohibitions against torture, genocide, crimes against humanity, racial discrimination and slavery.[220] Also relevant are the prohibitions against arbitrary detention, non-refoulement and emerging environmental rights.[221] In the Australian context, an emerging customary right of special importance is the obligation to consult indigenous people 'in relation to actions which may affect them', or further an obligation to obtain their 'free, prior and informed consent'.[222]

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213 See *Criminal Code Act 1995* (Cth) ss 268.11, 268.115, 268.120(3); *Crimes Act 1914* (Cth) s 13.

214 Taylor Plaintiff's Submissions (n 123) [6]. See, eg, *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium) (Judgment)* [2002] ICJ Rep 3.

215 Taylor Plaintiff's Submissions (n 123) [35].

216 Attorney-General of the Commonwealth, 'Annotated Submissions of the Defendant', Submission in *Taylor v A-G (Cth)*, M36/2018, [53]–[55] ('Taylor Defendant's Submissions').

217 See, also, *Foreign State Immunities Act 1985* (Cth); Lee Charles Walker, 'Foreign State Immunity and Foreign Official Immunity: The Human Rights Dimension' (PhD Thesis, University of Sydney, 2018) 250–1.

218 *Cachia v Hanes* (1991) 23 NSWLR 304, 313 (Kirby P). See also *Dietrich* (n 10) 360 (Toohey J).

219 *Nevsun* (n 1) 227–31 [104]–[114] (Abella J); Eva Monteiro, 'Mining for Legal Luxuries: The Pitfalls and Potential of *Nevsun Resources Ltd v Araya*' (2021) 58 *Canadian Yearbook of International Law* 1, 12–13 <https://doi.org/10.1017/cyl.2021.2>.

220 Tladi (n 54).

221 Ibid 58–62 [131]–[136]. See also Working Group on Arbitrary Detention, *United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings before a Court*, UN Doc A/HRC/30/37 (6 July 2015); Benoit Mayer, 'Climate Assessment as an Emerging Obligation and Customary International Law' (2019) 68(2) *International and Comparative Law Quarterly* 271 <https://doi.org/10.1017/S0020589319000095>.

222 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Report 4 of 2017* (Report, 9 May 2017) [2.182]–[2.185] discussing the *United Nations Declaration on the Rights of Indigenous*

The principle of legality provides that a statute will not be taken to abrogate fundamental rights and freedoms absent 'clear and unequivocal language'.[223] Writing extra-curially, former Chief Justice French earmarked the interaction of this presumption with international law for 'further exploration', perhaps through the 'developmental processes' in *Mabo*.[224] Such interaction has already been suggested by the High Court.[225] Accepting custom as part of the common law would cement its norms in the principle of legality, adding positive prohibitions or obligations to common law values. The rights protected by the principle of legality have been dubbed the 'common law bill of rights'[226] and customary norms would strengthen this judicial means of rights protection in Australian courts.

The incorporation of customary norms into the common law would be of significant consequence for constitutional litigation in Australia. The use of international law to interpret the *Constitution* has been resisted by Australian courts.[227] Such material is rejected as 'rules created by the agreements and practices of other countries'.[228] To bend constitutional meaning to this foreign influence has even been called 'heretical'.[229] Despite what might seem an unreceptive bench, parties before the High Court have not shied away from citing international legal materials: empirical research has shown that between 2009 and 2012, there were more than 80 references in 41 constitutional cases.[230] However, it is rare that such international materials form a decisive part of the Court's reasoning, if any part at all. If customary norms were incorporated into the Australian common law, they would no longer be sidelined as foreign or irrelevant, and instead enable a judge to draw on (domestic, common law) human rights when interpreting the *Constitution*.

Three examples illustrate this point, noting that it is beyond the scope of this article to fully explore this topic. First, there is the principle in *Al-Kateb v Godwin*[231] that the *Migration Act 1958* (Cth) authorises indefinite administrative detention of alien non-citizens. The customary prohibition on arbitrary detention

Peoples, GA Res 61/295, UN Doc A/RES/61/295 (adopted 13 September 2007). See also, *Santos NA Barossa Pty Ltd v Tipakalippa* (2022) 296 FCR 124.

223 *Newman v Minister for Health and Aged Care* (2021) 173 ALD 88, 107 [78] (Thawley J), quoting *Momcilovic v The Queen* (2011) 245 CLR 1, 46 [43] (French CJ) ('*Momcilovic*').

224 French, 'Australia and International Law' (n 7) 24.

225 *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 417–9 [166]–[167] (Kirby P); *Momcilovic* (n 223) 47 [43] (French CJ); *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32.

226 James Spigelman, 'The Common Law Bill of Rights' (McPherson Lecture, University of Queensland, 10 March 2008). See also Dan Meagher, 'A Common Law Bill of Rights' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 2019) 373 <https://doi.org/10.5040/9781509919857.ch-019>.

227 See recently Kirby, 'Municipal Courts and the International Interpretive Principle' (n 24).

228 *Al-Kateb* (n 24).

229 Ibid 589 [63] (McHugh J).

230 Adam Fletcher, 'The Reception of International Law in Constitutional Litigation: The *Al-Kateb* Battle and Its Aftermath' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 2019) 79, 83 <https://doi.org/10.5040/9781509919857.ch-005>, citing Elisa Arcioni and Andrew McLeod, 'Cautious but Engaged: An Empirical Study of the Australian High Court's Use of Foreign and International Materials in Constitutional Cases' (2014) 42(3) *International Journal of Legal Information* 437, 453 <https://doi.org/10.1017/S0731126500012178>.

231 *Al-Kateb* (n 24).

could readily be applied to differently construe the limit on law-making power imposed by Chapter III of the *Constitution*. This is more fully explored elsewhere, noting that similar comments could be made about the principle of legality and construction of the *Migration Act*.[232] Second, in *CPCF*, the plaintiff submitted that any common law prerogative to prevent the entry of non-citizens to Australia was 'cut down' by Australia's customary non-refoulement obligations (construing section 61 of the *Constitution*).[233] Only Keane J responded: 'Powers exercisable by the Executive Government under the common law are not limited by international law obligations *not* incorporated into domestic law.'[234] Third, in *Love v Commonwealth*,[235] interpreting the aliens power,[236] Nettle J had regard to common law doctrines on the acquisition of sovereignty 'now developed in step with' custom, and international law on self-determination and indigenous peoples. His Honour said that 'such considerations need not be pursued further [because] domestic considerations dictate the proper conclusion'. The incorporation of custom into the common law would make it domestic.

IV PROVING CUSTOMARY INTERNATIONAL LAW IN AUSTRALIAN COURTS

Now that an Australian judge could be satisfied as a matter of law that customary international law is incorporated into domestic law, Part IV looks at the procedural question of proving custom in domestic courts. As per Brown and Rowe JJ in *Nevsun*:

> Substantively, customary international law norms can have a direct effect on public common law, without legislative enactment. But for that substantive effect to be afforded a customary international law norm, the existence of the norm must be proven as a matter of fact according to the normal court process.[237]

To reach a stage where Australian judges can apply customary norms as part of the common law, they must be able to identify them first. I argue that the ideal of judicial notice of international law should not distract from the inherently empirical (factual) nature of custom. This should be borne in mind by parties before Australian courts. First, I introduce the basic approach of treating international law like any other question of domestic law: sometimes put in terms of 'judicial notice'.[238] Second, I demonstrate the empirical nature of custom, which makes it different from other sources of international and domestic law. This raises special

232 Fletcher (n 230) 79.

233 CPCF Plaintiff's Submissions (n 121) [5], [58]–[66], [94]. See also Office of the United Nations High Commissioner for Refugees, 'Submissions of the United Nations High Commissioner for Refugees: Seeking Leave to Intervene as Amicus Curiae', Submissions in *CPCF v Minister for Immigration and Border Protection*, S169/2014, 15 September 2014.

234 *CPCF* (n 6) 650–1 [490] (Keane J) (emphasis in original). See also at 627–9 [383]–[388] (Gageler J), 643–5 [459]–[463] (Keane J).

235 *Love* (n 6) 250 [264], 254 [274]–[276].

236 *Australian Constitution* s 51(xix).

237 *Nevsun* (n 1) 250 [160].

238 See, eg, Crawford (n 188) 52, 65.

problems regarding proof. Third, I illustrate how the Australian experience bears out this difference.[239] Fourth, I set out practical implications. This Part has relevance outside incorporation/transformation cases.[240] A party invoking the presumption of conformity or validating legislation under the external affairs power[241] may also need to prove such a norm.

A Judicial Notice

In Canada, judges usually take judicial notice of international law. This means international law is approached as a question of law rather than fact: 'there can be no proof through evidence of the laws of the land'.[242] It is incumbent upon the judge to know the law, and while counsels' submissions guide the judge, they are not limited by this material.[243] This is captured by the maxim, *jura novit curia*. The position extends to all sources of international law, but as regards custom is intimately tied to the idea that it forms part of the common law. As said by Gibran van Ert:

> Customary international law must be noticed by Canadian courts to give effect to the doctrine of incorporation … Incorporation means that customary international law and the common law are one. Thus a failure to take judicial notice of international custom is also a failure to take judicial notice of the common law.[244]

The majority in *Nevsun* was of the same view, quoting van Ert: 'Canadian courts, like courts all over the world, are supposed to treat public international law as law, not fact.'[245] This captures an insistence by pro-incorporation writers that international law not be othered by domestic courts.[246] While international law is to be treated like domestic law, this is contrasted with the position in actions relying on foreign law (ie, the domestic law of other countries). Its content must be pleaded by the parties and proved in evidence by experts.[247]

Despite the fact that customary international law is presently not accepted as 'the law of the land' in Australia, the approach to proof is functionally equivalent to that in Canada, as affirmed by the Federal Court in *Australian Competition and Consumer Commission v PT Garuda Indonesia [No 9]* ('*PT Garuda [No 9]*').[248] In that case, Garuda relied on an expert report regarding the interpretation of an air services treaty[249] between Australia and Indonesia. The Australian Competition and

239 *Ure Trial* (n 6); *Ure Appeal* (n 6); *Taylor* (n 6).
240 See, further, *PT Garuda [No 9]* (n 2) 415 [38] (Perram J).
241 *Australian Constitution* s 51(xxix). See, eg, *Polyukhovich* (n 5).
242 Anne Warner La Forest, 'Evidence and International and Comparative Law' in Oonagh E Fitzgerald (ed), *The Globalized Rule of Law: Relationships between International and Domestic Law* (Irwin Law, 2006) 367, 371–2.
243 Ibid 371–2.
244 Gibran van Ert, *Using International Law in Canadian Courts* (Kluwer Law International, 2002) 33–4.
245 *Nevsun* (n 1) 224 [96] (Abella J), quoting van Ert, 'Three Ways' (n 69) 6.
246 La Forest (n 242) 370. See also Higgins (n 1) 1268.
247 Ibid 373–4; van Ert, *Using International Law in Canadian Courts* (n 244) 34–5.
248 *PT Garuda [No 9]* (n 2).
249 *Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Indonesia for Air Services between and beyond Their Respective Territory*, signed 7 March 1969, [1969] ATS 4 (entered into force 7 March 1969), art 6.

Consumer Commission objected to its admission partly on the basis that public international law could not be the subject of evidence but was to be addressed in legal argument.[250] Perram J started with the proposition that 'domestic law cannot be proved law by evidence'. The position was the same for international law.[251] However, reflecting the Australian view, his Honour rejected that this was explained by the proposition, allegedly arising from *Trendtex Trading Corp v Central Bank of Nigeria* ('*Trendtex*'),[252] that international law is part of domestic law.[253] Unlike in Canada, Perram J regarded international law and foreign law as equivalent in their 'non-autochthonous character'.[254] However, his Honour concluded that by doctrines like the presumption of conformity, international law 'exerts a discernible influence' on Australian law and in this 'very precise and limited sense' is 'one of [its] sources'. This justified it being approached as a legal question, rather than a factual one as for foreign law.[255] Ultimately, the expert report was excluded on other grounds.[256] Generally then, in Australia and Canada, international law is approached as a question of law, like domestic law.

B The Exceptional Nature of Custom

It is widely acknowledged that the formation of customary international law is theoretically problematic.[257] Paradoxical ideas are rife,[258] such as: how can a belief in a law (*opinio juris*) precede the law's existence? Can custom change if divergent state practice is a breach of existing custom? The basic problem is that customary international law is formed by reference to facts: 'state practice is merely a regularity of fact, not a norm.'[259] The International Law Commission ('ILC') emphasises that 'one must look to what States actually do', manifest in

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250 *PT Garuda [No 9]* (n 2) 412 [25].

251 Ibid 413–14 [31]–[32]. See further JD Heydon, *Cross on Evidence* (LexisNexis, 13th ed, 2021) 226 [3075], 1597–602 [41005].

252 *Trendtex* (n 93).

253 *PT Garuda [No 9]* (n 2) 414 [33]–[36].

254 Ibid 416 [41].

255 Ibid 415–17 [38]–[47].

256 Ibid 412–13 [28]–[29], 418 [51]–[54]. See *Evidence Act 1995* (Cth) s 135(c).

257 See, eg, Jörg Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems' (2004) 15(3) *European Journal of International Law* 523 <https://doi.org/10.1093/ejil/15.3.523> ('Uncertainty in the Formal Sources of International Law'); László Blutman, 'Conceptual Confusion and Methodological Deficiencies: Some Ways that Theories on Customary International Law Fail' (2014) 25(2) *European Journal of International Law* 529, 529–30 <https://doi.org/10.1093/ejil/chu034>, and citations therein; Bradley (n 55); Jörg Kammerhofer, *International Investment Law and Legal Theory: Expropriation and the Fragmentation of Sources* (Cambridge University Press, 2021) ch 2 <https://doi.org/10.1017/9781108989428>; Ryan M Scoville 'Finding Customary International Law' (2016) 101(5) *Iowa Law Review* 1893; Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26(2) *European Journal of International Law* 417 <https://doi.org/10.1093/ejil/chv020>.

258 See, eg, *Nevsun* (n 1) 251 [163] n 5; Curtis A Bradley, 'Customary International Law Adjudication as Common Law Adjudication' in Curtis A Bradley (ed), *Custom's Future: International Law in a Changing World* (Cambridge University Press, 2016) 34, 38, 40 <https://doi.org/10.1017/CBO9781316014264.003>.

259 Kammerhofer, 'Uncertainty in the Formal Sources of International Law' (n 257) 528.

'forms of practice as empirically verifiable facts'.[260] The ICJ has acknowledged the difficulty of proving custom. In *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark)*,[261] Judge Tanaka stated that the repetition, time and uptake of state practice required to evidence a general practice 'cannot be mathematically and uniformly decided'. Also, obtaining direct evidence of *opinio juris* (a state's motivation) is almost 'impossible'. Examples of state practice include diplomatic acts, treaty-signing and executive conduct. *Opinio juris* can manifest in government statements and correspondence.[262]

For domestic courts, the search for custom is a search for consensus.[263] Running through English, Canadian and Australian authorities is a rhetoric of 'evidence' and 'proof' foreign to normal legal inquiry.[264] In *R v Keyn*, Lord Coleridge said: 'The law of nations is that collection of usages which civilized states have agreed to observe in their dealing with one another. What these usages are, whether a particular one has or has not been agreed to, must be a matter of evidence'.[265]

In this way, the incorporation/transformation debate could be seen as secondary to the question of whether a party has sufficiently proved a general practice accepted as law:[266]

> A rule of international law becomes a rule – *whether accepted into domestic law or not* – only when it is certain and is accepted generally by the body of civilised nations; and it is for those who assert the rule to demonstrate it … It is certainly not for a domestic tribunal in effect to legislate a rule into existence for the purpose of domestic law and on the basis of material that is wholly indeterminate.[267]

Custom thus requires an empirical inquiry into the quantity and quality of facts. This is completely unlike other fields of law, domestic or international.[268] The dissentients in *Nevsun* stressed that customary identification involves 'empirical exercises'[269] and 'descriptive inquiry', not 'normative arguments'.[270] Thus, the exceptional nature of custom might pose problems to a procedural approach which treats it the same as domestic law.

260 *ILC Draft Conclusions* (n 46) 133.

261 Ibid 176–7.

262 Ibid 133, 140. On treaty-signing: see especially *North Sea* (n 46) 41 [70]–[71].

263 Cf *Trendtex* (n 93) 552–3 (Lord Denning MR).

264 United Kingdom: *West Rand Central Gold Mining Co Ltd v The King* [1905] 2 KB 391, 406–7 (Alverstone CJ); *Compania Naviera Vascongada v SS Cristina* [1938] AC 485, 497 (Macmillan LJ); *Trendtex* (n 93) 556 (Lord Denning MR), 567–70 (Stephenson LJ). Australia: *Polyukhovich* (n 5) 559–60 (Brennan J), 657, 666–9, 672, 692 (Toohey J); *Industrial Relations Act Case* (n 51) 545 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Nulyarimma* (n 4) 191 [132] (Merkel J). Canada: *Kazemi* (n 52) 267 [202] (Abella J); *Nevsun* (n 1) 198 [29] (Abella J), 257–61 [177]–[184] (Brown and Rowe JJ), 297–8 [269] (Côté J).

265 (1876) 2 Ex D 63, 153–4 (Lindley J agreeing at 91, Denman J agreeing at 108, Grove J agreeing at 113, Amphlett JA agreeing at 122, Brett JA agreeing at 143).

266 Mason, 'International Law as a Source of Domestic Law' (n 12) 214.

267 *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418, 513 (Oliver LJ) (emphasis added).

268 *North Sea* (n 46) 176 (Judge Tanaka).

269 *Nevsun* (n 1) 259 [180] (Brown and Rowe JJ).

270 Ibid 297–8 [269] (Côté J).

C The Australian Experience

The question of proof has been a significant barrier to parties invoking customary international law in Australian courts. Sometimes, the existence of a customary norm will be so clear as to not require proof – as for the prohibition on genocide in *Nulyarimma*.[271] However, Merkel J acknowledged that 'unlike the common law … international law is established by evidence and other appropriate material'.[272] In *Polyukhovich*,[273] the Commonwealth argued that amendments to the *War Crimes Act 1945* (Cth) were valid under the external affairs power as they implemented customary prohibitions on war crimes and crimes against humanity extant during WWII. The Court was referred to the Nuremberg Tribunal, the US military tribunal and decisions of Canadian, Israeli and Dutch courts, as well as texts and articles.[274] This was done in submissions, supporting the view that international law is 'ascertained essentially in the same way as a rule of domestic law'.[275] However, Henry Burmester KC, counsel in *Polyukhovich*, posits that Australian courts 'will be reluctant to determine the existence of a customary international law rule where the evidence is indeterminate'.[276] As well as the sources mentioned, counsel may need to present eclectic documentary evidence (while not admitted as such), including diplomatic correspondence, official manuals and General Assembly resolutions.[277] In the past, courts and opposing parties have relied on the arduous standard required to prove custom to summarily dismiss its applicability to the case at hand and avoid questions of its place in domestic law.[278] However, two recent cases considered proof of custom in detail.

First, in *Ure v Commonwealth* ('*Ure*')[279] a special case was stated which required the Court to decide whether the applicant could establish property rights under customary international law over two coral atolls.[280] Her claim was dismissed at first instance and unanimously on appeal, with all judges not finding sufficient evidence of (a) a permissive custom that an individual can acquire property rights over terra nullius and res nullius; or (b) a mandatory custom that a state subsequently acquiring sovereignty must recognise such rights.[281] The Court proceeded on the basis that custom was a question of law. While this was accepted between the parties, Yates J favourably cited *PT Garuda [No 9]* and Stephenson LJ in *Trendtex* referring to older authority on proof by judicial notice of treaties, texts

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271 *Nulyarimma* (n 4) especially at 191–2 [135] (Merkel J).

272 Ibid 191 [132].

273 *Polyukhovich* (n 5) (Brennan and Toohey JJ).

274 Burmester (n 5) 40, 46. See further *Polyukhovich* (n 5) 504–5.

275 Burmester (n 5) 40.

276 Ibid 46–7.

277 Law Society of New South Wales, *The Practitioner's Guide to International Law* (LexisNexis Butterworths, 2nd ed, 2014) 34.

278 See, eg, *Industrial Relations Act Case* (n 51); *Australian Competition and Consumer Commission v PT Garuda Indonesia Ltd* (2016) 244 FCR 190, 250–2 [252]–[257] (Dowsett and Edelman JJ) ('*PT Garuda*'); CPCF Defendants' Submissions (n 121) [21].

279 *Ure Trial* (n 6); *Ure Appeal* (n 6).

280 *Ure Trial* (n 6) 167 [13] (Yates J).

281 Ibid 185–6 [100]–[107] (Yates J).

and judicial decisions.[282] Both judgments engaged in detail with ICJ decisions on the identification as custom and affirmed the view in *Polyukhovich* that the standard elements of state practice and *opinio juris* were needed.[283] The Court also carefully considered diverse forms of state practice (concerning islands in the Arctic Ocean), namely:[284] the *Spitsbergen Treaty*,[285] diplomatic correspondence between the US and Norway and a decision of the Norwegian Supreme Court. Such documents were simply attached to the applicant's written submissions.[286]

Ure illustrates the empirical inquiry necessary to find a customary norm. Yates J rejected that the Treaty codified an existing customary rule on state recognition of antecedent private property rights because outside the Treaty there was 'no material before [his Honour] which establishes that fact'.[287] Further, the Full Court did not allow the applicant to draw on 'general principles of law' under article 38(1)(c) of the *ICJ Statute* to bolster efforts under article 38(1)(b). Rather, 'these are distinct sources of international law which stand on their own'; and nor are teachings in article 38(1)(d) 'likely to be able to demonstrate the existence of a customary rule if there is insufficient evidence of the custom'.[288] This seems correct given custom's exceptional make-up. Further, aided by 'additional correspondence from the [US] Department of State', the Full Court reconstructed one 'complicated episode' of competing claims over Jan Mayen Island incorporating the diplomatic correspondence and Norwegian Supreme Court decision.[289] Much of the Full Court's judgment concerned this decision, *Jacobsen v Norwegian Government*.[290] The applicant tendered a translation (and affidavit) not provided at first instance. The Commonwealth tendered an expert report in reply. Both parties objected to the other's evidence. Based on procedural fairness, the Court admitted only evidence on translation. The expert report was therefore excluded insofar as it addressed 'questions of Norwegian and international law and his opinion on what the Supreme Court might have meant'. Incidental doubts were raised as to its admissibility 'as a matter of the law of evidence'.[291]

Second, in *Taylor*,[292] the parties' submissions were mainly directed at whether the Attorney-General had acted on a correct understanding of international law (that under customary international law incumbent foreign ministers enjoy immunity from jurisdiction). Unlike *Ure*, the approach was more legalistic. The

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282 Ibid 181 [83]–[84] (Yates J), citing *PT Garuda [No 9]* (n 2) and *Trendtex* (n 93) 569 (Stephenson LJ), quoting *Compania Naviera Vascongada v SS Cristina* [1938] AC 485, 497 (Macmillan LJ). See also *Snedden (aka Vasiljkovic) v Minister for Justice* (2013) 306 ALR 452, 468–9 [55]–[60] (Davies J).

283 *Ure Trial* (n 6) 181–4 [85]–[97] (Yates J); *Ure Appeal* (n 6) 467–71 [29]–[41] (Perram, Robertson and Moshinsky JJ). Both refer to *North Sea* (n 46); *Lotus* (n 48); *Nicaragua* (n 46).

284 *Ure Trial* (n 6) 186 [105] (Yates J); *Ure Appeal* (n 6) 471 [42] (Perram, Robertson and Moshinsky JJ).

285 *Treaty Concerning the Archipelago of Spitsbergen*, opened for signature 9 February 1920, 2 LNTS 161 (entered into force 14 August 1925) ('*Spitsbergen Treaty*').

286 *Ure Appeal* (n 6) 477 [63] (Perram, Robertson and Moshinsky JJ).

287 *Ure Trial* (n 6) 188 [119].

288 *Ure Appeal* (n 6) 471 [41] (Perram, Robertson and Moshinsky JJ).

289 Ibid 477 [62].

290 (1940) 7 ILR 109.

291 *Ure Appeal* (n 6) 476 [59]–[61].

292 *Taylor* (n 6).

Commonwealth relied on ICJ decisions, International Criminal Court decisions, foreign judgments and ILC writings.[293] The plaintiff contended that the widespread uptake of the *Rome Statute of the International Criminal Court*[294] disavowed the immunity.[295] Nonetheless, the empirical quality of customary identification was evident. Both parties placed the onus of proof on the other.[296] The Commonwealth submitted that the plaintiff had 'a flawed understanding of how customary international law is formed' and pointed to no 'evidence'.[297] Also, the transcript refers to 'affidavits regarding alleged immunities' and 'relevant evidence' before the Court.[298] These affidavits are not publicly accessible, but it can be gleaned from the transcript that they annex copies of ICJ decisions. While the plaintiff did not ask the Commonwealth to 'formally prove' case law or texts, this possibility was acknowledged for other material as was the prospect of 'going through evidence to try and find facts'.[299] Nettle J asked whether there was 'anything required by way of facts' to determine the customary question – the Commonwealth replied 'it is just the law … exhibited to Ms Nance's affidavit'.[300]

D Practical Implications for Proving Custom

Tying this together, Australian courts have approached international law, including custom, as a question of law. It falls to counsel to place relevant material before the court, but practitioners and judges are reluctant to formally adduce and admit evidence, including expert reports. This is an appropriate basic approach. However, Australian courts should not pretend that customary norms are the same as other normative sources of law. Rather, parties should be aware of the onus they bear to prove the rule and not expect the court to be familiar with the law or attempt its own search through eclectic documentary material.[301] Further, drawing on the Supreme Court of Canada, there is little margin for error: custom is, 'by its very nature, unequivocal. It is not binding law if it is equivocal'.[302] This strict empirical reality is observed by Burmester and borne out in *Ure* and *Taylor*.

In Canada, there has been acknowledgment that it can be appropriate for custom to be formally proved by expert evidence.[303] Anne Warner La Forest notes the increasingly complex nature of customary norms and that 'there is strong

293 Taylor Defendant's Submissions (n 216) [33]–[38].

294 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

295 Taylor Plaintiff's Submissions (n 123) [48]–[57].

296 Ibid [57]; Taylor Defendant's Submissions (n 216) [36]–[38]; Daniel Taylor, 'Annotated Plaintiff's Reply', Submission in *Taylor v A-G (Cth)*, M36/2018, 5 June 2019, [14].

297 Taylor Defendant's Submissions (n 216) [38].

298 Transcript of Proceedings, *Taylor v A-G (Cth)* [2018] HCATrans 201, 232–8.

299 Ibid 243–63, 365–73.

300 Ibid 658–71.

301 Cf van Ert, *Using International Law in Canadian Courts* (n 244) 30–1; La Forest (n 242) 367, 370, 378–9, 387.

302 *Kazemi* (n 52) 230 [102] (LeBel J).

303 See, eg, Louis LeBel and Gloria Chao, 'The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law' (2002) 16(2) *Supreme Court Law Reports* 23, 60–1 <https://doi.org/10.60082/2563-8505.1019>.

reason to believe that courts are not comfortable with the traditional approach' of judicial notice.[304] In *Nevsun*, Brown and Rowe JJ proposed a three-step approach:[305] first, finding the facts of state practice and *opinio juris* (with judicial notice used in simple cases); second, recognising norms arising therefrom; third, applying such norms to the case at hand. They pointed also to the necessity of examining foreign cases in the search for custom and that, usually, foreign law is treated as fact. Their comments dovetail with the examination of the Norwegian decision in *Ure* (and the Full Court's exclusion of much of the expert report): 'Canadian judges need to be able to understand decisions rendered in a foreign legal system, in which they are not trained, and in languages they do not know. Making expert evidence available for judges to understand foreign language texts is simply sensible'.[306]

Even the *Nevsun* majority acknowledge that evidence of international law might, sometimes, be needed.[307] John Crawford observes that the 'process of judicial notice has a special character' where 'resort to expert witnesses' might be necessary.[308]

Such concessions have even more force in the Australian context. A good, flexible approach is proposed by La Forest in Canada: generally, submissions and their attachments will be sufficient, but expert evidence should be used where of assistance to the court.[309] An evidentiary method of ascertaining law 'does not affect its character as law'.[310] In a separate appeal of *Australian Competition and Consumer Commission v PT Garuda Indonesia Ltd*, Dowsett and Edelman JJ endorsed this approach, dispensing with a brief submission relying on custom:

> It was common ground that propositions of international law could be established without expert evidence and simply by way of submissions. That assumption … is highly questionable. For instance, the recognition that a developing international principle has become a requirement of international law can require evidence of widespread and representative State practice and *opinio iuris* … It may be difficult, for example, for a party to establish without either expert or lay evidence, a pattern of State behaviour and the reasons why States have acted in that way. However, it is not necessary to explore the extent to which the assumption is justified in this case.[311]

Stepping back, then, an Australian judge asked to give domestic effect to a customary norm will first need to be satisfied of the norm's existence. Parties should realise that this involves an empirical inquiry (and not rest on the ideal

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304 La Forest (n 242) 384–5.

305 *Nevsun* (n 1) 257–61 [177]–[184].

306 Ibid 259–60 [181].

307 Ibid 225–6 [99] (Abella J); van Ert, *Using International Law in Canadian Courts* (n 244) 39–40; van Ert, 'Three Ways' (n 69) 6–7.

308 Crawford (n 188) 52.

309 La Forest (n 242) 379–80, 387–8, citing *Bouzari v Iran* [2004] 71 OR (3d) 675 (CA); *Bouzari v Iran* [2002] ONSC 1624. See also van Ert, 'Three Ways' (n 69) 6, citing *Northwest Atlantic Fisheries Organization v Amaratunga* [2011] NSCA 73 and *R v Appulonappa* [2013] BCSC 31.

310 La Forest (n 242) 374, quoting Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 6th ed, 2003) 40.

311 *PT Garuda* (n 278) 251 [254].

of judicial notice) to avoid the 'blank stare'[312] from the judge.[313] While adducing evidence will not usually be necessary, courts and parties should not close their mind to this possibility.

V THE COURT'S ROLE

Finally, a judge asked to give domestic effect to customary international law in Australia must be satisfied that it is legitimate for a court (rather than Parliament) to do this. The split in the Supreme Court in *Nevsun* demonstrates this residual problem. The crux here is the 'real danger' that 'identifying customary international law can be changed from an empirical to a normative exercise, depending on the views of the person or body engaged in this process'.[314] In the Australian context, this danger could be linked to the 'deep anxieties' described by Charlesworth et al: it is not the court's role to 'legislate' international norms into domestic law, this should be left to Parliament.[315] In this Part, I argue that giving effect to custom in Australian courts is legitimate on both an international and domestic understanding of judicial function. First, I set out the competing identities which emerge when domestic courts engage with customary norms, evident in *Nevsun*. Second, in the Australian context, I advocate for a cautious approach to incorporation, fulfilling a valid international role and falling into step with the common law tradition.

A Competing Identities of Domestic Courts

Under article 38 of the *ICJ Statute*, domestic judicial decisions are both evidence of State practice under article 38(1)(b) and a subsidiary means for the determination of international law under article 38(1)(d).[316] Anthea Roberts describes domestic courts as 'Janus-faced', able to be 'law creators or law enforcers'.[317] The 'creation' function, which on a purely technical view should not occur, arises according to some commentators because the apparently stable criteria of state practice and *opinio juris* are cast aside by decision-makers in favour of normative discretion.[318] A recent global study found that judges 'duly pay lip-service to the two constitutive elements' but findings on custom are 'of an oracular nature',[319] tantamount to simple assertions. The same critique is levelled

312 Walker and Mitchell (n 108) 122–4, citing Paul L Hoffman, 'The "Blank Stare Phenomenon": Proving Customary International Law in US Courts' (1996) 25(1–2) *Georgia Journal of International and Comparative Law* 181.

313 La Forest (n 242) 387.

314 Walker and Mitchell (n 108) 115.

315 Charlesworth et al (n 11) 424–5. See also Walker and Mitchell (n 108) 123–5.

316 Roberts (n 71) 62–4.

317 Ibid 62, 68.

318 Bradley (n 258) 34.

319 Cedric MJ Ryngaert and Duco W Hora Siccama, 'Ascertaining Customary International Law: An Inquiry into the Methods Used by Domestic Courts' (2018) 65(1) *Netherlands International Law Review* 1, 3 <https://doi.org/10.1007/s40802-018-0104-y>.

at the ICJ.[320] Domestic courts are faced with competing identities when engaging with customary international law: normative law-creation (which might crystallise into new custom) or empirical law-enforcement. Consequently, 'one should expect to see variation among tribunals in how CIL is identified and applied'.[321] In turn, this gives rise to a unique judicial dialogue on customary norms. On sovereignty immunity, Lord Denning MR said in *Trendtex*:

> To my mind this notion of a consensus is a fiction. The nations are not in the least agreed upon the doctrine of sovereign immunity … It is, I think, for the courts of this country to define the rule as best they can, seeking guidance from the decisions of the courts of other countries, from the jurists who have studied the problem, from treaties and conventions and, above all, defining the rule in terms which are consonant with justice rather than adverse to it.[322]

Roberts points to divergent decisions of the House of Lords[323] and Italian Court of Cassation[324] on the existence of sovereign immunity from domestic civil claims for torture (maintained in the former but not the latter).[325] She concludes that the conflicting positions are explained by the courts' different self-understanding of their role vis-à-vis customary international law.[326] In *Jones v Saudi Arabia*, Lord Hoffman said of *Ferrini v Germany*:

> if the case had been concerned with domestic law, [it] might have been regarded by some as 'activist' but would have been well within the judicial function … But the same approach cannot be adopted in international law, which is based upon the common consent of nations. It is not for a national court to 'develop' international law by unilaterally adopting a version of that law which, however desirable … is simply not accepted by other states.[327]

Nevsun exposes the same competing identities.[328] Abella J believed that 'there is no reason for Canadian courts to be shy about implementing *and advancing* international law'.[329] The court's role was to 'shape the substance of international law'.[330] In light of this belief, the novel possibility allowed by the majority – that a corporation could incur civil liability for breach of customary norms – becomes more comprehensible. The dissenting judges subscribed to the conservative stance, where they did not make custom but only received it. Thus, Brown and Rowe JJ stated that there was no evidence for the majority's contention, stressing that on international law Canadian courts should follow 'the bulk of authority'.[331] Internal

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320 Bradley (n 258) 36. See generally Ryngaert and Siccama (n 318); Talmon (n 256).

321 Bradley (n 258) 50.

322 *Trendtex* (n 93) 552–3.

323 *Jones v Saudi Arabia* [2007] 1 AC 270 ('*Jones*').

324 *Ferrini v Germany* (2006) 128 ILR 658.

325 Roberts (n 71) 64–7.

326 Ibid 69. See also René Provost, 'Judging in Splendid Isolation' (2008) 56(1) *American Journal of Comparative Law* 125 <https://doi.org/10.5131/ajcl.2007.0004>.

327 *Jones* (n 323) 297–8 [63].

328 H Scott Fairly, 'International Law Matures within the Canadian Legal System: *Araya et al v Nevsun Resources Ltd*' (2021) 99(1) *Canadian Bar Review* 194, 210; *Nevsun* (n 1) 295 [262] (Brown and Rowe JJ).

329 *Nevsun* (n 1) 214 [71] (emphasis added).

330 Ibid 214 [72].

331 Ibid 281–2 [228], quoting *Kazemi* (n 52) 233–4 [108] (LeBel J).

concerns of the separation of powers were more important than participation in Abella J's 'choir' of domestic courts.[332] The doctrine of adoption was already 'extraordinary' in that 'it leads courts to adopt a role otherwise left to legislatures'.[333] But creating a rule of private liability for a customary breach (eg, of the prohibition of slavery) 'exceeds the limits of the judicial role'[334] – 'such fundamental reform to the common law must be left to the legislature'.[335] Justice Côté admonished, 'a court cannot abandon the test for international custom in order to recast international law into a form more compatible with its own preferences'. Custom 'moves only so far as state practice will allow'.[336]

B An Australian Approach

If Australian judges were to give domestic effect to customary norms, they would confront these competing identities. In *PT Garuda [No 9]* and *Ure*, the Court recognised its international stature under article 38.[337] Perram J concluded that 'Australian courts are, therefore, actual participants in the interpretation and implementation of international law' and, 'are themselves potential sources of the same international norms'.[338] Australian courts might echo Brown and Rowe JJ's concern over the separation of powers and the limits of judicial function. Burmester describes the backlash from *Teoh* 'from the political branches of government' and cautions, 'one could expect a similarly strong hostile reaction if an Australian court was to adopt a strong incorporation approach' to custom.[339] However, both law-creating and law-enforcing courts 'have a basis in the doctrine of sources'.[340] As part of an international system, it would be open to Australian courts to play an important, while cautious role in international judicial dialogue by recognising (and giving effect to) only clearly established custom – following the bulk of authority. While some authors go further to advocate for the primacy of domestic courts in international law,[341] a cautious application of customary norms by Australian courts would be enough to realise their international role under article 38.

This approach to customary incorporation would also respect domestic limits of judicial function. As mentioned, incorporation has been labelled part of the 'common law tradition'.[342] In *Nulyarimma*, Wilcox J observed that 'the incorporation approach is now dominant in England, Canada, and, perhaps, New Zealand':[343] a compelling indication that it poses no threat to the separation of powers. The empirical mindset advocated in Part IV ensures that judges are not

332 *Nevsun* (n 1) 214 [72].
333 Ibid 251–2 [164].
334 Ibid 246 [149].
335 Ibid.
336 Ibid 279 [269], quoting *Jones* (n 323) 297–8 [63] (Hoffman LJ).
337 *PT Garuda [No 9]* (n 2) 417 [45]–[47] (Perram J); *Ure Appeal* (n 6) 476 [57], 485–6 [109], 488 [122].
338 *PT Garuda [No 9]* (n 2) [46]–[47] (Perram J).
339 Burmester and Reye (n 57) 51.
340 Roberts (n 71) 91.
341 Cf Mills and Stephens (n 75).
342 *Hape* (n 37) 316 [39] (LeBel J). See also *Nulyarimma* (n 4) 204 [181] (Merkel J).
343 *Nulyarimma* (n 4) 163 [23].

receiving uncertain rules into the common law, but only those evidenced by international consensus (an inherently reactionary process).[344] Finally, both Abella J in *Nevsun*[345] and Merkel J in *Nulyarimma*[346] observed that customary international law, like the common law, is a system where change is inherent but incremental. Therefore, subject to parliamentary intervention, Australian judges could give effect to customary norms in a manner consonant with their judicial function.

VI CONCLUSION

This article aimed to find the proper place for customary international law in the Australian common law. On any view, the current state of judicial authority is unsatisfactory and this is one motivation behind this article. However, the way forward does not turn solely on questions of theory or doctrine. Rather, I have argued that moving past old precedents on the relationship between customary international law and the common law is only a first step to Australian courts being able to give domestic effect to customary norms. The lens I have applied in this article has been to use the Canadian experience, and in particular the recent decision in *Nevsun*, to illuminate further issues. These relate to proving custom before domestic courts and defining the boundaries of legitimate judicial function in receiving such norms. As I have emphasised throughout, my aim is pragmatic and limited: what steps would an Australian judge have to work through if they were to give domestic effect to a customary norm?

Part III was concerned with the well-documented doctrinal question. I argued that the position that custom is not part of Australian common law rests on weak precedent. Namely, *Chow* amounts to obiter consideration of English law, and *Nulyarimma* to a cautious policy decision of a Federal Court majority. They create no general rule. This finding is a key contribution of my article. And without purporting to fully address the normative question of whether and when custom *should* be given domestic effect, I illustrated the types of cases where such norms would be applicable and helpful – constitutional litigation being one such area. In Part IV, on proof, I proposed that while treating custom as a question of law (perhaps in terms of judicial notice) is a good starting position, this should not distract from what is an empirical task. This is because custom is made from facts, not norms. This mindset should guide any party trying to establish a customary norm in an Australian court. In Part V, on the court's role, I argued that while custom challenges a domestic court's identity, giving effect to its norms in Australia is legitimate on both an international and domestic understanding of judicial function.

While customary norms will only be relevant to some issues before Australian courts, their measured application as part of the common law would provide judges with a source of consensus-based, international rules on which to draw.

344 Charlesworth et al (n 11) 464.

345 *Nevsun* (n 1) 215 [74].

346 *Nulyarimma* (n 4) 203–5 [180]–[186]. Cf Susan Kiefel, 'The Adaptability of the Common Law to Change' (Speech, The Australasian Institute of Judicial Administration, 24 May 2018).

Also, developments like *Nevsun* reveal new frontiers, and recent cases from the High Court and Federal Court show that the issue is very much live in the mind of Australian practitioners and judges, albeit tempered by uncertainty as to the state of the law. This uncertainty should be resolved, one way or another. In making my argument, I have avoided aspirational statements of harmony between international and domestic law. Rather, I have detailed a realistic pathway where customary international law could be accepted in Australian common law.