UNHELPFUL AND INAPPROPRIATE?: THE QUESTION OF GENOCIDE AND THE STOLEN GENERATIONS

Julie Cassidy*

I Introduction

The first anniversary of the historic Australian Federal Government apology to the Stolen Generations on 13 February 2008 provides a pertinent impetus to reflect again on this important event. One aspect that seemingly did not receive much attention was the interview with Prime Minister Kevin Rudd the next day on the ABC's *Lateline* program regarding the terms of the apology. When asked why he had deliberately not used the term 'genocide', even though that term had been used in the Australian Human Rights and Equal Opportunity Commission ('HREOC') report, *Bringing Them Home*, the Prime Minister's reply was that genocide 'has a specific definition in international law and I don't believe [it] is either appropriate or helpful in describing the event[s] as they occurred or … in taking the country forward.'[1] This article considers whether it is in fact appropriate to use the word 'genocide' when examining the historical treatment of Aboriginal people in Australia,[2] and, in particular, the assimilationist policies that saw Aboriginal children forcibly removed from their families and detained in government and church institutions.

This article begins with an introduction to the prohibition against genocide under international law. It then turns to a brief overview of the factual background of the removal policies that underpins the consequent analysis. The article then places the question in its domestic legal context by examining the Australian and international jurisprudence thus far. It will be seen that the specific issue of whether the assimilationist policies relating to the Stolen Generations amounted to genocide has had scant attention in the domestic courts and has not been considered in an international forum. While such cases have been considered elsewhere, the analysis is often generic, considering the various legal issues in the cases[3] and typically examining each case in isolation.[4] It is intended that the article will provide a useful resource on the application of the concept of genocide through its synthesis of the combined Australian litigation in the context of the international law jurisprudence.

Even though, as Prime Minister Rudd suggests, the forcible removal of Aboriginal children from their families may not currently satisfy the 'specific definition [of genocide] in international law',[5] the fact that so many of the elements of genocide *are* satisfied is extremely disturbing. The article suggests that there is a substantial, if incomplete, foundation for claims of genocide and this will ensure that the matter continues to be a burning issue for the Stolen Generations of Australia and for other relevant Indigenous groups, such as the Indian residential school survivors in Canada.

Ultimately, it is concluded that the definition of genocide under international law should be revisited to include cultural genocide. The reasons for excluding cultural genocide are considered.[6] It will be seen that these include legitimising efforts to 'civilise' Indigenous peoples. This rationale cannot be accepted. Moreover, given modern international law's recognition of the right of Indigenous peoples to maintain their language and culture, it is arguable that modern state practice would no longer support such a rationale for the exclusion of the forced removal of Aboriginal people from the concept of cultural genocide.

II A Brief Outline of Genocide at International Law

A 'The Crime of Crimes'

International crimes include war crimes, crimes against humanity, genocide and torture.[7] In turn, genocide and

torture are considered the most serious crimes against humanity,[8] and genocide is considered 'the crime of crimes.'[9] This international crime has two sources under international law; first, international treaty law, specifically the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* ('*Genocide Convention*') and the 1998 *Rome Statute of the International Criminal Court* ('*Rome Treaty*'); and second, customary international law, which is derived from the practice of states. In a sense the two sources of international law are not mutually exclusive.[10] Customary international law often predates a relevant treaty,[11] while treaties often codify or spell out customary international law.[12] This is evident in the international law on genocide, with the *Genocide Convention*[13] and the *Rome Treaty*[14] codifying customary international law's prohibition against genocide.[15] Customary international law's prohibition against genocide is binding on states, even if they have not ratified the relevant treaties prohibiting it.[16]

As the author has elsewhere discussed in detail,[17] customary international law, including the prohibition against genocide, is part of a nation's domestic common law and is thus enforceable in the municipal courts. The judiciary has recognised that, in the absence of formal transformation of international law into domestic law through legislation, customary international law automatically flows into the national legal system becoming part of the 'law of the land.'[18] In the absence of specific inconsistent national legislation, individuals can rely on customary international law when enforcing their rights in the municipal arena.[19] Thus in *Polites v Commonwealth*[20] Williams J noted that customary international law, once 'established to the satisfaction of the courts, is recognised and acted upon as a part of [Australian] municipal law so far as it is not inconsistent with the rules enacted by statutes or finally declared by courts.'[21] This is known as the incorporation or adoption theory and has been affirmed in a number of subsequent Australian decisions.[22]

Before turning to the *Genocide Convention*, three interrelated points in regard to the character of customary international law's prohibition against genocide need to be addressed. First, some principles of international law are *jus cogens* – non-derogable norms reflecting essential principles crucial to maintaining the international legal order.[23] They must not be derogated from by international agreement (ie, treaty[24]) or national legislation, nor avoided by protest or acquiescence.[25] The prohibition against genocide is well established as a *jus cogens* norm.[26] Second, interrelated with the notion of *jus cogens* are obligations *erga omnes*. Customary international rules that are *erga omnes* impose obligations on all states and, as a corollary, confer on any state the right to demand acts contrary to customary international law be discontinued.[27] Thus where there is a breach of an *erga omnes* obligation a third party state has *locus standi* to bring an action against the offending state.[28] The prohibition against genocide under international customary law is recognised as imposing *erga omnes* obligations.[29]

Third, where an international crime is *jus cogens* or *erga omnes* it is also treated as *delict jure gentium*, extending to all members of the international community authority to apprehend and try the alleged offender.[30] This universal jurisdiction to prosecute international crimes allows any state that has actual custody of the alleged offender to exercise jurisdiction over him or her regardless of the offender's or victim's nationality or the *locus* of the crimes.[31] Thus, universal jurisdiction extends to domestic courts extraterritorial jurisdiction to prosecute international crimes. The doctrine of universal jurisdiction includes crimes against humanity and genocide.[32] Universal jurisdiction is recognised in certain cases under customary international law,[33] but is also supported by international treaty law, for example, the *Genocide Convention*.[34] The doctrine of universal jurisdiction is in turn supported by international law's imposition on states of an obligation *aut dedere aut judicare*[35] (a duty imposed on the state in custody of an alleged offender to either extradite them to another state or prosecute).[36] As noted below, treaties, such as the *Genocide Convention,* also support the co-operation of states, specifically in regard to extradition.

B *Genocide Convention*

The *Genocide Convention* was ratified by Australia on 8 July 1949. In Australia the *Genocide Convention Act 1949* (Cth) gave parliamentary approval to the ratification, but at the time there was no actual domestic legislation implementing the *Genocide Convention* in Australia. Such legislation was to follow the *Convention* coming into force on 12 January 1951. However, no legislation specifically making genocide a crime in Australia was enacted until relatively recently, with the passage of the *International Criminal Court (Consequential Amendments) Act 2002* (Cth). This Act made genocide a Commonwealth offence under the *Criminal Code Act 1995* (Cth).

Article 1 of the *Genocide Convention* confirms that genocide is a crime. 'Genocide' is then defined in art 2:

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.

Article 2 identifies the relevant *mens rea* as the 'intent' to destroy the protected group in whole or in part and is discussed in more detail below. Four protected groups are identified in art 2: national groups, ethnical groups, racial groups and religious groups. These terms are also discussed in more detail below. Specifically recognised within art 2 is the fact that genocide may occur through the forcible removal of children of an identified group.

Under art 3, genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempted genocide and complicity in genocide are punishable. Importantly in the context of this discussion, the genocide does not have to be effected; it suffices that there was an attempt to destroy a group that is identifiable in terms of ethnicity, race or religion. It will also be seen that, for an act to constitute genocide, the affected persons need not be numerous[37] and the genocide may operate within territorial confines.[38] Article 4 of the *Genocide Convention* provides that individuals committing genocide are to 'be punished, whether they are constitutionally responsible rulers, public officials or private individuals.'

Under art 5, contracting parties such as Australia undertake to enact legislation giving effect to the *Convention*. This includes an obligation to provide effective penalties for persons committing genocide. As noted above, in Australia this was only recently effected through the *International Criminal Court (Consequential Amendments) Act 2002* (Cth). The Act inserts new provisions into the Commonwealth *Criminal Code* creating criminal offences for genocide,[39] specifically:

- genocide by killing;[40]
- genocide by causing serious bodily or mental harm;[41]
- genocide by deliberately inflicting on the group conditions of life calculated to bring about its physical destruction;[42]
- imposing measures intended to prevent births;[43] and
- forcibly transferring children.[44]

Each offence has its stated *mens rea* as the 'intent to destroy' and in each case the four identified groups are national, ethnical, racial and religious groups. The punishment for each offence is life imprisonment.[45] Interestingly, this legislative recognition of the crime of genocide was consequent to the *Rome Treaty*, which created the International Criminal Court ('ICC'), rather than as an implementation of the *Genocide Convention*.

Article 6 of the *Genocide Convention* provides for the trial of persons charged with genocide by a competent tribunal of the state in the territory in which the act was committed or an international penal tribunal. In regard to the first aspect, and discussed further below in the context of the *Rome Treaty*, s 268.1(2) of the *Criminal Code* (Cth) makes clear Parliament's intention that, under the *Code*, the ICC's jurisdiction is to be complementary to the jurisdiction of Australian courts. The primacy of Australian jurisdiction over the genocide offences in the *Criminal Code* (Cth) is preserved under s 268.1(3).

In regard to the establishment of an international penal tribunal pursuant to art 6 of the *Convention*, there was a considerable gap between the commencement of the *Genocide Convention* and the formation of the ICC; and in the interim ad hoc international tribunals were created instead. Initial efforts to establish a permanent international criminal court began in the wake of the international military tribunals established after World War II at Nuremberg and Tokyo, though these efforts were frustrated by the Cold War.[46] In the early 1990s, in response to atrocities committed on a massive scale in former Yugoslavia and Rwanda, the United Nations Security Council established ad hoc international criminal tribunals to try individuals charged with crimes under international law in connection with the civil conflicts that had occurred in each of those countries.[47] (Jurisprudence established under these tribunals is considered below.) Nevertheless, prior to the creation of the ICC, international criminal law predominantly had to rely on enforcement by domestic courts; and despite

the *Genocide Convention* providing for the trial of persons charged with genocide by an international penal tribunal, the municipal courts continue to have primary jurisdiction over genocide. Under art 9 of the *Genocide Convention* the International Court of Justice ('ICJ') has jurisdiction over disputes between contracting parties in regard to state responsibility for genocide.

C *Rome Treaty*

The ICC was created pursuant to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held in Rome in July 1998, where the *Statute of the International Criminal Court* was adopted. The *Rome Treaty* came into force on 1 July 2002 upon the ratification by 60 states. As at June 2009, 139 states had signed the *Rome Treaty* and 108 states, including Australia, were parties to it.[48] Article 1 of the *Rome Treaty* establishes the ICC as a permanent court and vests it with jurisdiction over 'persons for the most serious crimes of international concern.' Under art 5 these offences include genocide and crimes against humanity.[49] The ICC can investigate and prosecute individuals[50] under art 5 and order reparations for victims under art 75. As noted above, under art 9 of the *Genocide Convention* the ICJ has jurisdiction over disputes between contracting parties in regard to state responsibility for genocide.

As for the ICC's jurisdictional scope, two points are relevant. First, some ratifying nations have expressly limited when they will refer a matter to the ICC. For example, on ratification of the *Rome Treaty*, Australia declared that a prosecution in the ICC of an Australian citizen is dependent upon agreement and certification by the Australian Attorney-General.[51] This procedure has been given legislative effect in the *International Criminal Court Act 2002* (Cth). Second, the ICC only has complementary jurisdiction,[52] meaning that it will take effect only when municipal courts are unwilling or unable to operate.[53] Again, on ratification, Australia made the following declaration 'the terms of which have full effect in Australian law, and which is not a reservation':[54]

> Australia notes that a case will be inadmissible before the International Criminal Court (the Court) where it is being investigated or prosecuted by a State. Australia reaffirms the primacy of its criminal jurisdiction in relation to crimes within the jurisdiction of the Court. To enable Australia to exercise its jurisdiction effectively, and fully adhering to its obligations under the Statute of the Court, no person will be surrendered to the Court by Australia until it has had the full opportunity to investigate or prosecute any alleged crimes.

III The Stolen Generations

The government policies in Australia of removing Aboriginal children from their families and placing them in official Aboriginal-only institutions is now well documented.[55] While the author has elsewhere suggested that assimilation was not always the sole impetus for the removal policies,[56] the logic of assimilation did form a key basis for the removals.[57] By removing Aboriginal children from their families, Australian governments sought to break the children's connection with their family, Aboriginal culture and traditional land, and in turn assimilate the children into white society.[58] Though these policies predated 1937, when the first conference of the Commonwealth and State Aboriginal Authorities was held, a telling and now infamous resolution was made by Australian governments at that 1937 conference. It was resolved that the 'destiny of the natives of aboriginal origin, but not of full blood, lies in their ultimate absorption by the people of the Commonwealth, and it therefore recommends that all efforts be directed to that end.'[59] This quote highlights two key aspects of the genocide debate. First, underpinning the removal policies during both the earlier segregation/protectionist era and the later assimilation period was the notion that 'full blooded' Aboriginal people would die out,[60] hopefully as 'quickly as possible.'[61] This raises the spectre of intent for the physical destruction of the Aboriginal races that would amount to genocide. Second, the aim was also to destroy, within Aboriginal children of mixed parentage, links with Aboriginal language and culture. This ties in with the concept of cultural genocide. Both issues are addressed below.

In Australia the policies of removing Aboriginal children from their families predated federation. Thus, initially it was the State governments that promulgated the removal policies. For example, the *Aboriginal Protection Act 1869* (Vic) established the Board for the Protection of Aborigines, and under the regulations[62] the Governor could order the removal of any Aboriginal child from their family and their placement in reformatory or industrial schools if the child was deemed neglected or unprotected. In South Australia, s 2 of the *Aboriginal Orphan Ordinance 1844* (SA) empowered the Protector of Aborigines to apply to two justices to order

the indenture of any 'half-caste' or other Aboriginal child.[63] In time legislative removal powers were not premised on neglect, much less the requirement of a court order.[64] For example, the neglect requirement in the *Aboriginal Protection Act 1869* (Vic) was removed by the *Aborigines Regulation 1899* (Vic). Broader removal powers were also conferred under the *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld). Under s 31 of the Queensland Act, the Minister was authorised to remove Aboriginal children from their families and detain them in institutions. The Queensland legislation stipulated that, whether the child's parents were living or not, legal guardianship of all Aboriginal children was placed with the Chief Protector of Aborigines.[65] Under these legislative provisions, numerous summary criminal offences were imposed for breaching these restrictive provisions.

Post-federation, the policies continued to be pursued by State governments,[66] as the Commonwealth's legislative powers over 'race' (s 51(xxvi) of the *Commonwealth Constitution*) excluded the 'aboriginal race'. It was not until 1967, pursuant to a national referendum amending the *Commonwealth Constitution*, that the Federal Government obtained legislative powers over Aboriginal affairs. Nevertheless, through the Commonwealth Government's control of the Northern Territory under s 122 of the *Constitution* and its co-ordination of State and Territory Aboriginal affairs, the Commonwealth Government played a primary role in promoting the policy of assimilation from the time of federation. Thus in 1911[67] the Federal Parliament enacted the *Aboriginals Ordinance 1911* (Cth), which under s 3 authorised the Northern Territory Chief Protector to remove any 'aboriginal or half-caste' child if it was, in the Chief Protector's opinion, in the best interests of the child. Given the high proportion of Aboriginal people in the Northern Territory,[68] the Commonwealth's role in the removal of Aboriginal children was significant from the outset. In *Cubillo v Commonwealth*,[69] the Full Federal Court found that documents dating from 1911[70] indicated support at the federal level for the removal of part-Aboriginal children from their families and for the placement of such children in institutions.

While the primary institutions where children were detained in the Northern Territory were in Darwin and Alice Springs, sometimes part-Aboriginal boys were placed in an institution in Adelaide, South Australia.[71] Thus, the children could be placed in institutions many miles from their families and possibly interstate. In Australia, the term 'Stolen Generations'[72] is now commonly used to describe those children who were forcibly removed from their families under these policies.

As may be apparent from this brief discussion, in Australia the focus was particularly on Aboriginal children of mixed parentage.[73] This is evidenced in a report dated 12 September 1911 from the Acting Administrator of the Northern Territory to the Minister for External Affairs, in which it was recommended that despite the undoubted protests from their mothers, 'all half-caste children who are living with aborigines' should be gathered in.[74] Similarly a year later the Chief Protector of Aboriginals reported that '[n]o half-caste children should be allowed to remain in any native camp, but they all should be withdrawn and placed on stations. So far as practicable, this plan is now being adopted.'[75] The part-Aboriginal children were identified in legislation using offensive terms such as 'half-caste', 'quadroons' or 'octoroons', based on the perceived percentage of Aboriginal/non-Indigenous blood; such being effectively determined on the child's complexion. The concentration on part-Aboriginal children stemmed from the conclusion that 'full blooded' Aboriginal persons would die out.[76]

The legislation authorising the removal of part-Aboriginal children purely on the basis of race was repealed in the 1950s and 1960s.[77] For example, the Northern Territory *Aboriginal Ordinance 1918* (Cth) was repealed in 1957 and the *Welfare Ordinance 1957* (Cth) did not replicate the power to remove part-Aboriginal children without a 'welfare' reason.[78] In the Northern Territory, it was not until 1964, with the enactment of the *Social Welfare Ordinance 1964* (NT), that Aboriginal children were covered by the general welfare provisions of that statute, rather than provisions specifically confined to Aboriginal children.[79] Similarly, in Queensland it was not until the *Aboriginal and Torres Strait Islander Act 1965* (Qld) repealed the *Aboriginals Preservation and Protection Act 1939* (Qld) that Aboriginal children fell under the general welfare provisions. However, the statutory power of the Queensland Director of Native Affairs to remove Aboriginal children from Aboriginal reserves remained in force until 1971.[80] Thus the removal of Aboriginal children occurred not only after acts of genocide had been prohibited under customary international law, but also after the *Genocide Convention* was drafted.

Whilst the removal of part-Aboriginal children from their families had been documented in Australia for many decades, the policy was not really debated in the public domain until the findings of the Royal Commission into Aboriginal

Deaths in Custody.[81] The Commission found that, of the 99 deaths investigated, 43 of the persons had, as children, been separated from their families and communities.[82] It was not until the revelations of the HREOC report *Bringing Them Home* that the general non-Indigenous Australian public became truly aware of the removal policies.[83] *Bringing Them Home* found that 'between one in three and one in ten Aboriginal children were forcibly removed from their families and communities between 1910 and 1970.'[84] It found that the children were forcibly taken without parental consent or consent obtained through threat, duress or undue influence. It has been estimated that in the course of the 1900s 40 000 Aboriginal children were removed from their families.[85]

Bringing Them Home found that the conditions in Aboriginal institutions where the children were placed were poor.[86] There were often insufficient resources to properly shelter, clothe and feed the children.[87] The standard of education provided in the institutions was very basic, being designed essentially to provide a basis for the children to ultimately work as menial labourers such as farm hands and domestic servants.[88] Children were subjected to excessive physical punishment[89] and in many cases sexual abuse.[90] Significant for the current discussion is the fact that the children were not allowed to speak their Aboriginal languages and were punished if they did.[91]

It was concluded in the *Bringing Them Home* Report that the policies pertaining to the forced removal of Aboriginal children from their families amounted to genocide.[92] The Report stated:

> the predominant aim of Indigenous child removals was the absorption or assimilation of the children into the wider, non-Indigenous, community so that their unique cultural values and ethnic identities would disappear, giving way to models of Western culture. In other words, the objective was 'the disintegration of the political and social institutions of culture, language, national feelings, religion, and the economical existence' of Indigenous peoples. Removal of children with this objective in mind is genocidal because it aims to destroy the 'cultural unit' which the [Genocide] Convention is concerned to preserve. [93]

As the *Bringing Them Home* Report concluded, the policies of forcible removal of children of Indigenous Australians to other groups for the purpose of raising them separately from and ignorant of their culture and people could properly be labelled 'genocidal' in breach of binding international law from at least 11 December 1946.[94]

IV Litigation

The then Howard Federal Government responded by rejecting the conclusion that the removal policy amounted to genocide.[95] Key aspects underpinning the Government's rejection included:

- the proportion of children affected was no more that 10 per cent and such was inconsistent with the 'extravagance of the allegation' of genocide;
- there was no intention to destroy a group; rather the motive for removing the children was a benign intent that reflected accepted child welfare practices at the time; and
- the finding of genocide was inconsistent with the findings in *Kruger v Commonwealth*[96] and *Cubillo v Commonwealth*.

As suggested in the Howard Government's response to *Bringing Them Home*, the Australian cases that have addressed the issue of genocide have rejected the claim that the forced removal of Aboriginal children from their families amounted to genocide. That being said, the reference by the Howard Government to *Cubillo v Commonwealth* is curious given genocide was not argued in that case. Furthermore, and as is discussed further below, *Kruger v Commonwealth* was confined to the constitutionality of a single Ordinance, and thus should not be seen as determining the issue.[97] Nevertheless, the approach of the courts on the issue of genocide and the Stolen Generations has largely been congruent with both the Howard Government's position and now the Rudd Government's position.

A *Kruger v Commonwealth*

The first case to raise the issue of whether the policy of removing Aboriginal children from their families constituted genocide was *Kruger v Commonwealth*. The plaintiffs in *Kruger v Commonwealth* were Aboriginal persons from the Northern Territory. Of the plaintiffs, five were removed as children from their families between 1925 and 1949 and detained as late as 1960. The sixth plaintiff was the mother of a child who had been removed from her family and detained in an Aboriginal-specific government institution. The

plaintiffs argued that the legislation[98] and regulations that facilitated the removal and detention of Aboriginal children in the Northern Territory were constitutionally invalid on a number of bases.[99] Most relevant for present purposes is the claim of unconstitutionality on the basis that the legislation and regulations in question authorised genocide. The plaintiffs sought damages for their personal, cultural, spiritual and financial losses, and the losses stemming from their consequent inability to participate in Aboriginal land claims. In regard to the latter, the removal of Aboriginal children from their communities effected a break in the required continuous connection with traditional Aboriginal lands,[100] and thus prevented them bringing a land claim under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and *Native Title Act 1993* (Cth).[101]

In the course of the High Court's judgment Brennan CJ noted that the:

> Revelations of the ways in which the powers conferred by the Ordinance [facilitating the institutionalisation of part-Aboriginal children] were exercised in many cases has profoundly distressed the nation.[102]

Similarly, Gaudron J asserted it was 'clearly correct' that the *Ordinance* had 'authorised gross violations of the rights and liberties of Aboriginal Australians'.[103] However, ultimately a majority of the High Court, with Gaudron J in dissent,[104] held that the *Ordinance* was not invalid.

The genocide submission was given cursory treatment by the Court. In terms of the sources of the relevant prohibition against genocide, customary international law's prohibition of genocide was barely noted. The majority justices primarily focused on the *Genocide Convention*. Only Dawson and Toohey JJ's judgments reflect any understanding that the *Genocide Convention*[105] and the *Rome Treaty*[106] codify customary international law on genocide.[107] To this end Dawson J referred to a 'pre-existing rule of international law involving a prohibition upon genocide', acknowledging such to be distinct from 'the provisions of the treaty'.[108] Toohey J recognised that the *Genocide Convention* 'reflected a norm of international law'. [109]

Beyond these simple notations, the enforceability of this customary international law is not addressed. This is particularly important in the context of the prohibition against genocide, as the relevant customary law predated the *Genocide Convention*. Thus customary international law's prohibition against genocide was binding on nation-states, such as Australia, even though they had not ratified the *Genocide Convention* at that point.[110] This meant that customary international law's prohibition of genocide had legal effect in the municipal arena even though the *Genocide Convention* had not been incorporated into domestic legislation.[111] Thus the legal effect of customary international law's prohibition in the domestic arena predates the signing of any relevant treaty, here the *Genocide Convention*, much less the date it was ratified.

In *Kruger v Commonwealth*, the only aspect of the interplay between customary international law and the domestic courts that was addressed is the judicial presumption against a parliamentary intention to breach international law. A rule of construction recognised by Australian[112] and other common law courts[113] is that, where possible, domestic legislation is to be construed to avoid conflicts with international norms. Of the majority justices in *Kruger v Commonwealth*, Dawson J alone noted the rule of construction that requires legislation to be interpreted 'in accordance with established rules of international law.'[114] He concluded, however, that this is merely a

> canon of construction and reading the relevant provisions of the 1918 Ordinance in a manner which is consistent with a rule of international law prohibiting genocide would yield no different result from reading those provisions … in their particular context. It certainly would not invalidate those provisions of the 1918 Ordinance which purportedly authorised the acts of which the plaintiffs complain.[115]

The majority justices ultimately concluded the *Genocide Convention* had been ratified after the enactment of the 1918 Ordinance and had not been legislatively incorporated into domestic law.[116] Relevantly, at the time of the case the Federal Government had not legislated to make genocide a domestic crime. The majority justices did not address the fact that the detention of Aboriginal children, including the plaintiffs, continued until 1960, well after Australia's ratification of the *Genocide Convention*. There is no discussion of the possibility that regulations authorising the removal of Aboriginal children may have been made pursuant to s 67 of the Ordinance after this date. Nor does the majority justices' conclusion address the operation of customary international law's pre-existing prohibition against genocide.

Nevertheless, it seems the majority justices would have rejected the suggestion that the Ordinance breached the prohibition against genocide in any case. The Court held that the intention to commit genocide,[117] as opposed to the actuality of effecting genocide, was important in terms of the validity of the legislation.[118] Accordingly, there could be no breach of the genocide prohibition as the Ordinance was not intended to destroy Aboriginal peoples as a race. In the opinion of Gummow J, the Ordinance was indicative of a concern 'to assist survival rather than destruction'.[119] Most of the justices found that the Ordinance was said to be based on the best interests of the Aboriginal people.[120] Thus the Court asserted that the view at the time[121] was that it was in the best interests of Aboriginal children that they be removed from their families; and that the Ordinance could therefore not be seen as intending to authorise genocide.[122] In regard to the latter point, however, it should be noted that the removal power under s 16 of the Ordinance was not premised on the best interests of the child. While under s 6 the Chief Protector had a discretion to remove any Aboriginal child if 'in his opinion it is necessary or desirable in the interests of the aboriginal or half-caste', the power under s 16 was more absolute.[123] Under s 16, the Chief Protector could cause any 'aboriginal or half-caste' to be removed to, and detained in, any reserve or Aboriginal institution. There was no need for the formulation of an opinion as to what was in the Aboriginal person's best interests.

Only Gaudron J appropriately addressed the plaintiffs' submissions regarding customary international law. Gaudron J noted that the *Genocide Convention* embodies 'an enduring peremptory norm of international law'; a *jus cogens* norm.[124] It was held by Gaudron J that '[t]he notion of genocide embodied in the definition in Article II of the *Genocide Convention* is … fundamentally repugnant to basic human rights acknowledged by the common law'.[125] Furthermore, the Government's legislative powers under the *Australian Constitution* 'must be construed on the basis that they were not intended to confer power to make laws authorising acts contrary to that norm.'[126]

While ordinarily

> different considerations apply to the interpretation of constitutional documents … s 122 [of the *Australian Constitution*, which gives the Commonwealth Parliament the power to pass laws for the Northern Territory] should be construed on the basis that it was not intended to extend to laws authorising gross violations of human rights and dignity contrary to established principles of the common law.[127]

Thus Gaudron J concluded that the above rule of construction is applicable to the interpretation of the Government's legislative powers, which must be construed not to authorise genocide. Moreover, presumably in light of its *jus cogens* status, Gaudron J held that the power to legislate for the Australian territories contained in s 122 *Constitution* 'does not confer power to pass laws authorising acts of genocide.'[128] Gaudron J concluded by adding:

> Subject to a consideration of the existence of a time bar, if acts were committed with the intention of destroying the plaintiffs' racial group, they may be the subject of an action for damages whether or not the Ordinance was valid.[129]

Thus Gaudron J correctly acknowledged the peremptory nature of the prohibition against genocide and its ability to invalidate a contrary domestic law. Gaudron J also correctly invoked the above discussed canon of construction that requires legislation to be interpreted in accordance with international law. However, her extension of this principle to the interpretation of the *Constitution* itself continues to be controversial.[130]

B *Nulyarimma v Thompson*

Claims of genocide were also made in *Nulyarimma v Thompson*,[131] but in a different context,[132] namely the Howard Federal Government's 'Ten Point Plan'[133] on native title and consequent *Native Title Amendment Act 1998* (Cth). While the case raises numerous legal issues in regard to the role of international law in the domestic arena – with some of the reasoning of the majority judges capable of being readily rejected, as the author has argued elsewhere[134] – the case is only discussed in this article on the particular claims of genocide.[135]

The appellants argued that the Government's abrogation of Aboriginal rights pursuant to the 'Ten Point Plan' constituted acts of genocide. The appellants stressed the importance of traditional lands to Aboriginal people and effectively argued that the 'Ten Point Plan' was part of a continuing act of genocide that was designed to cause a severance between Aboriginal peoples and their lands. An application was made to the Registrar of the Australian Capital Territory

('ACT') Magistrates Court to issue warrants for arrest of the then Prime Minister, Deputy Prime Minister and two members of Federal Parliament on charges of genocide. The Registrar refused to issue the warrants, and Crispin J of the ACT Supreme Court rejected an application for mandamus against the Registrar.[136] An appeal was then brought before the Full Court of the Federal Court. The appeal was heard with *Buzzacott v Hill*.[137] As Wilcox J noted, the two cases were very different in their 'nature and derivation' but had as their common feature 'claims by members of the Aboriginal community that certain Commonwealth Ministers and members of Parliament have engaged in genocide.'[138] In *Buzzacott v Hill* the plaintiff instituted proceedings in the Federal Court against two Commonwealth Ministers (the then Minister for the Environment and the Minister for Foreign Affairs and Trade) and the Commonwealth of Australia, alleging that the Commonwealth's failure to seek world heritage listing for the Arabunna people's traditional lands constituted genocide. The defendants moved to strike out the proceedings and the matter was referred to the Full Court of the Federal Court. While the Full Court accepted that genocide, as embodied in the *Genocide Convention*, was a *jus cogens* norm and thus a crime of universal jurisdiction,[139] the claims in both the *Nulyarimma* and *Buzzacott* appeals were nevertheless unanimously dismissed.

Wilcox J began by acknowledging the factual basis that underpins more general claims of genocide that are addressed below:

> Anybody who considers Australian history since 1788 will readily perceive why some people think it appropriate to use the term 'genocide' to describe the conduct of non-indigenes towards the indigenous population. Many indigenous Peoples have been wiped out; chiefly by exotic diseases and the loss of their traditional lands, but also by the direct killing or removal of individuals, especially children. Over several decades, children of mixed ancestry were systematically removed from their families and brought up in a European way of life. Those Peoples who have been deprived of their land, but who nevertheless have managed to survive, have lost their traditional way of life and much of their social structure, language and culture. [140]

In turn, Wilcox J acknowledged that it was possible to make a case that genocide had occurred within the terms of the *Genocide Convention* on the basis of four different categories of genocide:

> killing members of the group; causing serious bodily harm or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and forcibly transferring children of the group to another group.[141]

Wilcox J believed, however, the requisite intent to be absent. While it was recognised that in some cases 'such as the rounding up of the remaining Tasmanian Aboriginals in the 1830s, and their removal to Flinders Island', the intent to destroy existed, 'the biggest killers were diseases unintentionally introduced into Australia by whites and the consequences of denying Aboriginals access to their traditional lands.'[142] Thus the destruction of the Aboriginal peoples was said to be unintentional. The requisite intent was held not to have been made out in the context of the specific claims before the Court concerning the 'Ten Point Plan' and its effects on Aboriginal peoples' access to and ownership of their traditional land.[143]

Even if the requisite intent could be established, Wilcox J ultimately rejected the claims on the basis that genocide was not an offence under Australian law.[144] His Honour held that in the absence of specific legislation creating a crime, the courts should refuse to enforce a customary international law that creates such a crime.[145] Whitlam J also refused to recognise customary international law's prohibition against genocide, doing so on the basis that such was said to be contrary to the principle that the courts cannot create crimes.[146] Against this, Merkel J in his judgment noted that the Court was not creating a crime, but rather recognising an existing crime under customary international law.[147]

Whitlam J also held that customary international law's prohibition against genocide would be inconsistent with the *Criminal Code 1995* (Cth), which at that time did not make genocide a crime in Australia.[148] Effectively, he reasoned that, since s 1.1 of the *Criminal Code 1995* (Cth) abolished all common law offences, this would include customary international law's prohibition against genocide.[149] However, as Merkel J noted, s 1.1 refers to Commonwealth statutory and common law offences, not crimes under customary international law or the common law generally.[150] Most significantly, Wilcox J rejected the proposition that a 'norm of international law criminalising conduct that is not made punishable by the domestic law entitles a domestic court to try and punish an offender against that law'.[151] Both Wilcox and Whitlam JJ erroneously[152] required a domestic statute incorporating genocide into the municipal common law.[153]

In contrast, Merkel J acknowledged that, absent inconsistency with domestic law, customary international law is enforceable in domestic courts,[154] and thus that the crime of genocide was known to Australian law. Merkel J further noted that receiving the crime of genocide would be consistent with the common law.[155] His Honour concluded that 'genocide is an *a fortiori* example of where a rule of international law is to be adopted as part of municipal law'[156] and that 'it is difficult to see why a court should turn its back on over 300 years of acceptance of the law of nations forming a part of the common law.'[157] Merkel J concluded that 'genocide is an offence under the common law of Australia'[158] and that 'genocide was a universal crime under customary international law at the time of the events relied upon in the two matters before the Court.'[159]

Ultimately, however, Merkel J believed customary international law's prohibition against genocide was inconsistent with s 16 of the *Parliamentary Privileges Act 1987* (Cth). This provision prohibits a court from inquiring into the propriety of the exercise of legislative power or related parliamentary proceedings, and declared that members of Parliament in speaking to and voting on a Bill cannot commit a crime.[160] Thus, the parliamentarians who formulated the 'Ten Point Plan' could not be indicted for genocide.[161] As to the specific claims made by the applicant Buzzacott, Merkel J held the conduct complained of was 'plainly not capable of constituting genocide under international or municipal law',[162] and that the claims could not be sustained.[163]

C *Thorpe v Kennett*

Subsequent cases relating to genocide in Australia have been given comparatively cursory consideration, largely on the basis that *Nulyarimma v Thompson* had effectively determined that such claims could not be made. In *Thorpe v Kennett*,[164] this approach was taken by the Victorian Supreme Court. In that case, the Registrar of the Magistrates' Court of Victoria had, on the request of the plaintiff, issued a charge and summons against the then Premier of Victoria, Jeffrey Kennett, for the universal crime of genocide. The charge was said to relate to

> numerous acts, committed with the intent to destroy the original peoples of the land, causing serious mental harm to the original peoples of the land and deliberately imposing upon the original peoples of the land conditions of life calculated to destroy each peoples in whole or in part.[165]

Specifically, the plaintiff asserted that the then Premier had committed genocide by refusing to recognise the Gunai peoples as a sovereign nation and enacting the *Land Titles Validation (Amendment) Act 1998* (Vic), which further diminished the native title rights of the Gunai.[166]

On the basis of Crispin J's first instance decision in the *Nulyarimma* proceedings, *Re Thompson; Ex parte Nulyarimma*,[167] the charges had been dismissed in the Magistrates' Court for want of jurisdiction, namely that the offence of genocide does not form part of domestic law. The plaintiff's appeal to the Chief Magistrate had in turn been dismissed, again on the basis of Crispin J's decision at trial. In the Victorian Supreme Court, the decision of which was handed down after the appeal in *Nulyarimma v Thompson* had been decided, Warren J expressed reservations as to Merkel J's approach to the incorporation of international customary law into the common law in *Nulyarimma v Thompson*, preferring the approach of Wilcox J.[168] Her Honour concluded that genocide was not a criminal offence under the common law or the *Crimes Act 1958* (Vic),[169] reiterating the view that it is necessary to enact specific legislation incorporating genocide into domestic law for that offence to be enforceable.[170] Moreover, in regard to the specific allegations, the requisite intent to destroy was again said to be absent.[171]

It is worth noting briefly that the judgment of Warren J puts an erroneous gloss on Merkel J's approach in *Nulyarimma v Thompson* to the incorporation of customary international law into domestic law. Warren J asserted that, under Merkel J's approach, 'by the signing of an international treaty or convention the provisions of such a document are immediately incorporated into the law of the jurisdiction.'[172] In fact, Merkel J's discussion of the incorporation of international law into domestic law was confined to customary international law. His Honour was not suggesting that treaties and conventions (conventional international law) are self-executory.

D *Sumner v United Kingdom of Great Britain*

In *Sumner v United Kingdom of Great Britain*,[173] a decision of the Full Court of the South Australian Supreme Court, *Nulyarimma v Thompson* was again said to have determined that genocide is not an offence under Australian law. The plaintiff sought an interim injunction in the South Australian Supreme Court to restrain the building of the Hindmarsh Island bridge because of concerns as to the possible desecration of the site and culture of the Ngarrindjeri people.[174] To this

end the statement of claim asserted that the Ngarrindjeri people have a 'special interest in the land and waters, at the site of the proposed bridge at Goolwa, as traditional owners .... and as victims of genocide since white invasion'.[175] The plaintiff claimed that the defendants were liable for the theft and wrongful acquisition of Ngarrindjeri land and for 'continuing acts and attempted acts of genocide against Ngarrindjeri by the defendants since 1800'.[176] It was asserted that the defendants owed a duty of care to the Ngarrindjeri 'not to commit or attempt further acts of genocide and to protect Ngarrindjeri from any further acts or attempted acts of genocide.'[177] As to the bridge, the agreements for its construction were said to be illegal as they were contrary to, *inter alia*, the *Genocide Convention Act 1949* (Cth) and other human rights standards at international law.[178]

Bizarrely, the plaintiff relied on the *Genocide Act 1969* (UK). Despite such legislation expressly providing that it did not have extraterritorial effect, the plaintiff asserted there was sufficient historical connection between the Ngarrindjeri people and the United Kingdom to allow the reliance on the statute.[179] At first instance, Nyland J rejected the application, concluding that the Court did not have jurisdiction under the *Genocide Act 1969* (UK).[180] As to the issue of genocide, Nyland J reiterated that *Nulyarimma v Thompson* represented the current state of the law.[181]

On appeal, the Full Court of the South Australian Supreme Court unanimously rejected the subsequent appeal, agreeing with Nyland J that the appellant had not made out that there was a serious issue to be tried.[182] Specifically in regard to the claims of genocide, the Full Court asserted that *Nulyarimma v Thompson* had determined that genocide was not an offence under Australian law.[183] As to the *Genocide Act 1969* (UK), the Full Court reiterated that this was an Act of the Parliament of the United Kingdom and had no application in South Australia.[184]

The matter came before Nyland J again as a consequence of applications to strike out the plaintiff's statement of claim on the bases that the allegations of fact did not amount to genocide under international law and genocide is not a crime under Australian domestic law.[185] Nyland J acknowledged that genocide is a serious offence under international law which forms part of Australia's treaty obligations and is a 'peremptory norm of customary international law'.[186] However, His Honour stated that it was firmly entrenched that entering into a treaty does 'not give rise to a direct source of rights and obligations under Australian domestic law.'[187] In turn Nyland J concluded that the plaintiff could not rely on the *Genocide Convention* as it had not at that time been incorporated into Australian law.[188]

Nyland J did not, however, adequately address the role of customary international law. It was held that cases such as *Chow Hung Ching v The King*[189] provide that customary international law is merely a 'potential *source* of Australian common law but not an automatic part of it.'[190] Whether this was in fact decided in *Chow Hung Ching v The King* is highly contestable.[191] Indeed, in *Nulyarimma v Thompson*, Merkel J was of the opinion that *Chow Hung Ching v The King* in fact supports the 'common law adoption approach'[192] to international customary law, viz, that customary international law will be adopted or received into domestic law so long as it is 'not inconsistent with rules enacted by statutes or finally declared by the [courts]'.[193] Ultimately, Nyland J held, on the basis of *Nulyarimma v Thompson* and the Full Court's decision in *Sumner v United Kingdom of Great Britain*, that the offence of genocide was not recognised in Australian domestic law.[194] Interestingly, Nyland J asserted that all three justices in *Nulyarimma v Thompson* held that, in the absence of domestic legislation, the crime of genocide is not cognisable under Australian law.[195] As noted above, that was not the view shared by Merkel J.

As to the specific claims, Nyland J turned to the *Genocide Convention*, noting that under art 2 the intention to destroy is an essential element of the crime of genocide.[196] In turn, it was concluded that by building the bridge none of the defendants intended to destroy the Ngarrindjeri.[197] Nyland J also rejected the plaintiff's assertion that the failure to recognise the Ngarrindjeri as a sovereign nation amounted to an intention to destroy them.[198] Moreover, Nyland J asserted that the argument involved questioning the acquisition of sovereignty in Australia. This was rejected on the basis that no residual sovereignty resides in Australia's Indigenous peoples and that the issue is a non-justiciable act of state.[199] It is beyond the scope of this article to address the issue of Aboriginal sovereignty and the justiciability of the issue. These have been discussed by the author elsewhere.[200] Ultimately, the defendants' orders were granted and the whole action was struck out.[201]

V Application of the International Jurisprudence on Genocide to the Stolen Generations

The analysis now turns to international forums' discussion of the crime of genocide and the applicability of such to the treatment of Aboriginal peoples of Australia generally and, in particular, the forced removal of Aboriginal children from their families. While the forced removals ultimately fall short of satisfying the legal definition of genocide for reasons that will be explained below, it will be seen that the situation of the Stolen Generations nevertheless meets a significant number of the existing legal criteria for genocide.

A Protected Group

The first matter that needs to be determined is whether the Aboriginal peoples of Australia are a protected group. As noted above, art 2 of the *Genocide Convention* identifies four protected groups: national, ethnical, racial and religious groups. This in itself is an important aspect of the crime of genocide, as it reinforces that the 'victim of the crime of genocide is the group itself and not the individual.'[202] This is because the victim is not targeted on account of his or her individual characteristics, but because of membership in the group.[203] A common criterion of the four types of groups protected by the *Genocide Convention* is that 'membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.'[204]

An 'ethnic group' was defined in *Akayesu*,[205] a decision of the International Criminal Tribunal of Rwanda ('ICTR'), as a 'group whose members share a common language or culture.'[206] This was reiterated in *Kayishema*,[207] the ICTR adding that an 'ethnic group' is 'a group which distinguishes itself as such (self-identification); or a group identified as such by others, including perpetrators of the crimes (identification by others).'[208]

In *Akayesu* a 'racial group' was defined as a group 'based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.'[209] Again, self-identification and identification by others are important defining elements of a racial group.[210] In *Akayesu*[211] the Tribunal also defined a 'religious group' as a group 'whose members share the same religion, denomination or mode of worship.'[212] To some extent a broader notion was adopted in *Kayishema*, where the Tribunal defined a 'religious group' as including 'denomination or mode of worship or a group sharing common beliefs.'[213]

In the context of this article, the Indigenous peoples of Australia, including those affected by the assimilationist removal policies, could be identified as an ethnic, religious or racial group or groups. The above description of the necessary religious linkages, at least as defined in *Kayishema*, is clearly not confined to formalised Western religions, but includes shared beliefs and thus would readily include Aboriginal beliefs, such as creation stories. It is true that, contrary to the criteria established in relation to ethnic and religious groups, the Aboriginal peoples of Australia do not share a common language, and their cultural and religious practices and beliefs vary from one linguistic group to another; however, these peoples may still fall into these protected categories, as the group affected by the genocide may be confined by territorial limits.[214] Thus in *Krstic*,[215] a decision of the International Criminal Tribunal for the former Yugoslavia ('ICTY'), the Trial Chamber asserted that 'the intent to eradicate a group within a limited geographical area such as the region of a country or even a municipality'[216] could be characterised as genocide. The genocidal massacre in that case had occurred in a limited geographical area, namely Srebrenica. In the context of the Australia's Indigenous peoples, the group that may be affected by genocide could be a particular Aboriginal linguistic group, occupying a distinct area, sharing a common language and culture and/or religious beliefs. That affected group might be, for example, Tasmanian Aboriginal persons. Alternatively, identification could be on the basis of a racial group, as this does not require a shared language or culture.[217]

In regards to both ethnic and racial groupings, self-identification or alternatively identification by others, including the perpetrator, is important.[218] In addition to subjective identification of membership by either the victim or the perpetrator, ICTR in *Akayesu* noted that membership can be determined objectively through official classifications of an ethnic or racial group.[219] Thus in that case the Tribunal determined that Rwandan authorities considered Hutu and Tutsi as two distinct ethnic groups. Government identity cards, for example, detailed a person's relevant ethnic group and in turn the designation of Hutu or Tutsi.[220] Similarly, in *Rutaganda*[221] ICTR noted a number of objective indicators of the Tutsi population as a distinct ethnic group in the Rwandan *Constitution* and other legislation.

Turning to the Stolen Generations and the criterion of identification by others[222] as a racial group, the legislation that empowered government authorities to remove Aboriginal children from their families was racially based. The legislation specifically related to children of Aboriginal descent and, in particular, children of mixed ancestry. In addition to the specific legislative references to 'aboriginal child',[223] the offensive legislative distinction between 'half-castes', 'quadroons' and 'octoroons'[224] could also constitute a form of official classification. In the context of the Stolen Generations, there is therefore the possibility of two officially classified racial groups that could distinctly be considered in relation to genocide claims. The first is Aboriginal peoples who were classified as 'full bloods.' As noted above, underpinning the segregation of Aboriginal peoples under so-called protectionist legislation was the notion that 'full blooded' Aboriginal people would die out,[225] hopefully as 'quickly as possible'.[226] In the context of this discussion, it is the physical destruction of this racial group that could amount to genocide. The second racial group comprises Aboriginal children of mixed parentage. In terms of this racial group, in addition to physical destruction, the genocidal acts would be the destruction of Aboriginal language and culture; cultural genocide. These matters are further explored below in the context of the relevant *mens rea* and *actus reas*.

B Mens Rea

Did the Australian government have the requisite genocidal intent? Article 2 of the *Genocide Convention* identifies the *mens rea* as an 'intent to destroy, in whole or in part, a national, ethnical, racial or religious group.'[227] For genocide, the requisite intent is *dolus specialis*: 'an aggravated criminal intention' which is required in addition to the intent accompanying the offence of, for example, murder.[228] Kriangsak Kittichaisaree asserts that 'the requisite knowledge is that the accused knew or should have known that his act would destroy, in whole or in part, such protected group.'[229] The requirement of *dolus specialis* means that recklessness (*dolus eventualis*) and gross negligence are insufficient to satisfy genocide.[230] However, if established, the genocidal intent does not require any further malice. Thus a misguided benevolent motive will not suffice to remove actions from the category of genocide, as long as the intent to destroy exists.[231] This is of course relevant to the above-discussed suggestion that part-Aboriginal children were removed for the best interests of the child.

Dolus specialis is clearly difficult to establish.[232] While in certain cases it has been readily established on the basis of a confession and guilty plea by the accused,[233] in other cases the tribunals have had to infer the intent from certain presumptions of fact.[234] To this end, it has been suggested that the use of derogatory language towards members of the group may be a factor taken into account in inferring the *mens rea*.[235] The legislation that facilitated the removal of part-Aboriginal children in Australia used derogatory and offensive terms that classified children as objects depending on their perceived percentage of mixed parentage,[236] which may contribute to an inference of the requisite *mens rea*.

Another aspect of genocide's *mens rea* is the requirement of state involvement.[237] Thus in *Jelisic*,[238] the ICTY noted that in proving the genocidal intent it was necessary to show that the repeated killing of Muslims was backed up by a government organisation or system. In *Kayishema*[239] the ICTR concurred with this statement in *Jelisic*, affirming that genocide requires some plan or organisation, with direct or indirect involvement on the part of the state. In relation to the Stolen Generations, the restriction of 'full blood' Aboriginal persons to reserves and the removal of children of mixed ancestry was part of government policies that were effected through legislation. Under such legislation the removals were formally instigated by senior government officials, such as the Governor,[240] Minister,[241] Board for the Protection of Aborigines,[242] Department Head,[243] Chief Protector of Aborigines,[244] Director[245] or Commissioner of Natives.[246] That the removals were often affected by such figures in conjunction with missionaries does not negate the state's involvement. As Antonio Cassese notes, the relevant acts

> need not be perpetrated by State officials or by officials of entities such as insurgents, they are usually carried out with the complicity, connivance, or at least toleration or acquiescence of the authorities.[247]

In the context of the Stolen Generations, Australian governments did more than acquiesce to the removals; the removals were part of official government policy. Further, once removed, the children were then often detained in government-designated, Aboriginal-specific institutions. Even though some of these institutions were run by church or missionary organisations, they were nevertheless officially classified by government as Aboriginal institutions and in turn received government funding.[248] Based on these facts, the removal of Aboriginal children can be said to have been

effected by the state, acting either alone or in conjunction with religious bodies.

Relevant to the *mens rea* in the case of the Stolen Generations, the intent merely has to be to destroy part of the group. The 'part' of the group affected may be limited geographically or numerically. In *Krstic* the massacre had occurred in a limited geographical area, namely Srebrenica. The massacre was of between 7000 and 8000 Bosnian Muslim men of military age. These facts required the Tribunal to consider whether the requisite intent existed where only men of military age were massacred. The Trial Chamber concluded that:

> The intent to destroy a group, even if only in part, means seeking to destroy a distinct part of the group as opposed to an accumulation of isolated individuals within it. Although the perpetrators of genocide need not seek to destroy the entire group protected by the Convention, they must view the part of the group they wish to destroy as a distinct entity which must be eliminated as such.[249]

As noted above, the Trial Chamber also held that 'the intent to eradicate a group within a limited geographical area such as the region of a country or even a municipality' could be characterised as genocide.[250]

Thus, an intent to eradicate the Aboriginal peoples of a particular geographic area, such as Tasmania, would satisfy the *mens rea* requirement. The rounding up of the remaining Tasmanian Aboriginals in the 1830s and their removal to Flinders Island is noted by Wilcox J in *Nulyarimma v Thompson* as an example of an act that was 'intended to destroy, in whole or in part, a national, ethnical, racial or religious group.'[251] As Patricia Grimshaw et al note, the original population of between 1000 and 10 000 Aboriginal Tasmanians at the point of white settlement had been reduced to 18 persons by 1861.[252] Only the relationships between Tasmanian Aboriginal women and white sealers saved Indigenous Tasmanians from total annihilation.[253]

In the broader frontier context, the intent may be described in terms of the intended eradication of Aboriginal persons not of mixed ancestry.[254] As already noted, the removal policies in Australia were based on this notion that 'full blooded' Aboriginal persons would die out.[255] As the focus of this article is the Stolen Generations, this is just a further postulation in regards to the genocidal intent in regard to Australia's Indigenous peoples.[256]

As for the Stolen Generations, the intent may be described in terms of the destruction of the language and culture of Aboriginal persons of mixed parentage.[257] The stated intent underlying the policies of removing Aboriginal children from their families was the destruction of Aboriginal language and culture, so that the children could be assimilated into the wider non-Indigenous society.[258] As the *Bringing Them Home* Report concluded, the predominant aim of the removal policies was 'the disintegration of the political and social institutions of culture, language, national feelings, religion, and the economical existence' of Aboriginal peoples.[259] The affected group may be identified in terms of children of mixed parentage. As noted previously, a focus on different parts of a broader group does not negate a genocidal intent. All that is required is an intent to destroy 'a distinct part of the group as opposed to an accumulation of isolated individuals within it.'[260] The children of mixed parentage were treated by the Australia governments as a distinct part of the Aboriginal population.

It should be noted that the impact of the genocidal act does not have to be numerically large for the necessary genocidal intent to be established. During the process of drafting the *Genocide Convention*, it was suggested that the reference to 'intent to destroy in whole or in part … a group as such' would require an intent to destroy 'more than a small number of individuals who are members of the group'.[261] This has, however, been rejected by commentators who have noted that nothing in the *Genocide Convention* could justify such a restrictive interpretation and that it would in fact be contrary to customary international law.[262] According to international practice, 'successful counts or prosecutions of crimes against humanity, of which genocide is a species, have involved relatively small numbers of victims.'[263] Thus customary international law and art 2 of the *Genocide Convention* do not require the victims of genocide to be numerous. In this regard it is pertinent to recall the Howard Government's claim that a designation of cultural genocide in relation to the Stolen Generations was without foundation as the proportion of children affected (10 percent or less) was inconsistent with the notion of genocide.[264] This is clearly not the case under international law.

C Prohibited Acts

To recap, the five prohibited acts identified in art 2 of the *Genocide Convention* are:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

In regard to genocide through the imposition of serious bodily or mental harm, the acts that fall under this category are extremely broad and include 'acts of torture, rape, sexual violence, or inhuman or degrading treatment.'[265] Rape and sexual violence are considered one of the worst types of injuries as the victim suffers both bodily and mentally.[266] Particularly during the frontier period in Australia, colonists often raped Aboriginal women.[267] Such rapes continued after the early colonial period. One of the plaintiffs in *Nulyarimma v Thompson*[268] gave evidence that she was conceived as a consequence of her mother being raped by white men. In the context of the removal policies, many of the removed Aboriginal children were sexually abused.[269] The children were also subjected to excessive physical punishment, including when they practiced their culture or spoke in their native tongue.[270] They were subjected to degrading acts designed to desecrate their cultural and religious beliefs. As for governmental complicity in such acts, there is evidence that the governments knew or at least ought to have known of the abuse of the removed children.[271]

As Kittichaisaree recognises, an argument can be made

> that forced removal of children of the group to another group causes serious mental harm to these children as well as to their parents and close relatives, and that the perpetrator of such forced removal could also be punished under the rubric of the genocidal crime of 'causing serious bodily or mental harm to members of the group' as well.[272]

The key Australian cases provide disturbing evidence of the psychological harm caused to members of the Stolen Generations through the removal from their families.[273] There is evidence that as early as the 1940s 'the importance of affection in a child's normal development and the role played by parental affection in behaviour disorder' had been recognised.[274] Thus at least in regard to removals after this date, Australian governments knew or ought to have known of the consequent risk of psychological damage to the removed children. In this regard it is relevant to note that in *Cubillo v Commonwealth*[275] the Commonwealth conceded that trauma might have occurred whether or not the separation was voluntary but asserted that, despite the significant risk of pain and trauma, it was believed better to remove the part-Aboriginal child from its environment. In *Kruger v Commonwealth*, the High Court recognised that,

> [i]n retrospect, many would say that the risk of a child suffering mental harm by being kept away from its mother or family was too great to permit even a well-intentioned policy of separation to be implemented.[276]

As to genocide through deliberately inflicting conditions of life calculated to bring about physical destruction, this method of destruction does not immediately lead to death, but nevertheless ultimately leads to the physical destruction of the group.[277]

> Examples of such conditions of life include starving the targeted group; depriving the targeted group of proper housing (including systematic expulsion from homes), clothing, hygiene, and medical care for an extended period; subjecting the targeted group to a subsistence diet; compelling the targeted group to do excessive work or undergo excessive physical exertion.[278]

Arguably, such would be applicable to the poor conditions on reserves where 'full-blooded' Aboriginal peoples were statutorily confined. Equally, it is relevant to the substandard conditions in the Aboriginal institutions where children of mixed parentage were held. The *Bringing Them Home* Report found that the conditions in the institutions where the children were placed were frequently appalling.[279] There were often insufficient resources to properly shelter, clothe and feed the children.[280] Aboriginal people removed as children have told of insufficient warm clothing and footwear and inadequate food, including maggot-infested food.[281] Witnesses in the *Cubillo v Commonwealth* case spoke of always being hungry.[282] One of the plaintiffs, Mr Gunner, and another witness gave evidence that the children went to the rubbish dump looking for food.[283]

Again, it appears that government authorities were aware of the appalling conditions in which the children lived. The 1948 *Bateman Report* into native affairs in Western Australia

noted the general problem of malnutrition and in certain cases unacceptable sanitation and hygiene.[284] Lavatories, bathrooms and laundries were described as 'not only primitive but in some cases disgraceful' and the 'bedding in the children's dormitories was filthy.'[285] Equally, in the *Cubillo v Commonwealth* case the Full Federal Court found that by 1956 the Director of Welfare and the Northern Territory Administrator were expressing concerns about the staff and management of the Aboriginal institutions in which the plaintiffs were detained.[286] The conditions were regarded as being unsatisfactory even according to the standards of the time.[287] The institutions were found to be inadequately staffed and the facilities were inadequate and unhygienic. Complaints had been made about the lack of food and clothes provided to the children.[288] The amenities and staffing at one of the institutions were considered to be so bad that, at one stage, it was recommended that no more children be placed in the hostel.[289] This evidences a known failure, at least in some cases, on the part of the governments to properly maintain the children and provide them with the necessities of life so they could live with 'some acceptable level of dignity'.[290]

As to measures preventing births, as noted above, the so-called protectionist 'legislation restricted the rights of Aboriginal people in many fundamental areas such as their freedom of movement and association, their right to marry, to work and to deal with property.'[291] In *Nulyarimma v Thompson*[292] one of the plaintiffs gave evidence as to how she was forced by the superintendent at the Aboriginal institution where she was held to marry a white man. This was part of the social theory that Aboriginality could be 'bred out' through the mixing of the races.[293]

As to genocide through the forcible transfer of children of the group to another group, Aboriginal children were forcibly removed from their families and detained in Aboriginal institutions. In the leading cases the plaintiffs gave evidence as to their traumatic physical removal from their families.[294] It is nevertheless relevant to note that 'forcibly' being removed is not confined to physical force.[295] It may include threats of force or coercion through fear of violence, duress, detention, psychological oppression or abuse of power. [296] The threat may be against the child or another person.[297] Thus the threatening of parents (discussed in Part III above) suffices for the removal to be considered forcible.

VI Concluding Thoughts: Cultural Genocide

Given the express inclusion of the forcible removal of children as a genocidal act in art 2 of the *Genocide Convention*, why would Prime Minister Rudd suggest that the international law definition of genocide is not met? Traditionally, cultural genocide is seen as falling outside international law's prohibition of genocide.[298] Why then is the forcible removal of children included in art 2? This was intended to catch those cases where the 'ultimate result of such transfer is the actual physical destruction of a national, ethnic, racial, or religious group, as such.'[299] Thus, the inclusion of the forcible removal of children as a genocidal act in art 2 recognises that such can constitute both physical and cultural genocide. Ultimately, however, to be prohibited, the cultural genocide must be accompanied by a physical destruction of the group. Storey argues that the forcible removal of children effects the necessary physical elimination of the protected group. This occurs over a period of a generation or more as it is the removal policy that prevents self-perpetuation through the elimination of the 'features that define the group as a group, distinct from the broader community.'[300] Thus, through the planned destruction of culture and language, the removal of part-Aboriginal children can be said to have been designed to prevent the continued identity of the children as Indigenous and therefore distinct from the broader non-Indigenous community. In this way, the removal of part-Aboriginal children can be categorised as a prohibited genocidal act.

As Kittichaisaree notes, however, conventionally the removal of children has been classified as cultural genocide, falling outside international law's prohibition of genocide.[301] This view was also subsequently adopted by one of the authors of the *Bringing Them Home* Report, Sir Ronald Wilson, who recanted from the Report's conclusion that the removals did in fact amount to genocide.[302] Currently there is 'no judicial authority, treaty provision, or State practice to support' the notion that the 'destruction of culture short of physical destruction of such protected groups [constitutes] an act of genocide.'[303] Thus in *Krstic* the Trial Chamber had to consider the extent to which it could have regard to evidence of the cultural or social, as opposed to physical or biological, destruction of the group. It stated:

> despite recent developments, customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. Hence, an enterprise attacking only the cultural or sociological

> characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide. The Trial Chamber however points out that where there is a physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group. In this case, the Trial Chamber will thus take into account as evidence of intent to destroy the group the deliberate destruction of mosques and houses belonging to members of the group.[304]

The inclusion of cultural genocide in the *Genocide Convention* was specifically rejected by the Sixth Committee of the United Nations General Assembly, on the grounds that the *Convention* relates to 'physical destruction of a group, not to eliminating its cultural attributes.'[305] The stated concern was that concept of cultural genocide was not susceptible to precise definition.[306] Moreover, it was felt that the destruction of culture could be addressed in other areas of international law, such as human and minority rights, rather than the crime of genocide.[307] Genocide should focus on the physical destruction of the group, in particular mass killings.[308]

However, a more insidious reason for its exclusion was also suggested when the *Genocide Convention* was being drafted. The inclusion of cultural genocide 'might impede legitimate efforts by States to foster a national community and civilize "primitive" peoples.'[309] As Robert van Krieken notes, this was hardly surprising given the United Nations 'was broadly in support of the full assimilation of Indigenous peoples in a range of settler-colonial settings.'[310] Such a rationale for rejecting cultural genocide is obviously based on outdated and offensive notions of legitimising the colonisation of Indigenous people on the basis of cultural superiority. In light of international law's recognition of Indigenous peoples' right to language and culture, reflected in international instruments such as the *Declaration on the Rights of Indigenous Peoples*,[311] such a rationale for excluding cultural genocide as a genocidal act must be rejected. The definition of genocide needs to be revisited to recognise cultural genocide. It may be that this occurs through the development or modification of international treaty law on genocide. Alternatively it might be argued that state practice is developing, or may have in fact already developed, to a point that cultural genocide effected through the removal of children from a protected group is recognised as a genocidal act. While it appears that the domestic courts in Australia are unwilling to revisit the genocide issue, if the jurisdiction of the ICJ or the ICC can be invoked in relation to the Stolen Generations, it may be that modern customary international law could be expanded to recognise the destructive impact of cultural genocide on Indigenous groups.

Even if the removal of part-Aboriginal children from their families does not technically amount to genocide under international law, that does not detract from the painful and destructive consequences of the assimilationist policies. As van Krieken notes, 'it is possible to have both a narrow, legally legitimate conception of genocide, but also a broader one that does justice to the violence at the heart of the settler-colonial project.'[312] Ultimately, contrary to Prime Minister Rudd's suggestion, it is far from unhelpful to use the notion of genocide in the context of addressing the Stolen Generations issue. While the Prime Minister may be correct insofar as it may be technically inappropriate to use the term genocide in a legal context, in the broader political and social context of the apology he was arguably wrong not to invoke the term and all the human emotions that accompany its use.

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* Julie Cassidy LLB (Hons) (Adel) PhD (Bond) is Associate Professor in the School of Law at Deakin University.

1 ABC Television, 'Tony Jones Talks to Prime Minister Kevin Rudd', *Lateline*, 14 February 2008 <http://www.abc.net.au/lateline/content/2007/s2163296.htm> at 22 July 2009.

2 It would be remiss to exclude from any discussion of genocidal acts impacting on Indigenous peoples the decimation of Aboriginal populations through European settlement. Thus while the focus of this article is the removal of Aboriginal children from their families and communities, some comment is made in regard to the physical destruction of Aboriginal populations.

3 See, eg, Tony Buti, 'Kruger and Bray and the Common Law' (1998) 4(3) *UNSW Law Journal Forum* 22; Mark Champion, 'Post-Kruger: Where to Now for the Stolen Generations?' (1998) *Indigenous Law Bulletin* 9; Sarah Joseph, '*Kruger v Commonwealth*: Constitutional Rights and the Stolen Generations' (1998) 24(2) *Monash University Law Review* 486; Julie Cassidy, 'The Stolen Generations – Canada and Australia: The Legacy of Assimilation' (2006) 11(1) *Deakin Law Review* 131.

4 See, eg, Lachlan Kennedy and Deborah Nance, 'Stolen Generations: The Kruger Action' (1996) 3(78) *Aboriginal Law*

Bulletin 11; Martin Flynn and Sue Stanton, 'Another Failed Sovereignty Claim: Thorpe v Commonwealth of Australia (No 3)' (1997) 4(7) *Indigenous Law Bulletin* 19; Lachlan Kennedy and Deborah Nance, 'Stolen Generations Litigation: Kruger, Bray v Commonwealth' (1997) 4(6) *Indigenous Law Bulletin* 22; Michael D Schaefer, 'The Stolen Generations – In the Aftermath of Kruger and Bray' (1998) 21(1) *UNSW Law Journal* 247; Matthew Storey, '*Kruger v The Commonwealth*: Does Genocide Require Malice?' (1998) 21(1) *UNSW Law Journal* 224; M Walker and N Bhuta, 'Upholding the Law v Maintaining Legality: *Nulyarimma v Thompson*' (1999) 4(24) *Indigenous Law Bulletin* 15.

5 ABC Television, above n 1.

6 See further Robert van Krieken, 'Cultural Genocide in Australia' in Dan Stone (ed), *The Historiography of Genocide* (2008) 128.

7 Antonio Cassese, *International Criminal Law* (2003) 23–4.

8 *R v Bow Street Metropolitan Stipendiary Magistrate; ex parte Pinochet Ugarte (No 3)* [1999] 2 WLR 827, 907–8 ('*Pinochet (No 3)*').

9 *Prosecutor v Akayesu*, Case No ICTR-96-4-T (2 September 1998); 37 ILM 1399 ('*Akayesu*').

10 See Hugh M Kindred and Phillip M Saunders, *International Law Chiefly as Interpreted and Applied in Canada* (7th ed, 2006) 186.

11 For example, by 1950 the prohibition against torture had already been recognised under customary international law and thus significantly predated the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('*Convention Against Torture*'): see *Pinochet (No 3)* [1999] 2 WLR 827 (House of Lords), 911–12 (Lord Millett); J Herman Burgers and Hans Danelius, *The United Nations Convention Against Torture* (1984) 1.

12 *Pinochet (No 3)* [1999] 2 WLR 827, 911–12 (Lord Millett) in regard to the refinement of customary international law in the *Convention Against Torture*. See also Hilary Charlesworth, 'Customary International Law and the Nicaragua Case' (1984–1987) 11 *Australian Yearbook of International Law* 1, 12; Malcolm N Shaw, *International Law* (4th ed, 1997) 75–6; Cassese, *International Criminal Law*, above n 7, 23.

13 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 15, 23; GA Res 96(1), UN GAOR, 1st sess, 55th plen mtg (1946); noted in the preamble to the *Genocide Convention*. See also *Attorney-General of Israel v Eichmann* (1962) 36 ILR 277, 296–7. See Kriangsak Kittichaisaree, *International Criminal Law* (2001) 250.

14 William Schabas, 'Article 6' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (1999).

15 See also Kittichaisaree, above n 13, 69, 250.

16 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 15, 23–4. See also Theodor Meron, *Human Rights and Humanitarian Norms as Custom* (1989) 11; Antonio Cassese, *Human Rights in a Changing World* (1990) 78.

17 Julie Cassidy, 'The Domestic Enforcement of Human Rights: The Relationship between Customary International Law and Municipal Law' (Paper presented at the Public Health and Human Rights Conference, Monash University Prato Centre, Italy, 9 June 2007).

18 Interrelated with such is the canon of construction that requires that legislation be construed to avoid conflicts with international norms: *Polites v Commonwealth* (1945) 70 CLR 60, 68–9 (Latham CJ), 74 (Rich J), 77 (Dixon J), 79 (McTiernan J), 81 (Williams J); *Dietrich v The Queen* (1992) 177 CLR 292, 306 (Mason CJ and McHugh J); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287–8 (Mason CJ and Deane J), 315 (McHugh J), *Kruger v Commonwealth* (1997) 190 CLR 1, 71 (Dawson J), 87–8 (Toohey J); *Al-Kateb v Godwin* [2004] HCA 37, [175] (Kirby J); *Coleman v Power* [2004] HCA 39, [240] (Kirby J). See also the discussion of the 'Bangalore principles' in Justice Michael Kirby, 'The Australian Use of International Human Rights Norms: From Bangalore to Balliol – A View from the Antipodes' (1993) 16(1) *UNSW Law Journal* 363; Justice Michael Kirby, 'The Impact of International Human Rights Norms: "A Law Undergoing Evolution"' (1995) 25 *University of Western Australia Law Review* 30, 44; Justice Michael Kirby, 'The Bangalore Principles' (1997) 78 *The Parliamentarian* 326; Justice Michael Kirby, 'Domestic Implementation of International Human Rights Norms' (1999) 5(2) *Australian Journal of Human Rights* 109.

19 Thus customary international law is enforceable in the domestic courts, '[b]ut only so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals': per Lord Atkin in *Chung Chi Cheung v R* [1939] AC 160 (Privy Council), 167–8. See for example *Polites v Commonwealth* (1945) 70 CLR 60.

20 *Polites v Commonwealth* (1945) 70 CLR 60. All members of the court, including Williams J, ultimately concluded that the express words of the subject statute were inconsistent with customary international law and thus indicated a clear intention to legislate contrary to international law.

21 *Polites v Commonwealth* (1945) 70 CLR 60, 80–1.

22 See, eg, *Chow Hung Ching v The King* (1949) 77 CLR 449, 462, 470–1, 477, 487; *Bonser v La Macchia* (1969) 122 CLR 177, 214; *New South Wales v Commonwealth* (1975) 135 CLR 337, 407, 465–6, 496. See further the extra-curial comments of Justice Michael Kirby whereby he notes that a new relationship between international and national law is emerging that sees a greater use of the former in the municipal arena: Kirby, ''Domestic Implementation of International Human Rights Norms', above

n 18, 124–5. The approach adopted by the Australian judiciary has, however, been inconsistent. See further Cassidy, 'The Domestic Enforcement of Human Rights', above n 17.

23 International Law Commission, *Yearbook of the International Law Commission 1963*, vol 1, 63–86, 72, 76–7, 214, UN Doc A/CN.4/SER.A/1963 (1964).

24 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), art 53. See also American Law Institute, *Restatement of the Law Third, Foreign Relations Law of the United States* (1987), s 331(2); *Prosecutor v Furundzija* IT-95-17/1-T (10 December 1998), [153]; *Suresh v Canada (Minister of Citizenship and Immigration)* [2002] 1 SCR 3, [61]; *Bouzari v Iran* (2004) 243 DLR (4th) 406, [86].

25 Charlesworth, above n 12, 3-4; Ian Brownlie, *Principles of Public International Law* (5th ed, 1998) 10; Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law: Volume I – Peace* (9th ed, 1992) 29; Stephen Donaghue, 'Balancing Sovereignty and International Law: The Domestic Impact of International Law in Australia' (1995) 17 *Adelaide Law Review* 213, 224–6, 261; Kindred and Saunders, above n 10, 138, 244.

26 Brownlie, above n 25, 517; Henry J Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals* (1996) 133, 145–7; Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (1988) 456; Lyal S Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation* (1997) 115, 117, 246; Meron, above n 16, 11; Penelope Mathew, 'International Law and the Protection of Human Rights in Australia' (1995) 17 *Sydney Law Review* 177, 179; I A Shearer, *Starke's International Law* (11th ed, 1994) 49; D J Harris, *Cases And Materials on International Law* (5th ed, 1998) 836–7; Cassese, *International Criminal Law*, above n 7, 98. See also American Law Institute, above n 24, s 702.

27 *Barcelona Traction, Light and Power Company Ltd (Second Phase)* [1970] ICJ Rep 3, 32; *Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, 134–7. See also Cassese, *International Criminal Law*, above n 7, 98.

28 However, a breach of an *erga omnes* obligation does not necessarily allow the ICJ to rule on a matter without the offending state submitting to its jurisdiction. Thus in *Case Concerning East Timor (Portugal v Australia)* [1995] ICJ Rep 90, the ICJ agreed that the right of peoples to self-determination was a principle of *jus cogens*, but held that it could not rule on the lawfulness of the conduct of a state not a party to the case. This was so even if one state (here Portugal) had legal standing because of the *jus cogens* nature of the rights being violated and its *erga omnes* effect. In this case Indonesia did not consent to the ICJ's jurisdiction and thus the ICJ could not rule on whether East Timor's self-determination had been breached by the maritime agreement between Australia and Indonesia.

29 *Barcelona Traction, Light and Power Company Ltd (Second Phase)* [1970] ICJ Rep 3, 32; *Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, 134-137; *Nulyarimma v Thompson* [1999] FCA 1192, [18] (Wilcox J). See also Brownlie, above n 25, 515, 517; Shaw, above n 12, 97–8; Cassese, *Human Rights in a Changing World*, above n 16, 79; Meron, above n 16, 194; Shearer, above n 26, 49; Hannikainen, above n 26, 456; Sunga, above n 26, , 115, 117, 246; Mathew, above n 26, 179; Cassese, *International Criminal Law*, above n 7, 98.

30 Stephen Hall, *Public International Law* (2003) 218.

31 Ibid.

32 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 15, 23. See, eg, *Attorney-General of Israel v Eichmann* (1962) 36 ILR 277.

33 See, eg, *Attorney-General of Israel v Eichmann* (1962) 36 ILR 277. See also the discussion in *Pinochet (No 3)* [1999] 2 WLR 827 (House of Lords).

34 As noted below, under art 6 of the *Genocide Convention*, alleged offenders of genocide are to be tried by a competent tribunal of the 'State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted jurisdiction.' The ICJ has stated that states have a duty to set up appropriate judicial mechanisms or procedures for the universal repression of genocide: *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 15, 23.

35 See further M Cherif Bassiouni and Edward M Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (1995).

36 Kindred and Saunders, above n 10, 728. Alternatively the phrase *aut punier, aut dedere*; that is, a duty imposed on the state in custody of an alleged offender to either punish the offender or extradite to another state: Shearer, above n 26, 213.

37 Cassese, *International Criminal Law*, above n 7, 107.

38 *Prosecutor v Jelisic*, Case No IT-95-10-T (14 December 1999) ('*Jelisic*'), [83]; *Prosecutor v Krstic*, Case No IT–98–33–A (19 April 2004) ('*Krstic*'), [589]–[590].

39 See *International Criminal Court (Consequential Amendments) Act 2002* (Cth), sch 1.

40 *Criminal Code* (Cth), s 268.3.

41 *Criminal Code* (Cth), s 268.4.

42 *Criminal Code* (Cth), s 268.5.

43 *Criminal Code* (Cth), s 268.6.

44 *Criminal Code* (Cth), s 268. See the definition of 'forcibly transfers one or more persons' in s 268.4(2).

45 *Criminal Code* (Cth), ch 8, div 268, sub-div B. Note ch 8, div 268, sub-div C creates offences for crimes against humanity.

46 See Christine Ward, 'A Conversation with ICC President Philippe Kirsch' (2007) *Continuum* 21.

47 See International Criminal Tribunal for the former Yugoslavia, *About the ICTY* <http://www.icty.org/sections/AbouttheICTY> at 26 July 2009; International Criminal Tribunal for Rwanda, *About the Tribunal: General Information* <http://www.ictr.org/default.htm> at 26 July 2009.

48 See UN Treaty Collection <http://treaties.un.org> at 17 June 2009.

49 Note that the ICC only has jurisdiction over offences that have been committed after the *Rome Treaty* came into force: *Rome Treaty*, art 11. Moreover, there is no liability for offences committed by nationals of, or on the territory of, a state prior to the *Rome Treaty* coming into force in that particular state unless the state chooses to accept the ICC's jurisdiction under art 12(3).

50 Under art 25(1) of the *Rome Treaty*, the ICC only has jurisdiction to prosecute individuals, implicitly to the exclusion of prosecutions of states and corporations. No immunity may be extended to a person by reason of their position in a nation (ie, no diplomatic immunity): art 27.

51 Quoted in Martin Flynn, *Human Rights in Australia: Treaties, Statutes and Cases* (2003) 118.

52 *Rome Treaty*, preamble [10], arts 1, 17. See also Bartram Brown, 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals' (1998) 23 *Yale Law Journal* 383; Adriaan Bos, 'The Role of an International Court in the Light of the Principle of Complementarity' in Eric Denters and Nico Schrijver (eds), *Reflections on International Law From the Low Countries* (1998) 249; Kindred and Saunders, above n 10, 809.

53 See *Rome Treaty*, art 17.

54 Quoted in Flynn, *Human Rights in Australia*, above n 51, 118.

55 See in particular the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families ('*Bringing Them Home* Inquiry'), *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, Human Rights and Equal Opportunity Commission (1997) ('*Bringing Them Home* Report') 32. The author has also written numerous articles pertaining to the legal issues arising from these policies: Julie Cassidy, 'Case Comment: Cubillo and Gunner v The Commonwealth: A Denial of the Stolen Generation?' (2003) 12(1) *Griffith Law Review* 114; Julie Cassidy, 'The Stolen Generation: A Breach of Fiduciary Duties? Canadian v Australian Approaches to Fiduciary Duties' (2003) 34(2) *University of Ottawa Law Review* 175; Julie Cassidy, 'The Best Interests of the Child?: The Stolen Generations in Canada and Australia' (2006) 15(1) *Griffith Law Review* 111; Cassidy, 'The Stolen Generations', above n 3.

56 Further prompting these policies was pressure from pastoralists for governments to provide them with cheap labour (particularly farmhands) and to dispossess Aboriginal communities to facilitate the expansion of European settlement in Australia. See further Cassidy, 'The Best Interests of the Child?', above n 57.

57 *Cubillo v Commonwealth* [2000] FCA 1084 ('*Cubillo*'), [1146]. See also *Cubillo* [2000] FCA 1084, [158], [160], [162], [226], [233], [235], [251], [257]. *Williams v The Minister, Aboriginal Land Rights Act 1983 (No 2)* [1999] NSWSC 843, [88].

58 See *Cubillo* [2000] FCA 1084, [172]–[179], [190], [1146]; Bain Attwood, *The Making of the Aborigines* (1989), 16–17; *Bringing Them Home* Inquiry, *Bringing Them Home* Report, above n 55, 9; Kaye Healey (ed), *The Stolen Generation* (1998) 17, 23, 32.

59 Resolution passed at the first Conference of Commonwealth and State Aboriginal Authorities (21–23 April 1937). See also the discussion of the conference in Healey, above n 58, 23–4.

60 See above n 59. See further Lorna Lippmann, *Generations of Resistance: Aborigines Demand Justice* (2nd ed, 1991) 24. See also *Bringing Them Home* Inquiry, *Bringing Them Home* Report, above n 55, 32.

61 Anna Haebich, *For Their Own Good* (1992) 150.

62 *Aborigines Protection Regulations 1871* (Vic).

63 Heather McRae, Garth Nettheim and Laura Beacroft, *Indigenous Legal Issues* (2nd ed, 1997) 411.

64 See also *Aborigines Act 1905* (WA); *Aborigines Protection Regulation 1909* (WA); *Northern Territory Aboriginal Act 1910* (SA); *Aborigines Act 1911* (SA). Under the *Aborigines Act 1934* (SA), Aboriginal children were effectively deemed neglected within the terms of the *Maintenance Act 1926* (SA).

65 Under the *Aboriginals Preservation and Protection Act 1939* (Qld), this role was taken over by the Director of Native Affairs.

66 For example, in 1915 the *Aborigines Protection Act* 1909 (NSW) was amended to authorise under s 13A the New South Wales Aborigines Protection Board to remove Aboriginal children without the consent of their parents if the Board considered such to be in the children's best interests. The amendment also removed the precondition of neglect. No court order was required. 'Being Aboriginal' was sufficient to authorise the removal. By 1911 essentially all States and the Northern Territory had legislation in place for the forcible removal of aboriginal children from their families: Healey, above n 58, 11. It has been suggested that the exception was Tasmania as this State denied that it had any Aboriginal persons living in the State: see Healey, above n 58, 11. However, even in Tasmania the *Cape Barren*

Island Reserve Act 1912 (Tas) had some impact in this regard as it authorised the removal of Aboriginal persons from the mainland to Cape Barren Island and, more specifically, provided for the creation of a 'half-caste' reserve and authorised the Secretary for Lands to determine who could reside in the reserve. After 1935 Aboriginal children continued to be removed from Cape Barren Island and surrounding islands, but pursuant to the *Infants Welfare Act 1935* (Tas) and subsequent welfare legislation: *Bringing Them Home* Inquiry, *Bringing Them Home* Report, above n 55, 626.

67 This date is significant because the Northern Territory was originally annexed to South Australia and it was not until 1911 that the Commonwealth became responsible for the Northern Territory. This historical fact explains why the discussion below refers to both the *Northern Territory Aboriginal Act 1910* (SA) and *Aboriginals Ordinance 1911* (Cth) in regard to the Aboriginal peoples of the Northern Territory.

68 In a sense the existence of removal powers in Western Australia, Queensland and the Northern Territory were, therefore, most significant from a purely numerical perspective as a consequence of their significant Aboriginal populations.

69 [2000] FCA 1084, [170], [200], [220].

70 Ibid [171].

71 Ibid [170], [200], [220]–[256].

72 Apparently Peter Read coined this term: Peter Read, *The Stolen Generation: The Removal of Aboriginal Children in New South Wales 1883 to 1969* (1982).

73 Healey, above n 58, 19, 23–4, 33; Antonio Buti, *Separated: Australian Aboriginal Childhood Separations and Guardianship Law* (2004) 49. See also *Bringing Them Home* Inquiry, *Bringing Them Home* Report, above n 55, 32.

74 *Cubillo* [2000] FCA 1084, [171].

75 Ibid [2000] FCA 1084, [172] (quotation of Baldwin Spencer, writing as the Chief Protector of Aboriginals in 1912).

76 See above ns 59–61.

77 For example, in Victoria the *Aborigines Act 1957* (Vic) deleted the specific power to remove Aboriginal children from their families. Thus from this date Aboriginal children fell under the general auspices of the *Child Welfare Act 1954* (Vic). See also *Aboriginal Act 1962* (SA) whereby the removal of Aboriginal children was effectively shifted to the auspices of the *Maintenance Act 1926* (SA). It has been stated that that removal on the basis of Aboriginality probably continued to be authorised in South Australia until the enactment of the *Community Welfare Act 1972* (SA): McRae, Nettheim and Beacroft, above n 63, 411. Similarly, in New South Wales it was not until the repeal of the *Aborigines Protection Act 1909* (NSW) by the *Aborigines Act 1969* (NSW) that Aboriginal children were subject to general child welfare laws and could not be removed on the basis of Aboriginality: McRae, Nettheim and Beacroft, above n 63, 411.

78 *Cubillo* [2000] FCA 1084, [259].

79 McRae, Nettheim and Beacroft, above n 63, 411. See also above n 77.

80 The powers were abolished by the *Aborigines Act 1971* (Qld) and *Torres Strait Islanders Act 1971* (Qld).

81 See Commonwealth, Royal Commission into Aboriginal Deaths in Custody, Commissioner J H Wootten, *Report of the Inquiry into the Death of Malcolm Charles Smith* (1989).

82 See Healey, above n 58, 12. Note also the significance of the address of then Prime Minister, Paul Keating, in Sydney on 10 December 1992 when he acknowledged that '[w]e took the children from their mothers'. The speech is reproduced at (1993) 3(61) *Aboriginal Law Bulletin* 4, 4.

83 The relatively recent release of the film *Rabbit-Proof Fence* also served to heighten the public awareness both in Australia and Canada. The film was written and produced by Christine Olsen and is based on the 1996 book *Follow the Rabbit-Proof Fence*, authored by Doris Pilkington (Nugi Garimara).

84 *Bringing Them Home* Inquiry, *Bringing Them Home: A Guide to the Findings and Recommendations of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families* (1997) 4 ('*Bringing Them Home* Guide'). It has been stated that between 1919 and 1929 one third of all Aboriginal children were removed from their families and between 1950 and 1965 one in five children were separated from their families: Healey, above n 58, 12. See also Read, above n 72, 18.

85 Healey, above n 58, 12.

86 *Bringing Them Home* Inquiry, *Bringing Them Home* Guide, above n 84, 15.

87 Ibid. See also Healey above n 58, 19.

88 *Bringing Them Home* Inquiry, *Bringing Them Home* Guide, above n 84, 16. See also Healey, above n 58.

89 *Bringing Them Home* Inquiry, *Bringing Them Home* Guide, above n 84, 15–16.

90 Ibid 17. See also Healey above n 58, 12, 19.

91 Healey, above n 58, 18.

92 *Bringing Them Home* Inquiry, *Bringing Them Home* Report, above n 55, 266, 269, 273, 275.

93 Ibid 273.

94 Ibid 275.

95 John Herron, Minister for Aboriginal and Torres Strait Island Affairs, *Submission to Senate Legal and Constitutional References Committee: 'Inquiry into the Stolen Generation'* (2000) 29–32.

96 (1997) 146 ALR 126 ('*Kruger*').

97 While it will be seen the Court held that the subject Ordinance was constitutionally valid and did not authorise genocide, as Buti notes, this begs the question whether genocide nevertheless occurred as suggested by HREOC. See Antonio Buti, 'Unfinished Business: The Australian Stolen Generations' (2000) 7(4) *Murdoch University Electronic Journal of Law*, [41].

98 Specifically *Aboriginal Ordinance 1918* (Cth), ss 6, 7, 16, 67. See further L Kennedy and D Nance, 'Stolen Generations: The Kruger Action', above n 4; Barbara Cummings, 'Writs and Rights in the Stolen Generations (NT) Case' (1996) 3(86) *Aboriginal Law Bulletin* 8; Cassidy, 'The Stolen Generations', above n 3.

99 Briefly, these included that the Ordinance: was not a law for the government of the Northern Territory and thus was not authorised under s 122 of the *Constitution* (the 'territories' power); purported to confer judicial power on persons other than federal courts, contrary to Chapter III of the *Constitution*; breached certain implied constitutional rights; and breached s 116 of the *Constitution*, which protects the free exercise of religion. See further Champion, above n 3; S Joseph, above n 3; Cassidy, 'The Stolen Generations', above n 3; Buti, 'Kruger and Bray and the Common Law', above n 3; Julie Cassidy, 'A Legacy of Assimilation: Abuse in Canadian Native Residential Schools' (2003) 7 *Southern Cross University Law Review* 154.

100 In this regard see *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; *Western Australia v Ward* (2002) 213 CLR 1; *Risk v Northern Territory* [2006] FCA 404.

101 See also Healey, above n 58, 12–13, 34.

102 *Kruger* (1997) 146 ALR 126, 134.

103 Ibid 186.

104 In the majority were Brennan CJ, Dawson J (with whom McHugh J agreed) and Gummow J. Gaudron J dissented, finding that the key provisions of the Ordinance were invalid because they breached the rights to freedom of association and political speech: ibid, 206.

105 *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 15, 23; GA Res 96(1), UN GAOR, 1st sess, 55th plen mtg (1946); noted in the preamble to the *Genocide Convention*. See Kittichaisaree, above n 13, 250.

106 Kittichaisaree, above n 13, 69, 250.

107 See further Schabas, 'Article 6', above n 14.

108 *Kruger* (1997) 146 ALR 126, 161.

109 Ibid 174.

110 *Pinochet (No 3)* [1999] 2 WLR 827 (House of Lords), 911–12 (Lord Millett); Burgers and Danelius, above n 11, 1.

111 See, eg, *Dietrich v The Queen* (1992) 177 CLR 292, 305 (Mason CJ and McHugh J); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–7 (Mason CJ and Deane J), 298 (Toohey J), 315 (McHugh J).

112 See above n 18.

113 'It has also been observed that an act of congress ought never to be construed to violate the law of nations if any other possible construction remains': *Murray v The Schooner Charming Betsey*, 6 US (2 Cranch) 64, 118 (1804). 'In cases admitting of doubt, the presumption would be that Parliament intended to legislate without violating any rule of international law, and the construction accordingly': *The Annapolis* (1861) Lush 295, 306. See also *Bloxam v Favre* (1883) 8 PD 101; *Leroux v Brown* (1852) 12 CB 801; *Lopez v Burslem* (1843) 4 Moore 300, 305; *R v Dudley* (1884) 14 QBD 273, 284.

114 *Kruger* (1997) 146 ALR 126, 161.

115 Ibid 162.

116 Ibid 160–1 (Dawson J), 174 (Toohey J), 231–2 (Gummow J).

117 Ibid 160–1 (Dawson J), 174 (Toohey J), 190 (Gaudron J), 218–19 (McHugh J).

118 However, Gaudron J noted that if the acts were committed with the intention of destroying the plaintiffs' racial group, they might be subject to an action for damages even if the Ordinance was a valid law: ibid 190.

119 Ibid 230–1.

120 Ibid 174 (Toohey J), 231 (Gummow J), 161–2 (Dawson J). See also Gaudron J's comments to the same effect at 190.

121 The Court stressed that it is community standards at the time of the removal, not today, that must be considered: ibid 231 (Gummow J).

122 Ibid 174 (Toohey J); 231 (Gummow J). Dawson, Toohey and Gummow JJ noted that the *Genocide Convention* had been ratified after the enactment of the Ordinance and had not been legislatively incorporated into domestic law: see ibid 160, 174, 231–2. Dawson J, with whom Gummow J agreed, also noted that the *Genocide Convention* was not concerned with cultural genocide: ibid 162. Gaudron J, by contrast, asserted that 's 122 should be construed on the basis that it was not intended to extend to laws authorising gross violations of human rights and dignity contrary to established principles of the common law … s 122 does not confer power to pass laws authorising genocide as defined in Art III of the Genocide Convention': ibid 190.

123 In terms of gender discrimination in the exercise of this discretion, see further Cummings, above n 98.

124 *Kruger* (1997) 146 ALR 126, 187.

125 Ibid 188.

126 Ibid 187.

127 Ibid 190.

128 Ibid.

129 Ibid.

130 See the direct divergence of views of McHugh and Kirby JJ in

Al-Kateb v Godwin (2004) 219 CLR 562.

131 [1999] FCA 1192 ('*Nulyarimma*').

132 It is relevant to note that one of the plaintiffs, Wadjularbinna Nulyarimma, was forcibly removed from her family.

133 Nick Minchin, *The Ten Point Plan: The Federal Government's Response to the Wik Decision*, Department of Prime Minister and Cabinet (1997). See further Richard Bartlett, *Native Title in Australia* (2nd ed, 2004) ch 5.

134 Cassidy, 'The Domestic Enforcement of Human Rights', above n 17.

135 See further Sean Peters, 'The Genocide Case: *Nulyarimma v Thompson*' (1999) *Australian International Law Journal* 233; Martin Flynn, 'Genocide: It's a Crime Everywhere But Not in Australia' (2000) 29(1) *University of Western Australia Law Review* 59; Andrew D Mitchell, 'Genocide, Human Rights Implementation and the Relationship Between International and Domestic Law: *Nulyarimma v Thompson*' (2000) 24 *Melbourne University Law Review* 15, 20; Douglas Guilfoyle, '*Nulyarimma v Thompson*: Is Genocide a Crime at Common Law in Australia?' (2001) 29 *Federal Law Review* 1; Henry Burmester and Susan Reye, 'The Place of Customary International Law in Australia: Unfinished Business' (2001) 21 *Australian Yearbook of International Law* 39.

136 *Re Thompson; Ex parte Nulyarimma* (1998) 136 ACTR 9.

137 [1999] FCA 1192.

138 Ibid [1].

139 Ibid [18] (Wilcox J), [36], [57] (Whitlam J), [78], [140]–[141] (Merkel J).

140 Ibid [5].

141 Ibid [7].

142 Ibid [12].

143 Ibid [15]–[16].

144 Ibid [32] (Wilcox J), [59] (Whitlam J).

145 Ibid [26]–[29], [32]. See also the discussion in Guilfoyle, above n 35.

146 Ibid [53].

147 Ibid [167], [177].

148 Ibid [54].

149 Ibid.

150 Ibid [163].

151 Ibid [25].

152 See further Cassidy, 'The Domestic Enforcement of Human Rights', above n 17.

153 *Nulyarimma* [1999] FCA 1192, [22].

154 Ibid [132], quoting *Western Australia v Commonwealth* (1995) 183 CLR 373, 485; *R v Keyn* (1876) 2 Ex D 63; *Chung Chi Cheung v R* [1939] AC 160; *Chow Hung Ching v The King* (1949) 77 CLR 449.

155 *Nulyarimma* [1999] FCA 1192, [181]–[185].

156 Ibid [183].

157 Ibid [184].

158 Ibid [186].

159 Ibid.

160 Ibid [193]-[197].

161 Ibid [198].

162 Ibid [231].

163 Ibid [186], [193]–[198], [207], [224], [233]–[234] (per Merkel J).

164 [1999] VSC 442.

165 Ibid [1].

166 Ibid [8].

167 (1998) 136 ACT 9.

168 *Thorpe v Kennett* [1999] VSC 442, [43].

169 Ibid [43]–[46].

170 Ibid [43], [45].

171 Ibid [45].

172 Ibid [43].

173 [1999] SASC 462 ('*Sumner* appeal').

174 See *Sumner v United Kingdom of Great Britain* [1999] SASC 456, [3] ('*Sumner* trial').

175 *Sumner* appeal [1999] SASC 462, [16].

176 Ibid [19].

177 Ibid [20].

178 Ibid [17].

179 *Sumner* trial [1999] SASC 456, [27].

180 Ibid [26], [28].

181 Ibid [28]–[32], [40].

182 *Sumner* appeal [1999] SASC 462, [39]–[61].

183 Ibid [50].

184 Ibid [53]–[55].

185 *Sumner v United Kingdom of Great Britain* [2000] SASC 91, [13] ('*Sumner* second trial').

186 Ibid [17].

187 Ibid [25].

188 Ibid [26].

189 (1949) 77 CLR 449.

190 *Sumner* second trial [2000] SASC 91, [30].

191 From the particular page reference provided by Nyland J, it may be that His Honour is referring to Dixon J's quotation in *Chow Hung Ching v The King* of an article by J L Brierly, which ambiguously provides that 'international law is not a part, but is one of the sources, of English law': *Chow Hung Ching v The King* (1949) 77 CLR 449, 477. Strangely, Brierly had attributed this notion to the decision in *West Rand Central Gold Mining Co v R* [1905] 2 KB 391, a case that in fact supports the 'common law adoption approach' to customary international law, subject to sufficient proof of the relevant custom.

192 *Nulyarimma* [1999] FCA 1192, [131].

193 Ibid [132].

194 *Sumner* second trial [2000] SASC 91, [32].
195 Ibid.
196 Ibid [18]–[19].
197 Ibid [22].
198 Ibid [19].
199 Ibid [20]–[21].
200 Julie Cassidy, 'Sovereignty of Aboriginal Peoples' (1998) 9(1) *Indiana International and Comparative Law Review* 65.
201 *Sumner* second trial [2000] SASC 91, [84].
202 Kittichaisaree, above n 13, 69.
203 Cassese, *International Criminal Law*, above n 7, 103. Cassese quotes the German Federal Court of Justice in *Jorgic* (1999) 401 that in the case of genocide the perpetrators do not target a person 'in his capacity as an individual … [as they] do not see the victim as a human being but only as a member of the persecuted group.'
204 *Akayesu*, Case No ICTR-96-4-T (2 September 1998), [511].
205 Ibid.
206 Ibid [513].
207 *Prosecutor v Kayishema*, Case No ICTR-95-1-T (5 May 2001) (*'Kayishema'*).
208 Ibid [98].
209 *Akayesu*, Case No ICTR-96-4-T (2 September 1998), [514]. This was echoed in *Kayishema*, Case No ICTR-95-1-T (5 May 2001), [98].
210 *Kayishema*, Case No ICTR-95-1-T (5 May 2001), [98].
211 *Akayesu*, Case No ICTR-96-4-T (2 September 1998), [514].
212 Ibid [515].
213 *Kayishema*, Case No ICTR-95-1-T (5 May 2001), [98].
214 *Jelisic*, Case No IT-95-10-T (14 December 1999), [83]; *Krstic*, Case No IT–98–33–A (19 April 2004), [589]–[590].
215 *Krstic*, Case No IT–98–33–A (19 April 2004).
216 Ibid.
217 See above n 210.
218 *Kayishema*, Case No ICTR-95-1-T (5 May 2001), [98].
219 *Akayesu*, Case No ICTR-96-4-T (2 September 1998), [702].
220 Ibid.
221 *Prosecutor v Rutaganda*, Case No ICTR-96-3-T (6 December 1999), [400]–[401].
222 *Kayishema*, Case No ICTR-95-1-T (5 May 2001), [98].
223 See, eg, the above discussed *Aboriginal Ordinance 1918* (Cth).
224 See, eg, *Aborigines Regulation* 1916 (Vic); *Aborigines Protection (Amendment) Act 1918* (NSW); *Native Welfare Act Amendment Act 1960* (WA).
225 See above ns 59–60.
226 Haebich, above n 61, 150.
227 *Akayesu*, Case No ICTR-96-4-T (2 September 1998), [1406]. See also Cassese, *International Criminal Law*, above n 7, 106–7.
228 Cassese, *International Criminal Law*, above n 7, 103. See also *Akayesu*, Case No ICTR-96-4-T (2 September 1998), [1406].
229 Kittichaisaree, above n 13, 72, citing *Akayesu*, Case No ICTR-96-4-T (2 September 1998), [520].
230 Cassese, *International Criminal Law*, above n 7, 103.
231 See further Storey, above n 4.
232 *Akayesu*, Case No ICTR-96-4-T (2 September 1998), [523]. See also Cassese, *International Criminal Law*, above n 7, 76.
233 *Akayesu*, Case No ICTR-96-4-T (2 September 1998), [523].
234 Note that in *Prosecutor v Kambanda*, Case No ICTR 97-23-S (4 September 1998), *Prosecutor v Serushago*, Case No ICTR 98-39-S (5 February 1999) and *Prosecutor v Ruggiu*, Case No ICTR-97-32-I (1 June 2000) the accused pleaded guilty and therefore the Trial Chamber only dealt with sentencing.
235 Kittichaisaree, above n 13, 72, citing *Akayesu*, Case No ICTR-96-4-T (2 September 1998), 520].
236 See, eg, *Aborigines Regulation 1916* (Vic); *Aborigines Protection (Amendment) Act 1918* (NSW); *Native Welfare Act Amendment Act 1960* (WA).
237 Kittichaisaree, above n 13, 74–6; Cassese, *International Criminal Law*, above n 7, 100.
238 *Jelisic*, Case No IT-95-10-T (14 December 1999), [100]–[101].
239 *Kayishema*, Case No ICTR-95-1-T (5 May 2001), [94].
240 See, eg, *Aborigines Protection Regulations 1871* (Vic).
241 See, eg, *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld), s 31.
242 See, eg, *Aborigines Protection (Amendment) Act 1940* (NSW).
243 Cf Buti *Separated*, above n 73, 61–2, 158.
244 See, eg, *Aboriginal Ordinance 1918* (Cth), s 7; *Aborigines Act 1905* (WA); *Aborigines Act Amendment Act 1911* (WA); *An Ordinance for the Protection, Maintenance and Upbringing of Orphans and other Destitute Children and Aborigines Act 1844* (SA); *Northern Territory Aboriginals Act 1910* (SA); *Aborigines Act 1911* (SA).
245 See, eg, *Aboriginals Preservation and Protection Act 1939* (Qld), s 18; *Aboriginals Ordinance 1953* (Cth).
246 See, eg, *Native Administration Act 1936* (WA).
247 Cassese, *International Criminal Law*, above n 7, 106.
248 See, eg, the discussion of the relevant Aboriginal institutions in *Cubillo v Commonwealth* [1999] FCA 518, [25]–[28] and *Cubillo* [2000] FCA 1084, [1], [10], [12], [514], [744], [1156].
249 *Krstic*, Case No IT–98–33–A (19 April 2004), [590].
250 Ibid [589].
251 *Nulyarimma* [1999] FCA 1192, [12].
252 Patricia Grimshaw et al, *Creating A Nation* (1994) 142.
253 Lyndall Ryan, *The Aboriginal Tasmanians* (2nd ed, 1996).
254 As Wilcox J noted in *Nulyarimma*, 'on the Australian mainland, there were shooting parties and poisoning campaigns to "clear"

local holdings of their indigenous populations': *Nulyarimma* [1999] FCA 1192, [12]. The degree of direct killings of Aboriginal persons in Australia is now well documented: See further Henry Reynolds, *The Other Side of the Frontier* (1982); Grimshaw et al, above n 252, 131–42.

255 See above ns 59–61.

256 See further Reynolds, above n 254; Grimshaw et al, above n 252, 131–42.

257 As noted above, in Canada the focus was not on children of mixed parentage, but rather the stated intent of assimilating all Aboriginal children.

258 See above ns 59–61.

259 *Bringing Them Home* Inquiry, *Bringing Them Home* Report, above n 55, 273.

260 *Krstic*, Case No IT–98–33–A (19 April 2004), [590].

261 Cassese, *International Criminal Law*, above n 7, 107.

262 Ibid citing Leila Sadat Wexler and Jordan J Paust (1998) 13(3) *Nouvelles Études Pénales* 5.

263 Ibid citing Leila Sadat Wexler and Jordan J Paust (1998) 13(3) *Nouvelles Études Pénales* 5.

264 Herron, above n 95, 29–32.

265 Kittichaisaree, above n 13, 74–6; Cassese, *International Criminal Law*, above n 7, 100.

266 Kittichaisaree, above n 13, 78.

267 Grimshaw et al, above n 252, 142.

268 *Nulyarimma* [1999] FCA 1192, [9].

269 *Bringing Them Home* Inquiry, *Bringing Them Home* Report, above n 55, 17.

270 Healey, above n 58, 18.

271 See, eg, *Cubillo v Commonwealth* [2001] FCA 1213, [333]; *M(FS) v Clarke* [1999] 11 WWR 301, 352–3.

272 Kittichaisaree, above n 13, 82, citing *Akayesu*, Case No ICTR-96-4-T (2 September 1998), [509]; *Kayishema*, Case No ICTR-95-1-T (5 May 2001), [118].

273 See, eg, *Cubillo v Commonwealth* [1999] FCA 518.

274 *Cubillo* [2000] FCA 1084, [1455].

275 *Cubillo v Commonwealth* [1999] FCA 518, [13].

276 *Kruger* (1997) 190 CLR 1, 36.

277 Kittichaisaree, above n 13, 79.

278 Ibid, citing *Akayesu*, Case No ICTR-96-4-T (2 September 1998), [505]–[506]; *Kayishema*, Case No ICTR-95-1-T (5 May 2001), [115]–[116]; *Prosecutor v Rutaganda*, Case No ICTR-96-3-T (6 December 1999), [51].

279 *Bringing Them Home* Inquiry, *Bringing Them Home* Report, above n 55, 264.

280 Ibid 262–5.

281 Buti *Separated*, above n 73, 161.

282 See, eg, *Cubillo* [2000] FCA 1084, [547].

283 *Cubillo* [2000] FCA 1084, [878]. The other witness added that the children would also run alongside the railway tracks hoping that the passengers or the staff on 'The Ghan' train would throw them food: *Cubillo* [2000] FCA 1084, [977].

284 *Report on Survey of Native Affairs* (1948) 5, 13, cited by Buti *Separated*, above n 73, 161.

285 *Report on Survey of Native Affairs*, above n 284, 13, cited by Buti *Separated*, above n 73, 131.

286 See, eg, *Cubillo* [2000] FCA 1084, [556]–[557], [756]–[759].

287 Ibid [343].

288 Ibid [796].

289 Ibid [343].

290 Buti *Separated*, above n 73, 160.

291 *Cubillo* [2000] FCA 1084, [1298]. See further Jennifer Clarke 'Case Note: Cubillo v Commonwealth' (2001) 25 *Melbourne University Law Review* 218.

292 *Nulyarimma* [1999] FCA 1192, [9].

293 See above ns 59–61.

294 See, eg, *Cubillo v Commonwealth* [1999] FCA 518, [25].

295 Kittichaisaree, above n 13, 82.

296 Ibid.

297 Ibid.

298 Ibid 70.

299 Ibid.

300 See further Storey, above n 4.

301 Kittichaisaree, above n 13, 70.

302 See Robert van Krieken, 'Cultural Genocide Reconsidered' (2008) 12(Special Edition) *Australian Indigenous Law Review* 76, 76.

303 S James Anaya, *Indigenous People in International Law* (1996) 192, 209.

304 *Krstic*, Case No IT–98–33–A (19 April 2004), [580].

305 Kittichaisaree, above n 13, 70; van Krieken, 'Cultural Genocide Reconsidered', above n 302, 78. See further William Schabas, *Genocide in International Law: The Crime of Crimes* (2000) 175–89.

306 Kittichaisaree, above n 13, 70, citing Steven R Ratner and Jason S Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (1997) 29 (especially note 24).

307 Pieter Drost, *Genocide: United Nations Legislation on International Criminal Law* (1959) vol 2, 11; van Krieken, 'Cultural Genocide in Australia', above n 6, 129, 138; van Krieken, 'Cultural Genocide Reconsidered', above n 302, 76, 78.

308 Van Krieken, 'Cultural Genocide in Australia', above n 6, 129, 138. See further Johannes Morsink, 'Cultural Genocide, the Universal Declaration and Minority Rights' (1999) 21 *Human Rights Quarterly* 1009; Schabas, *Genocide in International Law*, above n 305. Van Krieken discusses the concern for the overuse of the

term and the consequent undermining of its meaningfulness: van Krieken, 'Cultural Genocide in Australia', above n 6, 129–30.

309 Kittichaisaree, above n 13, 70, citing Steven R Ratner and Jason S Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (1997) 29 (especially note 24). See also van Krieken, 'Cultural Genocide Reconsidered', above n 302, 76–7.

310 Van Krieken, 'Cultural Genocide Reconsidered', above n 302, 76.

311 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, UN Doc A/RES/47/1 (2007).

312 Van Krieken, 'Cultural Genocide Reconsidered', above n 302, 76. See further Larissa Behrendt, 'Genocide: The Distance Between Law and Life' (2001) 25 *Aboriginal History* 132; van Krieken, 'Cultural Genocide in Australia', above n 6, 131, 147–150; van Krieken, 'Cultural Genocide Reconsidered', above n 302, 77–80.