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Indigenous Australians and International Law: Racial Discrimination, Genocide and Reparations

By
Michael Legg*

*There are aspects of our history of which we are right to be proud and others of which we should properly feel ashamed. Neither should be thought to wash away the other. Even more, we have something new to be ashamed of if we try to deny what else we have to be ashamed of.*¹

I. INTRODUCTION

History once written by the victors is now being reconsidered from the perspective of the disadvantaged and re-interpreted through the language of international law and human rights. Human rights groups and the media are forcing many members of the international community to respond to new questions of morality regarding treatment of minority groups, including indigenous peoples, by predecessor majority-controlled governments or colonizing nations.²

Part of this reconsideration is taking place in Australia as it confronts its own questions of morality arising out of European settlers' treatment of Indigenous Australians after settlement in 1788. Australia's record on Indigenous Australians is at best ambiguous and at worst an example of genocide by eugenics. The 1990s were especially ambiguous with the recognition of native title rights, a report into the removal of indigenous children from their families, and yet a refusal to apologize for past practices or offer any form of reparation.

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1. MARTIN KRYGIER, BETWEEN FEAR AND HOPE: HYBRID THOUGHTS ON PUBLIC VALUES 65 (1997).

2. See generally RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS (1999); ELAZAR BARKAN, THE GUILT OF NATIONS (2000); International Third World Legal Studies Association, New York and the Community Peace Program, School of Government, University of the Western Cape, INTO THE 21ST CENTURY: RECONSTRUCTION AND REPARATIONS CONFERENCE, Cape Town, South Africa, Jan. 4-6, 2001. See also Chris Cunneen, *Review Essay: Reflections on Reparations and Reconciliation*, 12(3) CURRENT ISSUES IN CRIM. JUST. 382 (2001); Gay Alcorn, *The Business of Saying Sorry*, SYDNEY MORNING HERALD June 20, 2001, <http://www.smh.com.au/news/0106/20/features/features1.html> (last visited Feb. 20, 2002).

International law has had a major influence on human rights developments within Australia. Indeed, Australia generally tends to be receptive to international influence and to seek active engagement with the rest of the world as shown by its prior enthusiastic participation in the United Nations (UN). This article will explain the role of international law in the enactment of legislation under international human rights covenants, such as the Racial Discrimination Act 1975 (Cth)³ (RDA), the recognition and reduction of native title, and the removal of indigenous children from their families giving rise to claims of racial discrimination, genocide and calls for reparations. To facilitate this discussion, the article begins with a brief history of Indigenous Australians and sets out the legal framework, including the operation of Australia's Constitution, in which rights protection and international law operate within Australia. The article concludes by highlighting the successes and limitations of Australia's application of international law in confronting past injustices and in achieving reconciliation. In particular, this article argues that although international law can operate as a source of human rights, its dependence on voluntary adherence (except in the most extreme circumstances)⁴ means that ultimately rights can only be protected if they are entrenched in the Australian Constitution. The lack of an entrenched right of equality is the source of much of the mistreatment of Indigenous Australians.

II.

A BRIEF HISTORY OF INDIGENOUS AUSTRALIANS

A paper of this length cannot hope accurately to depict the history of Indigenous Australians.⁵ Especially as much of that history was oral and occurred prior to white settlement in 1788, and the written history is from the perspective of white Australians. As a result, this article offers only a broad overview. The common estimate of the length of Indigenous Australians' occupation of Australia prior to white settlement is around 40,000 years. Indigenous Australians organized themselves in tribes that were typically nomadic but occupied defined areas. The tribes had sophisticated systems of kinship, law and religion, which, like the appearance of the tribes themselves, varied from place to place across the disparate parts of Australia.

3. Australian legislation is cited by its short title, year of enactment and the jurisdiction enacting the legislation. The abbreviation 'Cth' signifies Commonwealth or Federal legislation, 'SA' refers to South Australia and 'NT' refers to the Northern Territory.

4. For example the UN Security Council's decisions to authorize military force against countries engaging in ethnic cleansing and the establishment of International Criminal Tribunals.

5. Useful histories include: COUNCIL FOR ABORIGINAL RECONCILIATION, RECONCILIATION AUSTRALIA'S CHALLENGE - FINAL REPORT OF THE COUNCIL FOR ABORIGINAL RECONCILIATION TO THE PRIME MINISTER AND THE COMMONWEALTH PARLIAMENT (2000) [hereinafter CAR FINAL REPORT], ch. 1, <http://www.reconciliation.org.au/finalreport/index.htm> (last visited Feb. 20, 2002); JARED DIAMOND, GUNS GERMS AND STEEL 295-321 (1999); ROBERT HUGHES, THE FATAL SHORE (1987); BRUCE ELDER, BLOOD ON THE WATTLE (1988); THE STRUGGLE FOR ABORIGINAL RIGHTS: A DOCUMENTARY HISTORY (Bain Attwood & Andrew Markus eds., 1999) [hereinafter Attwood & Markus]; DAVID DAY, CLAIMING A CONTINENT: A NEW HISTORY OF AUSTRALIA (1997); JOHN PILGER, A SECRET COUNTRY (1989).

Indigenous Australians had only minor contact with Europeans prior to 1788, mainly with Dutch explorers on the west and north coasts and with Captain Cook who claimed the east coast for England in 1770. The First Fleet's arrival at Sydney Cove in 1788 marked a dramatic change in Indigenous Australians' way of life:

Within months of [the First Fleet's arrival] there was open animosity as Indigenous people protested against the Europeans cutting down trees, taking their food and game, and driving them back into others' territories. Bitter conflict followed as Aboriginal people engaged in guerilla warfare—plundering crops, burning huts, and driving away stock to be met by punitive expeditions of great ferocity in which bands of Aborigines encountered were indiscriminately killed.⁶

The settlement of Australia, which many Indigenous Australians consider an invasion, continued unabated. The settlement decimated the Indigenous Australian population with disease, starvation, intentional poisoning and rifles, to which spears and boomerangs were vastly inferior. The Europeans forcibly moved many of the remaining Indigenous Australians onto missions and government reserves. Other Indigenous Australians became unemployed fringe dwellers, or casual laborers in rural Australia. The result was that Indigenous Australians “were no longer allowed to live as they had done for tens of thousands of years, but neither were they able to become equal partners and citizens in the wider society that had taken their land.”⁷

The federation of the Australian colonies in 1901 resulted in a Constitution that assumed Indigenous Australians were a dying race and there was no need to make provision for them in an enduring document. It was not until the 1960s and 70s that public awareness about the history and living conditions of Indigenous Australians started to grow. In the 1990s, reports into Aboriginal Deaths in Custody⁸ and the separation of Aboriginal and Torres Strait Islander children from their families (Bringing them Home Report) highlighted the destructive ramifications of government social policy on Indigenous Australians.

The Australian community has begun to demonstrate its support for Indigenous Australians and has attempted reconciliation through an annual ‘Sorry Day’ and ‘Walk for Reconciliation.’ However, debate continues over the appropriate way to address the claims of racial discrimination and genocide stemming from the separation of indigenous children from their families.

6. Anne Bickford, *Contact History: Aborigines in New South Wales after 1788*, 1 AUSTL. ABORIGINAL STUD. 57 (1988), quoted in BRINGING THEM HOME, NATIONAL INQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES (1997) [hereinafter BRINGING THEM HOME REPORT] ch. 3, <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/> (last visited Feb. 20, 2002).

7. CAR FINAL REPORT, *supra* note 5, at ch. 1, <http://www.reconciliation.org.au/finalreport/text01.htm> (last visited Feb. 20, 2002).

8. COMMISSIONER ELLIOTT JOHNSTON, QC, ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY REPORT (1991) (5 Volumes), <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/rciadic/#national> (last visited Feb. 20, 2002).

III.

THE OPERATION OF INTERNATIONAL LAW IN THE AUSTRALIAN
LEGAL SYSTEMA. *The Australian Legal System*

Australia is a constitutional democracy organized under a federal system.⁹ Australia has retained its English heritage through "responsible government" and the continued presence of the monarchy, represented by the Governor-General, as the head of state.¹⁰ Responsible government is a system of executive government accountability to the Parliament and, ultimately, to the people.¹¹ Australia adopted a written constitution to turn the six English colonies into states within a federation. That constitution did not contain a bill of rights, as the founders preferred to entrust the protection of rights to Parliament rather than the Judiciary.

The Australian Constitution creates the federal system and specifies the powers of the Federal Parliament.¹² Each State retains plenary power but a valid Federal law will override a State's inconsistent legislation.¹³ The Constitution also creates the Federal Executive¹⁴ and Judiciary.¹⁵ There is strict separation of power between the Judiciary and the other arms of government, whilst the Executive is largely drawn from the ruling party in the Legislature. The Legislature and Executive also include the Governor-General. A literal reading of the Constitution would suggest that the Governor-General exerts significant power, but in operation the Governor-General acts only on the advice of his or her ministers. The main exception to this is the rare occasion when the Governor-General exercises the "reserve powers" allowing for the dismissal of a government and the calling of elections.

The peak court¹⁶ is the High Court of Australia, which has original jurisdiction to interpret the Constitution and appellate jurisdiction from Federal and

9. An overview of Australia's system of government can be found at the Commonwealth Parliament's website, at <http://www.aph.gov.au> (last visited Feb. 20, 2002), and an overview of the operation of the High Court can be found on the Court's website, at <http://www.hcourt.gov.au> (last visited Feb. 20, 2002).

10. On Nov. 6, 1999, Australian voters defeated a referendum to alter the Constitution to remove the monarchy and create a republic with an appointed President.

11. See *Federated Engine-Drivers' and Firemen's Ass'n of Australasia v. Adelaide Chem. and Fertilizer Co. Ltd.* (1920) 28 C.L.R. 1 (Austl.); see also *Lange v. Austl. Broad. Corp.* (1997) 189 C.L.R. 520, 557 (Austl.).

12. AUSTRAL. CONST. ch. I, §§ 51, 52 (setting out the powers of the Parliament).

13. *Id.* at ch. V, § 109 (dealing with the inconsistency of laws).

14. *Id.* at ch. II.

15. *Id.* at ch. III.

16. The hierarchy of courts in Australia involves two prongs, one for Federal Courts and one for State Courts. In the Federal Court system the hierarchy starting at the bottom is the Federal Court, with a single judge, Federal Court of Appeals, which is usually three judges and then the High Court. The Federal hierarchy also includes the Family Court of Australia. In the State Court system the names of Courts vary with the state, but they usually involve three levels. Starting at the bottom will be a Local Court/Magistrate's Court/Court of Petty Sessions that deals with small civil and criminal matters. At the intermediate level is a District Court/County Court that deals with civil matters below a certain dollar amount and more serious criminal matters. Above those courts is a Supreme Court with a single judge sitting that usually has unlimited jurisdiction and then the Su-

State courts.¹⁷ As a result, whilst there are differences in the statutory law between States, the High Court's decisions tend to create uniformity in the common law and in judicial interpretation of statutes using similar wording. The lack of a bill of rights has meant that whilst the High Court regularly engages in judicial review it has only a small number of individual rights to protect. Those rights include section 51(xxxi), which allows the Parliament to make laws for the acquisition of property on just terms; section 80, which guarantees a trial by jury for indictable Commonwealth offences; section 116, which provides for freedom of religion; and section 117, which prevents discrimination on the basis of a person's residency in a particular State. Some High Court judges have also developed rights by implication from the separation of powers, and responsible and representative government that the Constitution embodies.¹⁸ The only last-remaining implied right is freedom of political communication, but its scope is uncertain as the Court has expressed the right in varying ways.¹⁹

B. The Relationship between International and Domestic Law

The Australian Constitution addresses itself to international relations by granting the Federal Parliament the power to make laws with respect to "trade and commerce with other countries" and "external affairs," pursuant to section 51(i) and (xxix), respectively, and by giving the High Court original jurisdiction in all matters "arising under any treaty" pursuant to section 75.

The High Court has held that the Federal Executive has exclusive power to enter into treaties without parliamentary approval.²⁰ Those treaties, however, can only be enacted into domestic law pursuant to a constitutional head of power of which section 51(xxix) is the most obvious.²¹ In addition, the States may not enter into treaties. These arrangements flow more from Australia's common law heritage than its Constitution. The High Court relied on English practice that a treaty cannot affect private rights under domestic law so that implementing legislation is required.²² At various times, the government of the day has made

preme Court's Court of Appeals which is made up of three judges. Appeals from the State Court of Appeals can then be heard by the High Court. Judges are referred to as Chief Justice Brennan or Justice Brennan, as the case requires, which may be abbreviated to Brennan CJ or Brennan J. See RICHARD CHISHOLM & GARTH NETTHEIM, *UNDERSTANDING LAW* (5th ed. 1997).

17. *AUSTL. CONST.* at §§ 73(ii), 76(i); *Judiciary Act 1903 (Cth)*, § 30(a).

18. As the Australian Constitution does not contain an express bill of rights some High Court judges have drawn on the underlying principles and structure of the Constitution to imply rights. A limited version of freedom of speech, referred to as freedom of political communication, was implied from responsible and representative government requiring the exchange of political viewpoints to be able to function. See *Austl. Capital Television Pty. Ltd. v. Commonwealth*, (1992) 177 C.L.R. 106 (*Austl.*); see also *Nationwide News Pty. Ltd. v. Wills* (1992) 177 C.L.R. 1 (*Austl.*).

19. GEORGE WILLIAMS, *HUMAN RIGHTS UNDER THE AUSTRALIAN CONSTITUTION* 165-97 (1999) (discussing each of the express and implied rights).

20. *R v. Burgess; Ex parte Henry* (1936) 55 C.L.R. 608, 681-82 (*Austl.*).

21. The areas granted to the Australian Federal Legislature for it to make laws are denominated as 'heads of power,' similar to the U.S. nomenclature of power in 'commerce power', 'taxing power' and 'spending power'.

22. See *Walker v. Baird* [1892] A.C. 491 (Eng.); see also G.P.J. McGinley, *The Status of Treaties in Australian Municipal Law: The Principle of Walker v. Baird Reconsidered*, 12 *ADEL. L. REV.* 367 (1990).

administrative arrangements requiring itself to consult parliament before signing treaties.²³

The two-step process is necessary as otherwise the signing of a treaty that was self-executing would mean that the Executive, rather than Parliament, would have the power to enact laws. It follows that the main way for international law based upon treaties to affect domestic relations is if Parliament enacted enabling legislation. The Court has broadly interpreted the external affairs head of power so that, providing that the legislation is "capable of being reasonably considered appropriate and adapted" to carrying out the purposes of the treaty, it will be held valid.²⁴

International law may also influence domestic law through rules of construction. In *Minister of State for Immigration and Ethnic Affairs v. Teoh*,²⁵ the High Court considered the effect of a treaty, the UN Convention on the Rights of the Child, that had been ratified but not implemented. Chief Justice Mason and Justice Deane set out two fundamental rules:

Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party. . . . The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law.²⁶

The High Court's position on the relationship between customary international law and Australian domestic law is less clear. The issue has traditionally involved consideration of two schools of thought—one adopting the doctrine of incorporation and the other the doctrine of transformation. The doctrine of incorporation provides that domestic law incorporates customary international law unless the international law conflicts with an Act of Parliament. The doctrine of transformation requires that common law or legislation adopt customary international law for international law to become part of domestic law.²⁷ Thus, where no legislation exists, the doctrine of incorporation automatically makes the international law part of domestic law, whilst the doctrine of transformation requires the court to determine whether the rule is inconsistent with existing legislation, common law, or public policy.

The Australian approach does not fit neatly into either of the above schools of thought, but at present customary international law would not appear to be automatically adopted in Australia. Instead, customary international law is one

23. For an overview of the treaty making process in Australia, see TREATY-MAKING AND AUSTRALIA: GLOBALISATION VERSUS SOVEREIGNTY (Philip Alston & Madelaine Chiam eds., 1995), and see Jan Linehan, *The Law of Treaties, in PUBLIC INTERNATIONAL LAW: AN AUSTRALIAN PERSPECTIVE* 111-17 (Sam Blay et al. eds., 1997).

24. *Commonwealth v. Tas.* (1983) 158 C.L.R. 1, 259 (Austl.); see also *Richardson v. Forestry Comm'n* (1988) 164 C.L.R. 261 (Austl.).

25. *Minister of State for Immigration and Ethnic Affairs v. Teoh* (1995) 183 C.L.R. 273 (Austl.).

26. *Id.* at 287.

27. See generally IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 42-46 (5th ed. 1998).

of the sources of the common law, and when the applicability of customary international law is in question, the judge's role is to determine if that law has been received into the common law.²⁸ Exactly how the judge should perform that role has not been spelt out, but the approaches of Justice Brennan in *Mabo v. State of Queensland [No 2]*,²⁹ and Justice Merkel in *Nulyarimma v. Thompson*,³⁰ discussed below, provide some guidance.

Either way, a clear legislative provision in contravention of international law principles must be applied and enforced.³¹ This approach flows from the Federal Parliament possessing legislative supremacy in the areas in which the Constitution grants it power.

The above rules of construction do not fetter Parliament's constitutionally bestowed legislative power.³² For example, in *Horta v. The Commonwealth*,³³ the plaintiff contended that Australia's treaty with Indonesia over the development of petroleum resources in the Timor Sea between East Timor and northern Australia conflicted with international law and so rendered the domestic enabling legislation void. The High Court unanimously rejected the contention and held that "Neither s.51(xxix) itself nor any other provisions of the Constitution confines the legislative power with respect to 'External affairs' to the enactment of laws which are consistent with . . . the requirements of international law."³⁴

The supremacy of Parliament means that international human rights norms remain vulnerable to conflicting domestic legislation. As a result the rights of minority groups such as Indigenous Australians are vulnerable to discriminatory legislation.

IV.

THE AUSTRALIAN CONSTITUTION AND INDIGENOUS AUSTRALIANS

The starting point for any consideration of Australia's treatment of its indigenous population is the Australian Constitution.³⁵ The Constitution gives the Federal Parliament power to legislate for Indigenous Australians pursuant to section 51(xxvi), or what is colloquially known as, "the race power." Under the

28. See *Chow Hung Ching v. The King* (1949) 77 C.L.R. 449, 477 (Austl.) (per Dixon, J.); *Nulyarimma v. Thompson* (1999) 165 A.L.R. 621, 651-53 (Austl. F.C.A.) (per Merkel, J.); Sir Anthony Mason, *International Law as a Source of Domestic Law in INTERNATIONAL LAW AND AUSTRALIAN FEDERALISM* 218 (Brian Opeskin ed., 1997). See also Rosalie Balkin, *International Law and Domestic Law in PUBLIC INTERNATIONAL LAW: AN AUSTRALIAN PERSPECTIVE* 121-27 (Sam Blay et al. eds., 1997).

29. (1992) 175 C.L.R. 1 (Austl.) [hereinafter *Mabo [No 2]*].

30. (1999) 165 A.L.R. 621 (Austl. F.C.A.).

31. See *Koowarta v. Bjelke-Petersen* (1982) 153 C.L.R. 168, 204 (Austl.); see also *Kartinyeri v. The Commonwealth* (1998) 195 C.L.R. 337, 384 (Austl.).

32. See *Polites v. The Commonwealth* (1945) 70 C.L.R. 60 (Austl.).

33. (1994) 181 C.L.R. 183 (Austl.).

34. *Id.* at 195.

35. For a detailed account of the drafting of section 51(xxvi), its amendment, and the High Court's approach to its interpretation, see John Williams & John Bradsen, *The Perils of Inclusion: The Constitution and The Race Power*, 19 ADEL. L. REV. 95 (1997). See also Robert Sadler, *The Federal Parliament's Power to Make Laws "With Respect to . . . The People of Any Race."*, 10(2) SYDNEY L. REV. 591 (1982).

race power, Parliament has power to make laws with respect to: "The people of any race, *other than the aboriginal race in any State*, for whom it is deemed necessary to make special laws."

In 1967, the Australian people passed a referendum³⁶ amending section 51(xxvi) by deleting the words in italics. Prior to the referendum, only the States could legislate regarding Indigenous Australians. The force of international opinion in helping to foster the amendment was clearly expressed by the "Vote Yes Campaign," which stated that, "Australians are held collectively responsible for the treatment and conditions of the Aboriginal people by world opinion."³⁷ The comments of the President of the Aborigines Advancement League that, "The image of Australia throughout the world is at stake. If it is not passed, Australia will be held up to ridicule,"³⁸ indicate that Indigenous Australians campaigning for the amendment recognized the force of international opinion.

On May 27, 1967, the Australian people as a nation, and in each of the six states, voted overwhelmingly to amend section 51(xxvi) and delete section 127 (which explicitly excluded Aborigines from the census).³⁹ It was, and still is, the referendum that attracted the most support from voters of all the referenda in the history of Australia.

Since the amendment of section 51(xxvi), the High Court has had to interpret whether the race power authorizes laws prohibiting racial discrimination, establishing native title legislation, and, most recently, the validity of the Hindmarsh Island Bridge Act 1997 ("Bridge Act"). In doing so, the Court considered but did not have to decide whether section 51(xxvi) could be used for adverse discriminatory laws against Aboriginal people or could only be used in a beneficial manner. The Judge's opinions were largely dicta up until considering the Bridge Act as they chiefly relied on the external affairs power.

In *Koowarta v. Bjelke-Petersen*,⁴⁰ the High Court rejected the Queensland Government's constitutional challenge to the enactment of Federal anti-racial discrimination legislation. Justice Wilson in dicta noted that:

The existence of racial barriers is repugnant to the ideals of any human society. In substance the preamble [of the International Convention on the Elimination of All Forms of Racial Discrimination] testifies to the view that it is essential to the peace and well-being of the international community that the laws of a community apply to all the members of that community regardless of race. In these days,

36. The process to amend the Australian Constitution is contained in section 128 and requires a referendum at which the amendment is passed by a national majority and a majority in four of the six states.

37. The National Directorate, Vote Yes Campaign, Referendum on Aborigines (Background Notes), (Mar. 31, 1967), in ATTWOOD & MARKUS, *supra* note 5, at 214.

38. *No Vote Fear On Rights Issue*, THE AGE, Apr. 11, 1967, in ATTWOOD & MARKUS, *supra* note 5, at 215.

39. Yes - 89.34% No - 9.08% Informal 1.58%. See TONY BLACKSHIELD & GEORGE WILLIAMS, AUSTRALIAN CONSTITUTIONAL LAW & THEORY 1183-88 (2d ed. 1998). Voting is compulsory in Australia, so the figures have a high correlation with actual public sentiment.

40. (1982) 153 C.L.R. 168 (Austl.).

one would not readily contemplate the use of the [race] power to the detriment of the people of a race.⁴¹

Of the other judges that considered the race power, Justice Stephen saw the power as allowing laws which could be either benevolent or repressive, but commented that there was a new global concern for human rights and the suppression of racial discrimination.⁴² Justice Murphy interpreted the word "for" in section 51(xxvi) as meaning "for the benefit of."⁴³ Chief Justice Gibbs felt that it would be a mistake to think that the race power could only be used for the protection of a particular race.⁴⁴

In *The Commonwealth v. Tasmania* (Tasmanian Dam case),⁴⁵ the Court considered the Federal Parliament's ability to enact legislation to prevent a World Heritage listed piece of wilderness being flooded by the State of Tasmania damming the Franklin River. Justice Murphy spoke strongly for the race power being interpreted on the basis that the 1967 amendment took place so that Parliament could legislate for the maintenance, protection and advancement of the Aboriginal people,⁴⁶ that is, for their benefit. Justice Brennan commented that the 1967 Referendum demonstrated "an affirmation of the will of the Australian people that the odious policies of oppression and neglect of Aboriginal citizens were to be at an end, and that the primary object of the power is beneficial."⁴⁷ The dicta from *Koowarta* and the Tasmanian Dam case thus formed the precedent for the crucial case of *Kartinyeri v. The Commonwealth* (Hindmarsh Island Bridge case),⁴⁸ where the race power was the central question.

In the Hindmarsh Island Bridge case, a group of the indigenous Ngarindjeri people sought to prevent the construction of the Hindmarsh Island Bridge by invoking the Aboriginal and Torres Strait Island Heritage Protection Act 1984 (Cth) (Heritage Protection Act) to protect a sacred site. The Heritage Protection Act gave the Minister power to make declarations that preserved significant Aboriginal areas and objects. The Bridge Act prevented the Minister from declaring the area associated with the Hindmarsh Island Bridge.

The question for the High court was whether the Bridge Act was invalid because it was not supported by the race power or any other head of power. In the Hindmarsh Island Bridge case, the High Court found that the passing of the Bridge Act, which amended the Heritage Protection Act, was a valid exercise of power.

Chief Justice Brennan and Justice McHugh held in a joint judgment that, because Parliament had the power to enact the Heritage Protection Act under section 51(xxvi) of the Constitution, it had power to amend or restrict the operation of that same Act. That, they held, was what the Bridge Act did. They rea-

41. *Id.* at 244.

42. *Id.* at 209, 220.

43. *Id.* at 242.

44. *Id.* at 186.

45. (1983) 158 C.L.R. 1 (Austl.).

46. *Id.* at 180-81.

47. *Id.* at 242.

48. (1998) 195 C.L.R. 337 (Austl.).

soned that "the power to make laws includes a power to unmake them,"⁴⁹ or repeal them.

Justice Gummow and Justice Hayne found that the enactment of the Bridge Act was a valid use of the race power. They found that the power could support laws that conferred both benefits and disadvantages. It was for Parliament to determine what measures were necessary for a particular race. The very nature of the power was discriminatory in that the requirements for special laws meant that a particular race would be subject to a law that had a differential operation on them as opposed to other races. Parliament's ability to make such a decision may be limited where the law is enacted in manifest abuse of the power or is in conflict with the rule of law.⁵⁰ Justice Gummow and Justice Hayne agreed with Chief Justice Brennan and Justice McHugh on the operation of the Bridge Act on the Heritage Protection Act.

Justice Gaudron decided the question on the same basis as Chief Justice Brennan and Justice McHugh. The judgment reviewed both the original constitutional conventions that produced the Constitution as well as the surrounding materials from the 1967 referendum. In conducting this review, Justice Gaudron pointed out that the original intent of the race power was to authorize Parliament to make laws that discriminated against people of colored and alien races.⁵¹ Justice Gaudron considered that the effect of the 1967 referendum, as a minimalist change, was only to place Aboriginal people in the same constitutional position as people of other races.⁵²

However, Justice Gaudron also observed that the words "for whom it is deemed necessary to make special laws" limits the scope of the race power. The race power is broad enough to authorize laws that operate either to the advantage or disadvantage of the people of a particular race. The test of constitutional validity is not whether it is a beneficial law, but rather whether the law in question is reasonably capable of being viewed as appropriate and adapted to a real and relevant difference, which the Parliament might reasonably judge to exist.⁵³ Whether a law would be necessary requires consideration of the current circumstances in which Aboriginal Australians find themselves. Justice Gaudron described these circumstances as being "circumstances of a serious disadvantage, which disadvantages include the material circumstances and the vulnerability of their culture."⁵⁴ As a result, only laws directed to remedy that disadvantage could reasonably be viewed as appropriate and adapted to the current circumstances of Aborigines.

Justice Kirby found that the law was outside of the race power because it was detrimental to, and adversely discriminatory against, people of the Aboriginal race of Australia by reference to their race. Justice Kirby conducted a simi-

49. *Id.* at 355.

50. *Id.* at 363.

51. *Id.* at 361.

52. *Id.* at 366.

53. *Id.* at 367.

54. *Id.* at 378, 381.

lar analysis to Justice Gaudron's by reviewing the historical enactment and amendment to the race power. Justice Kirby differed from Justice Gaudron in finding that the 1967 referendum required that the power only be used to benefit a particular race.⁵⁵ Justice Kirby further expressed his view that the manifest abuse test, which was the mechanism by which the court was to protect the people from racist laws, was unworkable. Justice Kirby viewed the manifest abuse test as inadequate to prevent the enactment of laws such as those in Germany during the Third Reich or in South Africa during Apartheid.⁵⁶

Justice Kirby went on to state that, where the Constitution is ambiguous, the Court should adopt a meaning that conforms to principles of universal and fundamental rights.⁵⁷ Justice Kirby pointed out that the international law of fundamental rights prohibits detrimental distinctions on the basis of race. The Constitution should not allow the enactment of laws that violate fundamental human rights and human dignity. Justice Kirby's approach to constitutional interpretation does not appear to have the support of any of the other members of the Court.

The Court's propensity to state fundamental values that oppose racism towards Aborigines, which was present in *Koowarta* and the Tasmanian Dam case, gave way in the Hindmarsh Island Bridge case to the simple repeal argument. In phrasing the question in terms of power rather than rights and by adopting a traditional interpretation of the relationship between constitutional heads of power and international law, the majority of the High Court avoided the explicit determination of rights. However, the Court's decision also proved immensely significant in the context of native title and its extinguishment by legislation, which is discussed below. The Australian Constitution's race power thus remains inherently discriminatory in nature and with the limits of allowable discrimination still to be determined.

V.

RACIAL DISCRIMINATION ACT

The enactment of the RDA was the first major federal initiative to address the discrimination experienced by Indigenous Australians. Whilst the RDA made all racial discrimination unlawful, the Attorney-General, Lionel Murphy, on introducing the original bill commented, "Perhaps the most blatant example of racial discrimination in Australia is that which affects Aborigines."⁵⁸ The RDA was the legislative response to the Executive's ratification of the International Convention on the Elimination of All Forms of Racial Discrimination.⁵⁹

55. *Id.* at 413.

56. *Id.* at 414-16.

57. *Id.* at 417-19. See also Amelia Simpson & George Williams, *International Law and Constitutional Interpretation*, 11 PUB. L. REV. 205 (2000).

58. JOHN CHESTERMAN & BRIAN GALLIGAN, *CITIZENS WITHOUT RIGHTS* 196 (1997).

59. International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, (entered into force Jan. 4, 1969).

Australia became a signatory to the convention in October 1966 and ratified it in September 1975.

The RDA's main operative provisions are sections 9 and 10, which are reproduced in appendix 1. Section 9 makes unlawful discrimination on the basis of race, color, descent or national or ethnic origin so as to nullify or impair the enjoyment of the rights set out in Article 5 of the Convention. Section 10 makes laws that limit individual rights on the basis of race, color, descent or national or ethnic origin, as compared to persons from outside the group, function so that all citizens enjoy equal rights.

The Queensland government attacked the RDA on constitutional grounds in *Koowarta*. In addition to its discussion of the race power, set out above, the High Court held the legislation valid by reference to the external affairs head of federal power, section 51(xxix). Justice Stephen cited a number of international law covenants, texts and cases to support his finding that human rights were a legitimate subject of international concern and that racial equality was one of the human rights most in need of protection. Consequently, racial discrimination was within Australia's external affairs and the Federal Parliament could legitimately legislate to prevent it.⁶⁰ Justice Murphy, who had introduced the legislation into parliament when he was the Attorney-General, noted the ambiguous attitude towards human rights in general: "[D]uring this century we have witnessed the greatest recognition of and also the greatest denial of human rights in all history." Justice Murphy highlighted the ambiguity with regard to Australia, which condemned racial discrimination, but was also subject to complaints for violating human rights due to "discrimination against Aborigines." Justice Murphy concluded that Australia had an international obligation and an expectation from the Australian people to use the external affairs power to enact the RDA.⁶¹

Section 8 of the RDA provides that the prohibition on racial discrimination does not apply to "special measures" as discussed in the Convention on the Elimination of All Forms of Racial Discrimination Article 1, paragraph 4.⁶² Special measures are means by which formal equality may be diminished or avoided to achieve effective and genuine equality. The Court considered the operation of special measures in *Gerhardy v. Brown*.⁶³ In *Gerhardy*, the Pitjantjatjara Land Rights Act 1981 (SA) granted a large tract of land in South

60. *Koowarta*, 153 C.L.R. at 219-20. See also *id.* at 234 (Mason, J.); *id.* at 240-42 (Murphy, J.); *id.* at 260-61 (Brennan, J.). *Koowarta* was later affirmed in the *Tasmanian Dam case*, *supra* note 24. See also Andrew Byrnes & Hilary Charlesworth, *Federalism and the International Legal Order: Recent Developments in Australia*, 79 AM. J. INT'L L. 622 (1985).

61. See *Koowarta*, 153 C.L.R. at 238-40.

62. International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 59, at art. 1, para. 4, provides:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

63. (1985) 159 C.L.R. 70 (Austl.).

Australia to its traditional indigenous owners, but also prohibited non-Pitjantjatjara persons from entering the land without permission from its owners. The Court held valid the right to exclusion as a special measure. Justice Mason reasoned that "indigenous peoples may require special protection as a group because their lack of education, customs, values and weaknesses, particularly if they are a minority, may lead to an inability to defend and promote their own interests in transactions with the members of the dominant society."⁶⁴ In addition, Justice Brennan reviewed decisions by the International Court of Justice, Supreme Court of India and the United States Supreme Court to demonstrate the acceptance of the need for special measures. The essence of all these decisions was that real equality sometimes required treating some people differently.⁶⁵ Justice Brennan concluded that, "Aborigines with traditional relationships with their country may reasonably be thought to need protection from an inundation of their culture and identity by those who embrace different values and who constitute a majority in Australian society."⁶⁶

The availability of the external affairs power to enact legislation to protect human rights meant that international law could be the basis for creating legislation to provide Australians with a pseudo-bill of rights, provided the legislation did not conflict with other aspects of the Australian Constitution. The main difference between legislation protecting rights and a bill of rights is that the latter is entrenched. The former can be altered or repealed through legislation by Parliament.

VI.

FURTHER PROTECTION OF HUMAN RIGHTS

In addition to the RDA and common law claims, Australia has instituted other procedures that provide avenues for seeking remedies for human rights contraventions. Two procedures are of particular note because they have been invoked in relation to alleged human rights abuses against Indigenous Australians.

A. *Human Rights and Equal Opportunity Commission Act*

Further protection of human rights in Australia was achieved through the enactment of the Human Rights and Equal Opportunity Commission Act 1986 (Cth) (HREOC Act), which established a Commission⁶⁷ with broad surveillance of, and report making functions on, compliance with the human rights standards articulated in the International Covenant on Civil and Political Rights (ICCPR)

64. *Id.* at 105.

65. *Id.* at 128-31 (Brennan, J.) (citing Advisory Opinion on Minority Sch. in Alb. [1935] Ser A/B No.64; S. W. Afr. Cases (Second Phase) [1966] I.C.J.R. at 305-06; Kerala v. Thomas [1976] 1 S.C.R. 906, 951 (Ind.); and Univ. of Cal. Regents v. Bakke 438 U.S. 265, 407 (1978)).

66. *Gerhardy*, 159 C.L.R. at 143.

67. For information on the Commission's functions and activities, see <http://www.hreoc.gov.au> (last visited Feb. 20, 2002).

and a number of United Nations declarations.⁶⁸ The Commission also has responsibility for inquiring into alleged infringements under the RDA, the Sex Discrimination Act 1984 (Cth), and the Disability Discrimination Act 1992 (Cth).

In 1993, Parliament amended the HREOC Act to provide for an Aboriginal and Torres Strait Islander Social Justice Commissioner who has specific functions under the HREOC Act and the Native Title Act 1993 (Cth). A primary function of the new Commissioner is to monitor enforcement of the rights of Indigenous Australians. The Commission has played a leading role in generating reports on Australia's treatment of Indigenous Australians to the Federal Parliament and the UN.⁶⁹ Under section 46C(3)(c) of the HREOC Act, the Commissioner is allowed to consult international organizations and agencies. Section 46C(4) of the HREOC Act requires that the Commissioner in performing his or her functions consider the Universal Declaration of Human Rights, the ICCPR, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Rights of the Child, as well as any other instruments relating to human rights that the Commissioner deems relevant.

B. Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR)

The Optional Protocol⁷⁰ gives individuals who claim to have suffered a human rights violation the opportunity to challenge their government's actions through a communication to the United Nation's Human Rights Committee (HRC). For the HRC to accept a communication for review, there must be an identified victim who claims the violation of a specific right under the ICCPR and the claimant must have exhausted available domestic remedies.⁷¹ The Op-

68. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976). See also Convention Concerning Discrimination in Respect of Employment and Occupation, 362 U.N.T.S. 31 (entered into force June 15, 1960); Convention on the Rights of the Child, G.A. Res. 44/25, Annex, U.N. GAOR, 44th Sess., Supp. No. 49, at 167, U.N. Doc. A/44/49 (1989) (entered into force Sept. 2 1990); Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), U.N. GAOR, 14th Sess., Supp. No. 16, at 19, U.N. Doc. A/4354 (1959); Declaration on the Rights of Disabled Persons, G.A. Res. 3447 (XXX), U.N. GAOR, 30th Sess., Supp. No. 34, at 88, U.N. Doc. A/10034 (1975); Declaration on the Rights of Mentally Retarded Persons, G.A. Res. 3447 (XXX), U.N. GAOR, 26th Sess., Supp. No. 34, at 88, U.N. Doc. A/8429 (1971); Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, at 171, U.N. Doc. A/36/684 (1981).

69. For information on the Aboriginal and Torres Strait Islander Social Justice Commissioner and various reports submitted, see http://www.hreoc.gov.au/social_justice/index.html (last visited Feb. 20, 2002).

70. Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302 (entered into force Mar. 23, 1976). See generally Elizabeth Evatt, *Reflecting on the role of international communications in implementing human rights*, 5 (2) AUSTR. J. HUM. RTS. 20 (1999).

71. ICCPR Optional Protocol Art. 1, 2. See also Jane Hearn, *Individual communications under international human rights treaties: an Australian Government perspective*, 5 (2) AUSTR. J. HUM. RTS. 44 (1999) (setting out the operation of the optional protocol's procedures in Australia);

tional Protocol also provides for the HRC to bring the complaint to the government's attention and require written explanations clarifying the matter and setting out whether any remedy has been provided by the government.⁷²

Australia ratified the ICCPR on August 13, 1980 and the First Optional Protocol on September 25, 1991.⁷³ Australia has also accepted the procedures for individual complaint under Article 22 of the Convention Against Torture⁷⁴ and under Article 14 of the Racial Discrimination Convention⁷⁵ by lodging declarations with the United Nations on January 28, 1993.

The creation of HREOC and the ratification of international instruments allowing individual complaint to the HRC and other UN committees provide an accountability mechanism for human rights. Although available to Indigenous Australians the effectiveness of the mechanisms are largely determined by the government's willingness to act upon complaints.

VII. NATIVE TITLE

Australia first recognized Indigenous Australians' claim to native title⁷⁶ in 1992, 204 years after white settlement of Australia, in *Mabo [No 2]*.⁷⁷ *Mabo [No 2]* dealt with Murray Island in the Torres Strait and whether Queensland's sovereignty over the island was subject to the Murray Islanders' claims to land rights.

Justice Brennan delivered the lead judgment, with Chief Justice Mason and Justice McHugh concurring, and considered whether principles of international law supporting the recognition of native title could be incorporated into Australia's

Wayne Morgan, *Passive/aggressive: the Australian Government's responses to Optional Protocol communications*, 5 (2) AUSTL. J. HUM. RTS. 55 (1999).

72. ICCPR Optional Protocol Art. 4. An example of Australia's response to a request for explanation is *Toonen v. Austl.*, Communication, No. 488/1992, CCPR/C/50/D, which involved a breach of ICCPR Art. 17 (right to privacy) where the Federal government used section 51(xxix) of the Constitution to enact legislation to override the offending Tasmanian legislation.

73. See Christopher Caleo, *Implications of Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights*, 4 PUB. L. REV. 175 (1993); see also Hilary Charlesworth, *Australia's Accession to the First Optional Protocol to the International Covenant on Civil and Political Rights*, 18 (2) MELB. U. L. REV. 428 (1991).

74. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment G.A. Res. 39/46, Annex, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) (entered into force June 26, 1987).

75. International Convention on the Elimination of All Forms of Racial Discrimination 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

76. Native title means the rights and interests of Aboriginal and Torres Strait Islander people in land and waters according to their traditional laws and customs, that are recognized under Australian law. The native title of a particular group will depend on the traditional laws and customs of those people. Native title may also change over time. See the National Native Title Tribunal website, at http://www.nntt.gov.au/ntf_html/ntf_1a.html (last visited Mar. 15, 2002).

77. Comments on the case can be found in *ESSAYS ON THE MABO DECISION* (1993); Gerry Simpson, *Mabo, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence*, 19 MELB. U. L. REV. 195 (1993); Julie Cassidy, *Observations on Mabo v Queensland*, 1 (1) DEAKIN L. REV. 37 (1994). See also PETER BUTT & ROBERT EAGLESON, *MABO, WIK & NATIVE TITLE* (3d ed. 1998) (providing a plain English explanation of the Court's reasoning).

lian law. Justice Brennan's discussion of international laws' influence on Australian common law proceeded as follows:⁷⁸

In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. Australian law is not only the historical successor of, but is an organic development from, the law of England. Although our law is the prisoner of its history, it is not now bound by decisions of courts in the hierarchy of an Empire then concerned with the development of its colonies.⁷⁹

The peace and order of Australian society is built on the legal system. It can be modified to bring it into conformity with contemporary notions of justice and human rights, but it cannot be destroyed. It is not possible, a priori, to distinguish between cases that express a skeletal principle and those which do not, but no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system. If a postulated rule of the common law expressed in earlier cases seriously offends those contemporary values, the question arises whether the rule should be maintained and applied. Whenever such a question arises, it is necessary to assess whether the particular rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning.⁸⁰

The non-recognition of native title in Australia originated in the international law that existed at 1788 and recognized three effective ways of acquiring sovereignty over territory: (1) conquest, (2) cession, and (3) occupation of territory that was *terra nullius* (belonging to no one). Under the international law of the time the colonization of Australia was considered an occupation of uninhabited territory or *terra nullius* on the basis that:

English settlers brought with them the law of England and that, as the indigenous inhabitants were regarded as barbarous or unsettled and without a settled law, the law of England including the common law became the law of the Colony (so far as it was locally applicable) as though New South Wales were "an uninhabited country . . . discovered and planted by English subjects."⁸¹

If the first or second methods of acquisition were used then the territory's laws remained in force until changed by the new sovereign.

Justice Brennan then explained that the theory of *terra nullius* had more recently been discredited within international law. The International Court of Justice in its *Advisory Opinion on Western Sahara*⁸² was of the opinion that as indigenous peoples populated the Western Sahara at the time of colonization by

78. The actual text of Justice Brennan's reasoning is quoted verbatim as it was central to the overturning of 200 years of precedent.

79. *Mabo [No 2]*, *supra* note 29, at 29.

80. *Id.* at 30.

81. *Mabo [No 2]*, 175 C.L.R. at 37-38 (referring to Lord Watson in *Cooper v. Stuart* [1889] 14 App. Cas. at 291 (Eng.)); *id.* at 39 (Brennan, J.) (referring to *In re S. Rhodesia* [1919] A.C. at 233-34 (Eng.), where the English Court of Appeals applied *terra nullius* to lands inhabited by indigenous peoples on the basis that: Some native peoples may be "so low in the scale of social organization" that it is "idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.").

82. *Advisory Opinion on W. Sahara* [1975] I.C.J. 12, 39 (Oct. 16).

Spain in 1884 it was not a territory belonging to no one (*terra nullius*). Justice Brennan reasoned that the Court should discard the doctrines of the common law, which depended on the notion of *terra nullius*, and added:

If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination. . . . Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people.⁸³

Justice Brennan went on to explain that "The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights."⁸⁴ Justice Brennan supported his view of legitimate influence by specifically referring to Australia's accession to the Optional Protocol to the ICCPR, which gave individuals access to international remedies and therefore brought to bear on the common law the Covenant and the international standards it imports.

To arrive at the conclusion that Australian law could and should recognize native title, Justice Brennan also conducted a detailed analysis of Crown sovereignty and ownership of land, which will not be discussed here.

Justices Deane, Gaudron, and Toohey pointed out that whilst native title was not an entrenched right, extinguishment would be subject to the Constitution section 51(xxxi), which allowed acquisitions of property to occur only on just terms, and to the RDA.⁸⁵ Regarding the RDA, their Honors referred to *Mabo v. Queensland [No 1]*,⁸⁶ where the Queensland Government passed legislation to extinguish the native title the subject of *Mabo [No 2]*, but the legislation was inconsistent with section 10(1) of the RDA, and therefore ineffective under the Constitution, section 109 (equivalent to U.S. Constitution's supremacy clause).⁸⁷

The High Court in a 6-1 majority held that native title could exist but that the sovereign, subject to the Constitution and other valid laws, may extinguish native title. The land on the Murray Island under consideration in *Mabo [No 2]* had not had the plaintiffs' native title extinguished. However, the *Mabo [No 2]* decision left undecided exactly when native title was extinguished pre-*Mabo*, where it may continue to exist within Australia, and how existing native title could be claimed or extinguished. This dilemma called for a legislative response.

83. *Mabo [No 2]*, 175 C.L.R. at 41-42.

84. *Id.* at 42.

85. *Id.* at 111-12 (per Deane and Gaudron, JJ.); *id.* at 214-16 (per Toohey, J.).

86. *Mabo v. Queensl. [No 1]*, (1998) 166 C.L.R. 186 (Austl.) [hereinafter *Mabo [No 1]*].

87. *Id.* at 219 (per Brennan, Toohey, and Gaudron, JJ.); *id.* at 231 (per Deane, J.).

A. *Native Title Act 1993 (Cth)*

As a result of this perceived uncertainty, the Federal Government passed the Native Title Act 1993 (Cth), pursuant to the race power. The enactment of Federal legislation meant that the States were unable to pass inconsistent legislation without it being struck down by the courts on Constitutional grounds, under section 109.

The Native Title Act defined native title, and set out a procedure for claiming native title and determining its existence (including the creation of the National Native Title Tribunal whose decisions are appealable to the Federal court). It validated Commonwealth issued-titles occurring prior to January 1, 1994 (called past acts) that may have been invalidated by the RDA, and provided a mechanism for State and Territory titles from the same period to be validated. The Act also defined past acts that extinguish or do not extinguish native title, set out permissible future acts, provided native title holders and claimants with a right to negotiate before future acts are taken, and specified when compensation was payable for past and future acts that extinguished native title.⁸⁸

The aspect of the Native Title Act that is of greatest concern from an international law perspective is its relationship to the RDA. The Federal Government chose to validate all acts between the enactment of the RDA in 1975 and the Native Title Act by suspending the operation of the RDA for that period, and affording the protection of the RDA to native title holders prospectively.⁸⁹ In addition, effective validation also required just terms for any acquisitions within section 51(xxxi) of the Constitution. The Native Title Act effectively increased the time period in which native title could be extinguished from 1975 to January 1, 1994. The government's explanation was that this formed part of a larger framework for securing the position of native title holders.

The Native Title Act was subject to constitutional challenge in *State of Western Australia v. Commonwealth*.⁹⁰ The Court held that the Act was a valid use of the race power.⁹¹ The majority, in considering the interaction between the Native Title Act and the RDA, commented:

[I]t is not easy to detect any inconsistency between the Native Title Act and the Racial Discrimination Act. . . . But if there were any discrepancy in the operation of the two Acts, the Native Title Act can be regarded either as a special measure under s.8 of the Racial Discrimination Act or as a law which, though it makes racial distinctions, is not racially discriminatory so as to offend the Racial Discrimination Act or the International Convention on the Elimination of All Forms of Discrimination. . . . The general provisions of the Racial Discrimination Act

88. For a more detailed explanation of the legislation, see PETER BUTT, *LAND LAW* 892-911 (3d ed. 1996), and see Justice R.S. French, *A Hitchhiker's Guide to the Native Title Act* 25 (2) *MONASH U. L. REV.* 375, 378-86 (1999).

89. *State of W. Austl. v. The Commonwealth* (1995) 183 C.L.R. 373, 462 (Austl.).

90. *Id.* at 420-21; see also Samantha Hepburn, *Native Title Legislation under attack: The West Australian Challenge*, 1 (1) *NEWCASTLE L. REV.* 39 (1995).

91. *State of W. Austl.*, 183 C.L.R. at 462.

must yield to the specific provisions of the Native Title Act in order to allow those provisions a scope for operation.⁹²

The High Court's 265 page decision in *Wik Peoples v. Queensland*⁹³ undermined the Native Title Act's attempt at certainty. Two groups of native title claimants, the Wik and Thayorre Peoples, claimed that pastoral leases had not extinguished their native title. By a majority of four votes to three, the High Court agreed. The majority found that pastoral leases did not give the lessee a right of exclusive possession; rather, the rights and obligations of the pastoralist depend on the terms of the lease and the law under which it was granted. The pastoral lease was not a "lease" in the usual sense understood by property lawyers but a statutory invention for unique Australian circumstances.⁹⁴ Justice Toohey's conclusions reveal the Court's reasoning that, "There is nothing in the statute which authorized the lease, or in the lease itself, which conferred on the grantee rights to exclusive possession, in particular possession exclusive of all rights and interests of the indigenous inhabitants whose occupation derived from their traditional title."⁹⁵ In contrast, the minority decision by Chief Justice Brennan effectively held that the legislation creating pastoral leases created a legal interest in land, which is in substance the same as a common law lease that gives the lessee a right of exclusive possession, which is inconsistent with, and therefore extinguishes, native title.⁹⁶

The majority further held that if there is any inconsistency between the rights of the native title holders and the rights of the pastoralist, the rights of the native title holders must yield. If there is no conflict, the rights of each co-exist. Justice Toohey explained the finding as follows:

Inconsistency can only be determined, in the present context, by identifying what native title rights in the system of rights and interests upon which the appellants rely are asserted in relation to the land contained in the pastoral leases. This cannot be done by some general statement; it must "focus specifically on the traditions, customs and practices of the particular aboriginal group claiming the right." Those rights are then measured against the rights conferred on the grantees of the pastoral leases; to the extent of any inconsistency the latter prevail. It is apparent that at one end of the spectrum native title rights may "approach the rights flowing from full ownership at common law." On the other hand they may be an entitlement "to come on to land for ceremonial purposes, all other rights in the land belonging to another group."⁹⁷

The *Wik* decision created uncertainty as to what could be done on pastoral leases without impinging on native title rights. Some States had granted interests, including mining tenements, over former pastoral leases that were also sub-

92. *Id.* at 483-84.

93. (1996) 187 C.L.R. 1 (Austl.).

94. Henry Reynolds & Jamie Dalziel, *Aborigines and Pastoral Leases – Imperial and Colonial Policy, 1826 – 1855* (1996) 19 U. N.S.W. L.J. 315 (reproducing the expert evidence provided to the High Court); see also Jonathan Fulcher, *The Wik Judgment, Pastoral Leases and Colonial Office Policy and Intention in NSW in the 1840s*, 4 (1) AUSTRALIAN J. LEGAL HIST. 33 (1998) (assessing the historical evidence before the High Court in *Wik*).

95. *Wik*, 187 C.L.R. at 122.

96. *Id.* at 70-88.

97. *Id.* at 126-27.

ject to uncertainty. This uncertainty then led to another round of calls for government action—some rational and some misinformed.

B. *The Ten Point Plan*

The government responded to *Wik* with the “Ten Point Plan.” The Ten Point Plan reconsidered how to balance the competing interests of Indigenous Australians on one side, with pastoralists and miners on the other side. The Federal Parliament enacted the Plan as the Native Title Amendment Act 1998 (Cth) and its main effects were:

- Validation of acts/grants between the passage of the Native Title Act, January 1, 1994 and the *Wik* decision, December 23, 1996 (referred to as intermediate period acts) so that native title would be extinguished for this further period.⁹⁸
- Permission for States and Territories to confirm that exclusive tenures, such as freehold, residential, commercial and public works in existence on or before January 1, 1994 extinguished native title.
- Increase in pastoralists’ rights to conduct various activities (such as tourism) under their leases. Native title rights over current or former pastoral leases were permanently extinguished to the extent that those rights were inconsistent with those of the pastoralists.
- Reduction of native title claimants’ ability to negotiate in relation to mining activity and compulsory acquisition of native title rights.
- Increase in the difficulty of registration of native title claims, which, in turn, makes access to the right of negotiation more difficult.⁹⁹

Although the above amendments significantly reduced the rights of Indigenous Australians, the legal relationship between the Native Title Act and RDA remained the same as explained in *State of Western Australia*, the RDA must yield to the specific provisions of the Native Title Act. In addition, any constitutional challenge on the basis that the Native Title Act had ceased to be beneficial and was now adversely discriminatory would probably fail on the reasoning set forth in the *Hindmarsh Island Bridge* case.

98. After the amendments, the Native Title Act section 7 provided:

(1) This Act is intended to be read and construed subject to the provisions of the Racial Discrimination Act 1975.

(2) Subsection (1) means only that:

(a) the provisions of the Racial Discrimination Act 1975 apply to the performance of functions and the exercise of powers conferred by or authorised by this Act; and

(b) to construe this Act, and thereby to determine its operation, ambiguous terms should be construed consistently with the Racial Discrimination Act 1975 if that construction would remove the ambiguity.

(3) Subsections (1) and (2) do not affect the validation of past acts or intermediate period acts in accordance with this Act.” Native Title Act, 1993, § 7.

99. Justice R.S. French, *A Hitchhiker’s Guide to the Native Title Act*, 25 (2) *MONASH U. L. REV.* 375, 387-420 (1999) (providing detailed analysis of the Ten Point Plan and enabling legislation); see also Richard Bartlett, *A Return to Dispossession and Discrimination: The Ten Point Plan*, 27 (1) *U. W. AUSTRAL. L. REV.* 44 (1997); see also Garth Nettheim, *The Search for Certainty and the Native Title Amendment Act 1998 (Cth)*, 22 (2) *U. N.S.W. L.J.* 564 (1999).

C. An International Law Solution Through the Prohibition of Genocide?

The low likelihood of success of a constitutional challenge prompted challenges based on international law. In *Nulyarimma*, the appellants sought the issue of arrest warrants against four Commonwealth parliamentarians, including the Prime Minister, for their role in formulating the Ten Point Plan and its subsequent enactment as the Native Title Amendment Act 1998 (Cth) on the basis that their involvement amounted to the crime of genocide.¹⁰⁰

Before a Federal Court of Appeals, the appellants contended that: first, the international crime of genocide's status as *jus cogens* or a peremptory norm gave States universal jurisdiction; and second, the obligation imposed by customary law on each nation State is to extradite or prosecute any person, found within its territory, who appears to have committed any of the acts cited in the definition of genocide. The appellants then relied on Lord Millet's approach in *R v. Bow Street Magistrate, Ex parte Pinochet (No. 3)*,¹⁰¹ and *Attorney-General of Israel v. Eichmann*,¹⁰² to contend that, third, universal jurisdiction was an independent source of jurisdiction for an Australian court to try the crime of genocide.

Justices Wilcox and Whitlam accepted the first and second contentions but rejected the third, which was essential for the crime of genocide to exist under Australian domestic law without specific legislation. Justice Merkel dissented on the third contention. In considering the third issue, the Federal Court of Appeal had to determine if Australian domestic law recognized an offence of genocide. As no legislation creating such an offence had been passed, the Court had to determine the relationship between customary international law and Australian common law.

Despite the *jus cogens* nature of genocide, Justice Wilcox and Justice Whitlam both held that the crime could not be prosecuted domestically unless Parliament enacted legislation.¹⁰³ Both relied on Justice Brennan's judgment in *Polyukhovitch v. the Commonwealth*¹⁰⁴ that a municipal law may provide for the exercise of a universal jurisdiction recognized by international law, but that "a statutory vesting of the jurisdiction would be essential to its exercise by an Australian court."¹⁰⁵ Their Honors distinguished Lord Millet's approach in *Pinochet* and his interpretation of *Eichmann* that customary international law was part of the common law, by finding that both Pinochet and Eichmann engaged in

100. See Andrew Mitchell, *Genocide, Human Rights Implementation and the Relationship between International and Domestic Law: Nulyarimma v. Thompson*, (2000) 24 MELB. U. L. REV. 15 (2000).

101. (1999) 2 W.L.R. 827 (Eng. H.L.).

102. (1962) 36 I.L.R. 277 (Isr.).

103. *Kruger v. The Commonwealth* (1997) 190 C.L.R. 1, 70-71, 87 (Austl.) (restating the need for legislation to validly incorporate a treaty into municipal law in relation to the Genocide Convention). The Court did not directly decide that issue, but instead limited its holding to whether to imply a right to be free from genocide into the Australian Constitution, which is discussed below.

104. (1991) 172 C.L.R. 501 (Austl.).

105. *Id.* at 576 (holding that legislation providing for the trial in Australia of persons alleged to have committed war crimes outside Australia during the Second World War was a valid exercise of the Commonwealth Parliament's power to make laws with respect to external affairs).

conduct that was a criminal offence under domestic statutes rather than pursuant to customary international law.¹⁰⁶

Justice Merkel, in dissent, found that in Australia the Court's could determine that the common law could adopt international law that amounts to *ius cogens* as part of domestic law without the need for legislation, provided such adoption is not inconsistent with legislation or overarching common law principles or policies.¹⁰⁷ His Honor further observed that, "The significance of *Eichmann* . . . [is] that under customary international law jurisdiction vested in Israel as a common law state directly or by municipal statute. Lord Millett arrived at the same conclusion in *Pinochet*."¹⁰⁸

Justice Merkel went on to find that a decision to incorporate crimes against humanity, including genocide, as part of Australia's municipal law at the end of the 20th century satisfies the criteria of experience, common sense, legal principle and public policy. However, Justice Merkel denied appellants relief on the basis that formulation of legislative policy was protected from criminal prosecution and the necessary intent (discussed further below) needed to prove genocide had not been shown.

In *Nulyarimma*, the Federal Court determined that genocide was not a crime within Australia. This would appear to place Australia in breach of the Genocide Convention which at Article V requires the enactment of legislation to give effect to the provisions of the Convention.¹⁰⁹ As a result, a person found in Australia who was accused of committing genocide would have to be extradited for trial as the offence does not exist under domestic law. It also highlighted the difficulty with determining when customary international law becomes part of the common law. As a result of the majority's interpretation, the chief means for bringing international standards to bear on domestic conduct is through the Parliament enacting legislation. The willingness of the Government of the day to protect human rights thus becomes a central factor in whether human rights are afforded protection or not.

D. An International Law Solution Through the Prohibition of Racial Discrimination?

The other challenge to the Ten Point Plan was through the UN Committee on the Elimination of Racial Discrimination's (CERD) early warning procedures. Pursuant to these procedures, the Committee adopted Decision 1(53) on Australia on August 11, 1998 (A/53/18, paragraph 22), and requested information on the proposed changes of policy as to Aboriginal land rights, and in particular the amendments to the Native Title Act.

106. *Nulyarimma*, 165 A.L.R. at 630-31, 635-36. Pinochet was to be extradited pursuant to the Extradition Act 1989 (UK) which required the conduct to be criminal under UK law at the date of commission. Torture became a crime in the UK pursuant to the Criminal Justice Act 1988 (UK). Eichmann was prosecuted pursuant to the Nazi and Nazi Collaborators (Punishment) Law 1950.

107. *Id.* at 653-55.

108. *Id.* at 661.

109. Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

Australia responded with a detailed written reply and delegation to the Committee's 1323rd and 1324th meetings. In addition, the Acting Aboriginal and Torres and Strait Islander Social Justice Commissioner from HREOC and the Aboriginal and Torres Strait Islander Commission provided information on the effects that they perceived the Ten Point Plan would have on Indigenous Australian's ability to make native title claims.

The Committee made the following observations:

6. The Committee, having considered a series of new amendments to the Native Title Act, as adopted in 1998, expresses concern over the compatibility of the Native Title Act, as currently amended, with the State Party's international obligations under the Convention. While the original Native Title Act recognizes and seeks to protect indigenous title, provisions that extinguish or impair the exercise of indigenous title rights and interests pervade the amended Act. While the original 1993 Native Title Act was delicately balanced between the rights of indigenous and non-indigenous title-holders, the amended Act appears to create legal certainty for governments and third parties at the expense of indigenous title.
7. The Committee notes, in particular, four specific provisions that discriminate against indigenous title-holders under the newly amended Act. These include: the Act's "validation" provisions; the "confirmation of extinguishment" provisions; the primary production upgrade provisions; and restrictions concerning the right of indigenous title-holders to negotiate non-indigenous land uses.
8. These provisions raise concerns that the amended Act appears to wind back the protections of indigenous title offered in the *Mabo [No 2]* decision of the High Court of Australia and the 1993 Native Title Act. As such, the amended Act cannot be considered to be a special measure within the meaning of Articles 1(4) and 2(2) of the Convention and raises concerns about the State Party's compliance with Articles 2 and 5 of the Convention.
9. The lack of effective participation by indigenous communities in the formulation of the amendments also raises concerns with respect to the State Party's compliance with its obligations under Article 5(c) of the Convention. . . .¹¹⁰

In short, the report found Australia in breach of Articles 2 and 5 of the Racial Discrimination Convention.¹¹¹ The Committee further called on Australia to suspend the implementation of the Ten Point Plan and re-open discussions with Indigenous Australians. No such suspension or discussions took place. The HRC's review in July 2000 of Australia's compliance with the ICCPR again raised the issue of native title. The HRC expressed concern over the 1998 amendments to the Native Title Act and recommended that Australia "take further steps . . . to secure the rights of its indigenous population under article 27 of the Covenant."¹¹²

110. Committee on the Elimination of Racial Discrimination, *Decision (2)54 on Australia*, (54th Session), Mar. 18, 1999, U.N. Doc. CERD/C/54/Misc.40/Rev.2 (unedited version). The decision is included in Appendix 2 of ABORIGINAL AND TORRES STRAIT ISLANDER SOCIAL JUSTICE COMMISSIONER, NATIVE TITLE REPORT 1999, (1999) HREOC, http://www.hreoc.gov.au/pdf/social_justice/native_title_report_99.pdf [hereinafter NATIVE TITLE REPORT] (last visited Feb. 20, 2002).

111. Gillian Triggs, *Australia's Indigenous Peoples and International Law: Validity of the Native Title Amendment Act 1998 (Cth)*, 23 MELB. U. L. REV. 372 (1999).

112. Human Rights Committee, *Consideration of Reports Submitted under Article 40 - Concluding Observations of the Human Rights Committee: Australia*, (69th session), July 28, 2000, U.N. Doc. CCPR/CO/69/AUS.

The HRC and CERD reported that, under the Ten Point Plan, the amendments disproportionately disadvantaged Indigenous Australians. The CERD Committee's finding that the amended Native Title Act discriminates and can no longer be characterized as a special measure under the Racial Discrimination Convention led HREOC to conclude that the amended legislation may not fall within the scope of the external affairs power as it was not implementing the Convention.¹¹³ Even if HREOC's view is correct, the Native Title Act would survive constitutional challenge on the basis of the race power and the reasoning in the Hindmarsh Island Bridge case discussed above.

The Australian government did not follow the UN's reports and recommendations, and even called for an overhaul of the UN committee system and conditioned further cooperation with the committees on such an overhaul.¹¹⁴ Australia has also stated that it will not sign or ratify the new Optional Protocol to the Convention of the Elimination of All Forms of Discrimination Against Women which entered into force on December 22, 2000.¹¹⁵ The UN's focus on the sensitive issue of native title in Australia that provoked a negative reaction from the government highlights the extent to which the effectiveness of international bodies are subject to the whims of a country's preparedness to comply.¹¹⁶ This is particularly so when the alleged breaches are not of the type that attracts economic sanctions or military intervention.

E. Native Title Disputes Continue

Although the current Australian government has not acted on the UN's reports on native title, the Courts have continued to adjudicate native title disputes. In *Commonwealth v. Yarmirr*,¹¹⁷ the High Court considered the application of native title to seas, sea-bed and sub-soil. The majority held that native title that conferred exclusive possession, occupation, use and enjoyment of the relevant area of sea conflicted with common law public rights to navigate and to fish and the international right of innocent passage. As a result, the Indigenous groups were limited to the lower court's original finding of native title rights encompassing the right to fish, hunt and gather for the purpose of their communal needs and to be able to access the relevant areas for cultural and spiritual purposes.¹¹⁸

113. See NATIVE TITLE REPORT, *supra* note 110.

114. Commonwealth Minister for Foreign Affairs, The Hon. Alexander Downer MP, Attorney-General, The Hon. Daryl Williams AM QC MP, Minister for Immigration and Multicultural Affairs, The Hon. Philip Ruddock MP, *Improving the Effectiveness of UN Committees*, Press Release No. FA 97, Aug. 29, 2000.

115. Optional Protocol to the Convention on the Elimination of Discrimination against Women, G.A. Res. 54/4, Annex, U.N. GAOR, 54th Sess., Supp. No. 49, at 5, U.N. Doc. A/54/49 (Vol. I) (2000) (entered into force Dec. 22, 2000).

116. See Elizabeth Evatt, *How Australia "Supports" the United Nations Human Rights Treaty System*, 12 PUB. L. REV. 3, 7-8 (2001). See also Rochelle Haller, *UN Reports: Australia's Cold-Shoulder: Setting a Dangerous Precedent for Human Rights Violators*, 17 N.Y.L. SCH. J. HUM. RTS. 937 (2001).

117. (2001) 184 A.L.R. 113 (Austl.).

118. *Id.* at [94] (Gleeson, CJ.; Gaudron, Gummow, and Hayne, JJ.).

Justice Kirby took a different approach in his dissenting judgment. His Honor relied on international law making discrimination impermissible and Australia's adoption of that norm through the RDA and *Mabo [No 2]* to inform how the common law should define the content of native title.¹¹⁹ As a result, although the Indigenous group must demonstrate a continuing connection with the area claimed, the nature of that connection pre-settlement does not confine how they may use the area in the present day.¹²⁰ Instead, they should receive qualified exclusive possession, which yields to the international right of innocent passage, common law rights to navigate and statutorily licensed fishing, but otherwise is theirs to do with as they please. Any other outcome would be discriminatory because Indigenous Australians' property rights are frozen in time whilst other Australians' property rights are not. This means that although the Indigenous group may only have used the area for fishing and spiritual purposes pre-settlement that is not how the area must be used today. Instead native title affords them the entitlement to allow or withhold the use of the area for tourism, resource exploration and the like.¹²¹ Thus, international law continues to be a source of guidance in the development of native title jurisprudence even if it is not adopted by a majority of the High Court.

VIII.

THE STOLEN GENERATION

The Stolen Generation refers to Indigenous Australians whom Australian governments removed from their parents and extended family as part of a social-Darwinian policy that grew out of the belief that Indigenous Australians were a dying race and that those of mixed descent should be assimilated into the white population.¹²²

Each colony, or each State, after 1901, created 'protective' legislation that allowed government officials to remove an Indigenous child without having to establish to a court's satisfaction that the child was neglected. Consequently, there was no judicial oversight of the executive's actions. Despite this mechanism, the government officials did not achieve the objective of assimilation to the degree planned and Indigenous Australians did not die out as expected.

On May 11, 1995, the Federal Attorney-General referred the issue of past and present practices of separation of Indigenous children from their families to HREOC and an Inquiry chaired by retired High Court judge, Sir Ronald Wilson. The Inquiry had four main objectives:

1. to examine the past and continuing effects of separation of individuals, families and communities.

119. *Id.* at [294]-[96], [318]-[20].

120. *Id.* at [307], [309].

121. *Id.* at [294]-[296], [320].

122. PETER READ, *THE STOLEN GENERATIONS: THE REMOVAL OF ABORIGINAL CHILDREN IN NSW 1883 TO 1969* (photo reprint 1998) (1981). See also Malcolm Fraser, *The Past We Need to Understand*, 11 *PUB. L. REV.* 265, 268 (2000).

2. to re-unite families and otherwise deal with losses caused by separation, by recommending changes in laws, policies and practices.
3. to find justification for, and the nature of, any compensation that should be made to those affected by separation.
4. to look at current laws, policies and practices affecting the placement and care of Indigenous children. This included looking into the welfare and juvenile justice systems, and advising on any changes in the light of the principles of self-determination.

The Inquiry's findings are contained in the Bringing them Home Report.¹²³ The Bringing them Home Report contains extensive testimony from Indigenous Australians who were subject to the separation regimes, and recommendations to deal with the past practices and to prevent a re-occurrence of those practices. The main findings of the report were that:

- Nationally, government officials forcibly removed between one in three and one in ten Indigenous children from their families and communities between 1910 and 1970.¹²⁴
- Indigenous children were placed in institutions or church missions, were adopted or fostered, and were at risk of physical and sexual abuse. Many never received wages for their labor.
- Welfare officials failed in their duty to protect Indigenous wards from abuse.
- Under international law, from approximately 1946 the policies of forcible removal amount to genocide; and from 1950 the continuation of distinct laws for Indigenous children was racially discriminatory. Further, that the Commonwealth should legislate to implement the Genocide Convention with full domestic effect.
- The removal of Indigenous children continues today. Indigenous children are six times more likely to be removed for child welfare reasons and 21 more times likely for juvenile detention reasons than non-Indigenous children.
- For the purposes of responding to the effects of forcible removals, 'compensation' be broadly defined to mean 'reparation'; that the government should make reparation in recognition of the history of gross

123. BRINGING THEM HOME REPORT, *supra* note 6, <http://www.austlii.edu.au/au/special/rsj-project/rsjlibrary/hreoc/stolen/> (last visited Feb. 20, 2002).

124. This finding and the label 'stolen generation' have been subject to criticism on the basis that the evidence presented to the Inquiry was not rigorously tested and therefore overstates the number of Indigenous children removed. *See, e.g.,* SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE, HEALING: A LEGACY OF GENERATIONS: THE REPORT OF THE INQUIRY INTO THE FEDERAL GOVERNMENT'S IMPLEMENTATION OF THE RECOMMENDATIONS MADE BY THE HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION IN *Bringing Them Home* [hereinafter HEALING REPORT], Submission No. 36 (Mar. 2000) (federal government submission by Senator John Herron, Minister for Aboriginal and Torres Strait Islander Affairs), at 2, http://www.apf.gov.au/senate/committee/submissions/lc_stolen.htm (last visited Mar. 22, 2002); *see also* John Herron, *A generation was not stolen*, SYDNEY MORNING HERALD Apr. 4, 2000, <http://www.smh.com.au/news/0004/04/pageone/pageone09.html> (last visited Feb. 20, 2002).

violations of human rights; and that the van Boven principles (reproduced in appendix 2) should guide the reparation measures.

- State and Territory Governments should ensure that primary and secondary school curricula include substantial compulsory modules on the history and continuing effects of forcible removal.
- No records relating to Indigenous individuals, families or communities or to any children, Indigenous or otherwise, removed from their families for any reason, whether held by government or non-government agencies, should be destroyed. Additionally, the relevant governments should fund all government record agencies as a matter of urgency to preserve and index records relating to Indigenous individuals, families and/or communities and records relating to all children, Indigenous or otherwise, removed from their families for any reason.

The Inquiry implicated three main areas of international law: genocide, racial discrimination and the use of United Nations' recommendations on reparations for human rights abuse victims. This article sets out the Inquiry's findings on each of these issues and the Australian government's response.

A. *Genocide*

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide¹²⁵ (reproduced in part in appendix 3) was the first international document to define "genocide" in detail. Australia ratified the Convention in 1949 and it came into force in 1951. The Inquiry used the Convention as its starting point for evaluating the legal ramifications of removing Indigenous children from their families.

The Inquiry pointed out that genocide can be committed by means other than actual physical extermination. According to the Inquiry, the forcible transfer of children can be considered genocide, pursuant to Article 2(e) of the Convention, provided the other elements of the crime are established. The Inquiry adopted the United Nations Secretary-General's explanation that "the separation of children from their parents results in forcing upon the former at an impressionable and receptive age a culture and mentality different from their parents. This process tends to bring about the disappearance of the group as a cultural unit in a relatively short time."¹²⁶

The Inquiry found that the predominant aim of the forcible removal of Indigenous babies and children was to absorb or assimilate the children into the wider, non-Indigenous community so that their unique cultural values and identities would disappear.¹²⁷ For instance, Dr. Cecil Cook, Northern Territory

125. Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

126. UN Secretary-General, *Draft Convention on the Crime of Genocide: Commentary*, U.N. Doc. E/447, art. I(II)(3)(a), 2 (1947).

127. The Inquiry focused on the policies put forward by the government officials administering the 'protective' legislation, the Chief Protectors of Aborigines, who actively promoted a goal of assimilation. See BRINGING THEM HOME REPORT, *supra* note 6, at ch. 2, <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/stolen08.html#Heading23> (last visited Feb. 20, 2002).

Chief Protector of Aborigines from 1927 to 1939, said, "The problem of our half-castes will quickly be eliminated by the complete disappearance of the black race, and the swift submergence of their progeny in the white."¹²⁸

This finding about the government's intent in enacting the removal policy has been criticized on the basis that the actual policy behind removal was governmental concern for the welfare of the half-caste children. Those who take this view argue that Aboriginal communities rejected half-caste children and thus the children had to be taken into government care. They also argue that the removal was not forced, but instead parents willingly gave their children up as they lacked the resources to care for them.¹²⁹

In this context, the use of the term genocide is controversial as it connotes the planned destruction of the physical existence of a group. More precisely, under Article 2 of the Convention, it required "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group." The Inquiry considered the issue of mixed motives, that is, children who were removed so as to provide them with education, training, protection from malnutrition, neglect or abuse, even though it also furthered a policy of assimilation. The Inquiry found that multiple motivations did not prevent an act from being genocide if one of the intentions was to destroy the group.¹³⁰

The crime of genocide and the intent underlying government action were considered by the High Court in *Kruger v. The Commonwealth*,¹³¹ and by a Federal Court of Appeals in *Nulyarimma*. *Kruger* addressed the issue of genocide indirectly as it dealt with constitutional challenges to a Northern Territory Ordinance that allowed Indigenous Australians to be removed from their families. The case is discussed in greater detail below in relation to reparations. On whether the Northern Territory Ordinance breached the Genocide Convention, the High Court found that the Ordinance did not authorize the commission of acts with the intent to which the Convention referred. Justice Dawson pointed out that the Ordinance required that the powers it bestowed be exercised in the best interests of the Aborigines concerned or of the Aboriginal population.¹³² It is necessary to keep in mind, as Justice Toohey pointed out, that the holding

128. *Id.* at ch. 9, <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/stolen15.html#Heading57> (last visited Feb. 20, 2002); see also Tony Stephens, *Terra nullius of the spirit*, SYDNEY MORNING HERALD Apr. 4, 2000, <http://www.smh.com.au/news/0004/04/pageone/pageone02.html> (last visited Feb. 20, 2002).

129. HEALING REPORT, *supra* note 124, Submission No. 87 (May 2000) (submission by Peter Howson, Minister for Aboriginal Affairs, 1971-72), http://www.aph.gov.au/senate/committee/submissions/lc_stolen.htm (last visited Feb. 20, 2002); see also Peter Howson, *The truth about the 'stolen generation'*, THE AGE, Apr. 14, 2000, <http://www.theage.com.au/news/20000414/A2719-2000Apr13.html> (last visited Feb. 20, 2002).

130. BRINGING THEM HOME REPORT, *supra* note 6, at Part 4: Reparations, <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/stolen29.html#Heading103> (last visited Mar. 2, 2002). See also Matthew Lippman, *The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later*, 8 TEMP. INT'L & COMP. L.J. 1, 22-23 (1994).

131. (1997) 190 C.L.R. 1 (Austl.).

132. *Id.* at 70.

applied only to the validity of the Ordinance and not any governmental exercise of power under the Ordinance.¹³³

In *Nulyarimma*, the Federal Court engaged in a more detailed discussion of genocide. Justice Wilcox commented that:

[I]t is possible to make a case that there has been conduct by non-indigenous people towards Australian indigenes that falls within at least four of the categories of behaviour mentioned in the Convention definition 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. . . .

However, deplorable as our history is, in considering the appropriateness of the term "genocide", it is not possible too long to leave aside the matter of intent. As already mentioned, it is of the essence of the international crime of genocide that the relevant acts be intended to destroy, in whole or in part, a national, ethnical, racial or religious group.¹³⁴

Justice Wilcox reviewed some of the activities that could satisfy the requisite intention but added:

Nonetheless, it remains true that the biggest killers were diseases unintentionally introduced into Australia by whites and the consequences of denying Aboriginals access to their traditional lands. With the benefit of hindsight, we can easily see the link between denial of access and those consequences; but it is another matter to say they were, or should have been, foreseen by the first Europeans who settled on the land (with or without official approval), whose main objective was to make settlement pay.¹³⁵

In essence, European settlement was about surviving in a new land and creating a profitable colony. The harm that this caused to Indigenous Australians as a group was not intentional, but rather a side-effect of the way settlement proceeded.

Justice Wilcox concluded that the harm experienced by Indigenous Australians was not the product of any sustained or official intention to destroy the Aboriginal people, but rather the result of circumstances, attitudes and actions of many individuals, often in defiance of official instructions.¹³⁶

Justice Merkel also discussed the issue of intention by explaining the special nature of intent within the crime of genocide so as to highlight the malevolence of genocide as compared to other harms. His Honor explained:

[I]t is desirable that I make certain observations as to the dangers of demeaning what is involved in the international crime of genocide. Undoubtedly, a great deal of conduct engaged in by governments is genuinely believed by those affected by it to be deeply offensive, and in many instances harmful. However, deep offence or even substantial harm to particular groups, including indigenous people, in the community resulting from government conduct is not genocide . . . As was stated in a recent decision of the International Criminal Tribunal for Rwanda:

Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention,

133. *Id.* at 88.

134. *Nulyarimma*, 165 A.L.R. at 624-26.

135. *Id.* at 626.

136. *Id.*

required as a constitutive element of the crime, which requires that the perpetrator clearly seek to produce the act charged. The special intent in the crime of genocide lies in the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.¹³⁷

Justice Merkel went on to say:

I have made the above observations as I am conscious of the danger of raising unrealistic expectations about what might be achieved by recourse to the law to secure what might be perceived to be just outcomes for the Aboriginal people of Australia. Whilst, understandably, many Aboriginal people genuinely believe that they have been subjected to genocide since the commencement of the exercise of British sovereignty over Australia last century, it is another thing altogether to translate that belief into allegations of genocide perpetrated by particular individuals in the context of modern Australian society.¹³⁸

Both Justice Wilcox and Justice Merkel made their comments in the context of Native Title Act amendments rather than the removal of children from their families. The latter is a clearer violation of a category of behavior mentioned in the Convention. Nonetheless, the comments in *Nulyarimma* and *Kruger* suggest that specific intent is required for a finding of genocide as opposed to the Bringing them Home Report's findings that general intent is sufficient.¹³⁹

In addition, the Convention's drafters appear to have intended to adopt a requirement of specific intention,¹⁴⁰ and the recent decisions of the Rwanda International Criminal Tribunal¹⁴¹ also support such a requirement. Specific

137. *Id.* at 671 (quoting *Prosecutor v. Akayesu* [1998] 37 I.L.M. 1399, 1401, 1406).

138. *Id.* at 672.

139. AUSTRALIAN SENATE LEGAL AND CONSTITUTIONAL COMMITTEE, HUMANITY DIMINISHED: THE CRIME OF GENOCIDE (June 2000) [hereinafter HUMANITY DIMINISHED REPORT], ch. 2, ¶¶ 2.14-2.15, at 8-9, http://www.aph.gov.au/senate/committee/legcon_ctte/anti_genocide/index.htm (last visited Feb. 20, 2002). The HREOC commented: "On another view, it is sufficient to establish general rather than specific intent to destroy the group. This view is consistent with the proposition of Anglo-American criminal law that an accused cannot avoid liability for the foreseeable consequences of a deliberate course of action. Intent is established if the foreseeable consequences are, or seem likely to be, the destruction of the group. The virtue of this approach is that it covers a situation in which intent has not been express." *Id.* at 8 n.11 (citing HEALING REPORT, *supra* note 124, Submission No. 4, at 38). HREOC further argues that, in the case of forcible removal of Aboriginal children, there is considerable contemporary and official expression of destructive intent (with the inference that this satisfies a general, rather than specific, intent requirement). *Id.* at 8 n.12 (citing HEALING REPORT, *supra* note 124, Submission No. 4, at 28).

140. The Senate Legal and Constitutional Committee found that, "[t]he drafters of the Convention appear to have regarded the crime of genocide as requiring specific intent. For example, UN Doc. A/AC 6/SR 72 (1948), page 87 (per Mr Armado of Brazil) states: 'Genocide was characterised by the factor of particular intent to destroy a group. In the absence of that factor, whatever the degree of atrocity of an act and however similar it might be to the acts described in the Convention, that act still could not be called genocide . . . it was important to retain the concept of *dolus specialis*.' Patrick Thornberry, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES, (1991) Clarendon Press, pp. 73-74 states: 'It was pointed out in the Sixth Committee that the intention to destroy the group was what distinguished genocide from murder. Genocide was characterised by the factor of particular intent, *dolus specialis*, to destroy a group. In the absence of this factor, whatever the degree of atrocity of an act and however much it resembled acts described in the Convention, that act could not be called genocide.' HUMANITY DIMINISHED REPORT, *supra* note 139, at 8 n.11.

141. Asoka De Z. Gunawardana, *Contributions by the International Criminal Tribunal for Rwanda to Development of the Definition of Genocide*, 94 AM. SOC'Y INT'L L. PROC. 277, 277 (Apr. 2000). The Rwanda International Tribunal held in *The Prosecutor v. Bagilishema*, ICTR-95-1A-T, June 7, 2001, at [60]-[62]:

intent requires that "in addition to the intent to commit the underlying enumerated acts of [forcibly transferring children of the group to another group] the prosecution must also establish that the accused has an ulterior intention or secondary element of *mens rea* or the desire to achieve a particular objective,"¹⁴² to destroy the group.

This is not the first time that the intention element has been debated.¹⁴³ The issue has been argued in relation to the bombings of Dresden, Hiroshima, and Nagasaki from World War II and the US bombing strategy during the Vietnam War.¹⁴⁴ In those instances, as here, that an element of the offence is missing does not detract from the horror of the events and their effects. The most atrocious outcome does not qualify as genocide without the requisite intent. Genocide is not simply the result, but the intended result. If a finding of genocide only required general intent, genocide could lose its "emotional and political potency."¹⁴⁵

As a matter of law, and on the facts as reported in the Bringing them Home Report, the removal of Indigenous children from their families does not appear to be genocide. Nonetheless, the unwarranted removal of children from their families based on racial prejudice or misunderstanding of indigenous lifestyles should be condemned.

"The *dolus specialis* of the crime of genocide is found in the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".

For one of the underlying acts to be constitutive of the crime of genocide, it must have been committed against a person because this person was a member of a specific group, and specifically because of his or her membership of this group. Consequently, the perpetration of the act is in realisation of the purpose of the perpetrator, which is to destroy the group in whole or in part. It follows that the victim of the crime of genocide is singled out by the offender not by reason of his or her individual identity, but on account of his or her being a member of a national, ethnical, racial, or religious group. This means that the victim of the crime of genocide is not only the individual but also the group to which he or she belongs.

"On the issue of determining the offender's specific intent, the Chamber applies the following reasoning, as held in *Akayesu*:

"[. . .] intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act."

142. Payam Akhavan, *The Genocide Convention After Fifty Years: Contemporary Strategies for Combating a Crime Against Humanity*, 92 AM. SOC'Y INT'L L. PROC. 1, 10 (Apr. 1-4, 1998).

143. See generally Alexander Greenwalt, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, 99 COLUM. L. REV. 2259 (1999); Lawrence le Blanc, *The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding*, 77 AM. J. INT'L L. 341 (1983); LEO KUPER, *THE PREVENTION OF GENOCIDE* (1985); Benjamin Whitaker, *Revised and updated report on the question of the prevention and punishment of the crime of genocide*, July 2, 1985, U.N. Doc. E/CN.4/Sub.2/1985/6.

144. See generally STEVEN RATNER & JASON ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW* 33 (1997).

145. *Id.* at 42-43; see also Akhavan, *supra* note 142, at 7.

The final point to note on genocide is that the Inquiry's recommendation of enacting legislation beyond the Genocide Convention Act 1949 (Cth) to make genocide a crime within Australia has been picked up by the Federal Parliament. The Australian Senate's Legal and Constitutional Committee concluded, in June 2000, that anti-genocide legislation in Australia is both necessary and timely. Whilst such legislation is a welcome development, it must deal with difficult issues such as the scope of the acts that fall within the definition of genocide, the type of intent required and whether the Act should operate retrospectively.¹⁴⁶ A general intent requirement and retrospective adoption could see a number of lawsuits filed by members of the stolen generation.

Whilst retrospective legislation may be desirable to ensure Australia could prosecute acts committed in places like East Timor, it is not essential because Australia could extradite alleged offenders. However, retrospective criminal legislation is not unconstitutional in Australia¹⁴⁷ and some argue that it would only be giving effect to a crime that existed in international law since the 1946 UN General Assembly resolution 96(1), or alternatively, the 1948 Convention.¹⁴⁸ Although international law forbids retrospective crimes, Universal Declaration of Human Rights Article 11 refers to no one being held guilty of penal offences that did not exist under "national or international" law at the time the offence was committed, and so the existence of the crime of genocide under international law would also allow enactment of retrospective genocide legislation.

The specific intent associated with genocide is what distinguishes it from homicide and has prevented previous suggestions of general intent or gross negligence standards being adopted.¹⁴⁹ In addition, a change in the intent requirement would put Australia out of step with the rest of the world, which is particularly undesirable for a crime with *jus cogens* status. This concern was behind the statute of the recently created International Criminal Court retaining the existing Convention's definition of genocide because any change would have put the new Court out of step with the International Court of Justice, Yugoslavian and Rwandan Criminal Tribunals.¹⁵⁰

B. Racial Discrimination

The Inquiry found that UN members recognized racial discrimination as contrary to international law at least at the establishment of the United Nations in 1945. The inclusion of Article 55, which provides for "universal respect for,

146. HUMANITY DIMINISHED REPORT, *supra* note 139, at ch. 4 ¶¶ [4.37]-[4.50]; see also Ben Saul, *The International Crime of Genocide in Australian Law*, 22 (4) SYDNEY L. REV. 527 (2000).

147. *R v. Kidman* (1915) 20 C.L.R. 425 (Austl.); *Polyukhovich*, 172 C.L.R. at 535-40; *id.* at 608 (Deane, J., dissenting); *id.* at 705 (Gaudron, J., dissenting). However, the Court found *in obiter*, in *Polyukhovich*, that bills of attainder would be unconstitutional.

148. Saul, *supra* note 146, at 567-69.

149. Matthew Lippman, *Genocide: The Crime of the Century. The Jurisprudence of Death at the Dawn of the New Millennium*, 23 Hous. J. INT'L L. 467, 485 (2001).

150. *Id.* at 521; see also Timothy McCormack & Sue Robertson, *Jurisdictional Aspects of the Rome Statute for the New International Criminal Court*, MELB. U. L. REV. 635, 647-49 (1999).

and observance, of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion,”¹⁵¹ illustrates this recognition. Further, in 1948, the UN adopted the Universal Declaration of Human Rights, which at Article 2 provided, “Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹⁵²

As a result, from at least 1950 the international community recognized the prohibition of systematic racial discrimination on the scale experienced by Indigenous Australians as a rule binding on all members of the UN. The subsequent International Convention on the Elimination of All Forms of Racial Discrimination, finalized in 1965 and ratified by Australia in 1975, provided greater definition to what international law already prohibited. The Inquiry found that discriminatory legislation aimed at Indigenous children continued until 1954 in Western Australia, 1957 in Victoria, 1962 in South Australia, 1964 in the Northern Territory and 1965 in Queensland.¹⁵³

A breach of international law prohibiting racial discrimination, as compared to genocide, seems less controversial legally, as the elements are more easily met, but it is still very difficult for an individual to prove. Indeed, there was no statutory cause of action under domestic Australian law until the RDA was enacted in 1975. Prior to that date a plaintiff would have encountered the same arguments as in *Nulyarimma* over whether a cause of action existed absent legislation.

C. Commemoration, Reparations and an Apology

In 1989, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities entrusted Professor Theo van Boven with a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. Professor van Boven made a number of reports to the UN Commission on Human Rights¹⁵⁴ that recommended that victims of human rights contraventions receive reparation.

151. U.N. CHARTER, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force Oct. 24, 1945.

152. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

153. BRINGING THEM HOME REPORT, *supra* note 6, at ch. 13, <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/stolen29.html#Heading102> (last visited Feb. 20, 2002).

154. Theo van Boven, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: Final report submitted by Mr Theo van Boven, Special Rapporteur*, July 2, 1993, U.N. Doc. E/CN.4/Sub 2/1993/8; see also Theo van Boven, *Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law, prepared by Mr Theo van Boven pursuant to Sub-Commission resolution 1995/117*, May 24, 1996, U.N. Doc. E/CN.4/Sub 2/1996/17. See also M. Cherif Bassiouni, *Report of the independent expert on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms, Mr M. Cherif Bassiouni, submitted pursuant to Commission on Human Rights resolution 1998/43*, Feb. 9, 1999, U.N. Doc. E/CN.4/1999/65.

The Bringing them Home Inquiry's main findings on reparations, consistent with van Boven's report, were that:

- Reparation should consist of: (1) acknowledgment and apology, (2) guarantees against repetition, (3) measures of restitution, (4) measures of rehabilitation, and (5) monetary compensation, which was in accordance with van Boven principles 12 to 15.
- Government should make reparation to all who suffered because of forcible removal policies including: (1) individuals who were forcibly removed as children; (2) family members who suffered as a result of their removal; (3) communities which, as a result of the forcible removal of children, suffered cultural and community disintegration; and (4) descendants of those forcibly removed who, as a result, have been deprived of community ties, culture and language, and links with and entitlements to their traditional land. This implemented van Boven principle 6.
- Government should provide monetary compensation to people affected by forcible removal under the following heads: (1) Racial discrimination; (2) Arbitrary deprivation of liberty; (3) Pain and suffering; (4) Abuse, including physical, sexual and emotional abuse; (5) Disruption of family life; (6) Loss of cultural rights and fulfillment; (7) Loss of native title rights; (8) Labor exploitation; (9) Economic loss; and (10) Loss of opportunities. This was an elaboration of van Boven principle 12.
- The Aboriginal and Torres Strait Islander Commission, in consultation with the Council for Aboriginal Reconciliation, should arrange for an annual national 'Sorry Day' to commemorate the history of forcible removals and its effects, in accordance with van Boven principle 15(f).

The Inquiry went further on compensation by recommending that the Council of Australian Governments establish a joint National Compensation Fund. An Indigenous person who was removed from his or her family during childhood by compulsion, duress or undue influence would be entitled to a minimum lump sum payment from the National Compensation Fund in recognition of the removal. The government could defend on the ground that the removal was in the best interests of the child. Any person proving particularized harm and/or loss resulting from forcible removal, on the balance of probabilities, would be entitled to monetary compensation from the National Compensation Fund. The proposed statutory monetary compensation mechanism would not displace claimants' common law rights to seek damages through the courts, but a claimant successful in one forum would not be entitled to proceed in the other. No legislation has sought to put these detailed recommendations into practice.

Just after the publication of the Bringing them Home Report, the High Court handed down its decision in *Kruger*.¹⁵⁵ *Kruger* involved constitutional challenges by seven Indigenous Australians removed from their families and the

155. See Sarah Joseph, *Kruger v Commonwealth: Constitutional Rights and the Stolen Generations*, 24 (2) *MONASH U. L. REV.* 486 (1998).

mother of a child removed pursuant to Aboriginals Ordinance 1918 (NT). The Parliament enacted the Ordinance pursuant to its power to make laws for the government of territories, in this case the Northern Territory, under the Constitution section 122.

Section 7 of the Ordinance provided for a Chief Protector to undertake the care, custody or control of any Aboriginal or half-caste child if they believed it was necessary or desirable to do so in the interests of the child. To give effect to that role, the Chief Protector could enter premises to take custody of the Aboriginal or half-caste children and could force them to live on reserves or in Aboriginal institutions.

The Constitutional challenges in Kruger were:

1. breach of the doctrine of separation of powers by granting a non-judicial body, the Chief Protector, judicial powers in the form of a power of detention;
2. breach of an implied constitutional right to substantive legal equality;
3. breach of an implied constitutional right to freedom of movement and association;
4. breach of an implied constitutional right to be free from genocide;
5. breach of the constitutional right to freedom of religion, guaranteed by section 116.

All of the challenges failed. This article will not review the detailed reasoning behind the failure of each challenge, but certain themes are important for the role that international law may play. First, and most obviously, is the lack of constitutional rights for individuals. Only one of the challenges found expression in the text of the constitution, while all the others relied on minority judgments in previous High Court decisions, or on creative pleading. Second, the Ordinance was for a territory rather than a State, which led three judges, Chief Justice Brennan, Justice Dawson and Justice McHugh to find that section 122 gave the Federal parliament plenary power that was not subject to constitutional limitations. Whether this view would command a majority of the current Court is uncertain as three judges in *Newcrest Mining (WA) v. The Commonwealth*¹⁵⁶ found that section 122 was subject to the acquisition on just terms provision, section 51(xxxi). However, it does indicate that a significant part of Australia could be without protection of existing constitutional rights, and if individual rights were implied or the Constitution amended they may not extend to the territories. Third, there was no remedy for the plaintiffs.

Compensation from a government-created fund has not been forthcoming for two main reasons: first, an inability to quantify what compensation involves, and, second, resentment. How are fair and just terms for compensation determined? How much money should be paid out? Should it be paid to individuals or used for the benefit of indigenous people as a whole? The Prime Minister, John Howard, has advocated 'practical reconciliation' aimed at improving health, education and housing standards but without individual compensation.¹⁵⁷

156. (1997) 190 CLR 513 (Austl.).

157. John Howard, OPENING SPEECH AUSTRALIAN RECONCILIATION CONVENTION, May 26, 1997, <http://www.austlii.edu.au/au/other/IndigLRes/car/1997/3/speeches/opening/howard.htm> (last visited Oct. 29, 2001).

Some sections of the community resent the payment of money to people that do not look like the stereotypical Indigenous Australian or others regard compensation as "a lushly funded gravy train" going to people that have not earned it.¹⁵⁸

The lack of guidelines means that a hypothetical negotiation between members of Australian society will have wildly disparate starting points. The negotiation is about determining the value of pain, anguish, disruption of family life, loss of cultural rights and fulfillment. It means putting a dollar amount on van Boven's principle 12. A discussion between the Inquiry and the Croker Island Association, an indigenous group, starkly illustrated the difficulty of compensation. The Inquiry asked whether a minimum lump sum payment of \$2000 would be accepted. The response was: "[H]ow much is a mother worth?"¹⁵⁹

The payment of compensation requires that it be somehow proportional to the harm done and yet not be of such a magnitude that it poses a risk to the dominant group's identity and prosperity.¹⁶⁰ The trade-off is about making moral judgments more concrete through paying compensation, but also ensuring that both Indigenous and white Australians accept the moral judgment. Apologies and other symbolic acts that are heart-felt acknowledgements of past injustices sometimes achieve the trade-off that dollar amounts could never achieve.

The Australian Government specifically commented on the Bringing them Home Report's heavy reliance on the van Boven principles, and rejected their application in the Australian context because:

- (1) the forcible removal of Indigenous children did not amount to a gross violation of human rights and accordingly the principles are of no application, particularly if the laws were not genocidal; and
- (2) the van Boven principles did not have any formal status in international law.¹⁶¹

HREOC responded to the government's reasons by arguing that prohibition against genocide and racial discrimination existed at the time Indigenous children were being separated from their families¹⁶² and further, that the van Boven principles are a synthesis of international practice.¹⁶³

As the Parliament did not enact legislation giving effect to the Inquiry's recommendations, and as Constitutional challenges had failed, Indigenous Australians were left with only common law claims. A representative example of such a claim is that of Lorna Nelson Cubillo and Peter Gunner who were removed from their families pursuant to Aboriginals Ordinance 1918 (NT) (the subject of *Kruger*), in the case of Cubillo, and Welfare Ordinance 1953 (NT)

158. BARKAN, *supra* note 2, at 237.

159. HEALING REPORT, *supra* note 124, at ch. 8, para. 8.112, http://www.aph.gov.au/senate/committee/legcon_ctte/stolen/ (last visited Feb. 20, 2002).

160. BARKAN, *supra* note 2, at 328-29.

161. HEALING REPORT, *supra* note 124, Submission No. 36, http://www.aph.gov.au/senate/committee/submissions/lc_stolen.htm (last visited Mar. 22, 2002).

162. *Id.*, Submission No. 93, paras. 3.88- 3.106 (submission by William Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner), http://www.aph.gov.au/senate/committee/submissions/lc_stolen.htm (last visited Mar. 22, 2001).

163. *Id.*, paras. 3.68-3.83, http://www.aph.gov.au/senate/committee/submissions/lc_stolen.htm (last visited Mar. 22, 2001).

that replaced the 1918 Ordinance but provided similar powers, in the case of Gunner.

In *Cubillo v. The Commonwealth*,¹⁶⁴ the plaintiffs brought suit in the Federal Court and alleged that their removal and detention constituted wrongful imprisonment, was in breach of fiduciary and statutory duties, and the duty of care that the government owed them. The Commonwealth denied the claims and relied on the Northern Territory statute of limitations and the equitable defense of laches. Whilst the determination as to whether the government owed a duty to the applicants turned largely on the law, the questions of breach and policies of removal were mainly factual matters that both applicant and respondent could not prove or disprove due to the loss of witnesses to death or other causes and the lack of documentary evidence. Justice O'Loughlin, in reviewing the evidence, commented that in relation to the removal of Cubillo and other part-aboriginal children "neither the applicants nor the respondent could produce a single document in respect of that removal,"¹⁶⁵ and in relation to the existence of a government policy of removing part aboriginal children to destroy their association with their mothers and culture "there were . . . no documentary records or oral evidence from competent witnesses that could justify a finding that such a purpose existed in 1947 when [Cubillo] was removed."¹⁶⁶ On examining the applicants' requests for extensions of time under the statute of limitations, and arguing that their equitable claims should not be barred by reason of laches, Justice O'Loughlin denied the applicants' claims on the basis that the Commonwealth suffered "irreparable prejudice through the absence of material witnesses and the infirmities of others."¹⁶⁷

Justice O'Loughlin also considered standards by which to evaluate the conduct of the relevant administrator who oversaw the government department responsible for the removal of Aboriginal and part-Aboriginal children. His Honor held that any exercise of the power to remove and detain the applicants by the Director of Native Affairs must be determined by reference to standards, attitudes, opinions and beliefs prevailing at the time of its exercise and not by reference to contemporary standards, attitudes, opinions and beliefs.¹⁶⁸

In reaching this conclusion, Justice O'Loughlin followed the reasoning of the High Court in *Kruger*, as represented by the findings of Chief Justice Brennan and Justice Gummow. Chief Justice Brennan held that ". . . it would be erroneous . . . to hold that a step taken in purported exercise of a discretionary power was taken unreasonably . . . if the unreasonableness appears only from a change in community standards."¹⁶⁹ Additionally, Justice Gummow accepted that the provisions of the relevant legislation indicated a concern by the Execu-

164. (2000) 174 A.L.R. 97 (Austl. F.C.). See also *Cubillo v. The Commonwealth* (1999) 163 A.L.R. 395 (Austl. F.C.) (rejecting the Commonwealth's motion for summary dismissal).

165. *Cubillo*, (2000) 174 A.L.R. at 129.

166. *Id.* at 453.

167. *Id.* at 542.

168. *Id.* at 137-38.

169. *Kruger*, 190 C.L.R. at 36-37.

tive at the time "to assist survival rather than destruction, [but such a philosophy] now may appear entirely outmoded and unacceptable."¹⁷⁰

The evidentiary difficulties, statutes of limitations and the requirement that actions be judged by the standards of the time, demonstrate the difficulty of deciding a case arising from events of the 1940s and 50s, and equally the low likelihood of success of Indigenous Australians' claims.

Despite finding that the applicants had no sustainable causes of action, Justice O'Loughlin assessed damages in the event that an Appeal Court overturned the decision at first instance. In doing so, his Honor found that the applicants could recover for cultural loss¹⁷¹ and psychiatric injuries flowing from removal and detention.¹⁷² The claim also highlighted that the removal of children from their families prevented them from enjoying the rights of Indigenous Australians. For instance, they could not make a native title claim as they could not meet the requirement of continued connection with the land they claimed.¹⁷³ In the case of the applicants, and the stolen generation generally, that connection was broken through forcible removal by the government.¹⁷⁴ In the case of Gunner, he lost the opportunity to undergo the initiation process at age 13 which marked the commencement of the male ritual career which was essential for his induction into ceremonial life and acquisition of status in traditional terms.¹⁷⁵ Also, the applicants were expected to mitigate their losses by trying to re-establish aspects of their Aboriginal past and background. However, Justice O'Loughlin made no deduction for any benefits received, such as education, while the applicants were detained.¹⁷⁶

The types of damage claimed and the determination of those claims using legal principles highlights the difficulty in placing a monetary value on what is effectively impossible to value. This is not to suggest that such a process is novel, courts are called on to do this every day. It merely highlights that litigation is an unsatisfactory method for obtaining relief in such circumstances. If the litigation process is the only avenue for redress then the final conclusion of Justice O'Loughlin—"I remain satisfied that the Commonwealth of Australia is not obliged, as a matter of fact and law to compensate [the applicants] for their

170. *Id.* at 158.

171. The Court followed decisions in *Napaluma v. Baker*, (1982) 29 S.A.S.R. 192 (Austl. S.A.), *Dixon v. Davies*, (1982) 17 N.T.R. 31 (Austl. N.T.), *Weston v. Woodroffe*, (1985) 36 N.T.R. 34 (Austl. N.T.), and *Milpururru v. Indofurn Proprietary Ltd.*, (1994) 130 A.L.R. 659 (Austl. F.C.), dealing with Indigenous Australians' inability to take part in their culture. *Cubillo*, 174 A.L.R. at 564.

172. *Id.* at 575-77.

173. *Cubillo's* claim was that she had lost the right to be recognized as a traditional land owner under the Northern Territory's Land Rights Act. The importance of the connection with the land is quoted from *R v. Toohey* (1982) 158 C.L.R. 327 (Austl.), 356-57.

174. *Cubillo*, 174 A.L.R. at 567-68. See also BARKAN, *supra* note 2, at 248.

175. *Cubillo*, 174 A.L.R. at 570.

176. *Id.* at 570-71, 576-77.

losses”¹⁷⁷—will mean that many members of the stolen generation will receive no compensation.¹⁷⁸

Outside of the litigation process, the Australian Senate on November 24, 1999, referred the establishment of an alternative dispute resolution tribunal for resolving claims for compensation and potential mechanisms for establishing procedures to address the broader issue of reparations to the Senate Legal and Constitutional References Committee.¹⁷⁹ The Committee recommended the adoption of alternative dispute resolution, but the Government stated that any form of tribunal would not gain Government support unless it involved the ‘rigorous testing of claims,’ in which case, the Commonwealth stated that it did not see that a tribunal would provide any advantage over the ‘normal litigation process.’¹⁸⁰

The Government’s refusal to make compensation payments highlights that, “What is, or is not, compensable at law is more a matter of political judgment and government policy than it is a matter of any inherent legal understanding of compensability.”¹⁸¹ The UN’s van Boven principles can set out the components of reparation, but without a nation having the will to apply them domestically, they remain an aspiration.

To date, many Australians have commemorated a National ‘Sorry Day,’ but the Federal Government has offered neither an apology nor compensation.¹⁸² In August 1999, the Federal government expressed “deep and sincere regret” for past injustices but did not use the words ‘apology’ or ‘sorry.’ Some State governments, State police forces, and churches have delivered apologies for their roles in the removal of Indigenous children from their parents. The Federal Government has denied an apology on the basis that the current generation of Australians is not accountable for the actions of their forebears, and that the removal of children took place with ‘mixed motives,’ that is to say that some children were removed to prevent neglect rather than to achieve a policy of assimilation.

Proponents of an apology, like Aboriginal leader Mick Dodson at Corrobooree 2000, have pointed out the absurdity of denying reparation because of events occurring in the past, when that past (1910 to 1970) was part of many peoples’ lifetimes:

177. *Id.* at 582.

178. Plaintiffs’ appeal was unsuccessful. See *Cubillo v. The Commonwealth of Austl.* (2001) 183 A.L.R. 249 (Austl. F.C.A.). The appeal’s main significance was in the plaintiffs’ decision not to challenge the trial judge’s finding that there was no policy of removal of part-Aboriginal children. *Id.* Even with a more conventional approach to the litigation, the lapse of time giving rise to evidentiary difficulties and statutes of limitations problems prevented recovery. *Id.* The plaintiff’s request for special leave to appeal to the High Court was refused on May 3, 2002.

179. SENATE, OFFICIAL HANSARD 10587-99 (Nov. 24, 1999), www.aph.gov.au/hansard.

180. HEALING REPORT, *supra* note 124, ch. 8, para. 8.73, http://www.aph.gov.au/senate/committee/legcon_ctte/stolen.

181. Regina Graycar, *Compensation for The Stolen Children: Political Judgments and Community Values*, 4 (3) U. N.S.W. L.J. Forum 253, 254 (1998).

182. See MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS—FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 113 (1998).

Who is this generation that took my grandmother, my father, my mother and my grandfather and my two sisters? Who is this generation that tried to take me from my family in 1960? What generation do we look to, if Mr Howard says it wasn't this one? Where is this mythical group of Australians who made these laws, adopted these policies, put them into practice, who took the kids?¹⁸³

IX.

INTERNATIONAL LAW'S SUCCESSES AND LIMITATIONS—THE NEED FOR AUSTRALIA TO ACT

The discussion of Indigenous Australians' experience with rights protection demonstrates the successful use of international law to provide the impetus for the enactment of the RDA, HREOC Act and creation of HREOC. International Law has also served as a measuring stick or standard by which acts and omissions may be judged. The HREOC Submission on the Government response to the Bringing them Home Report stated that, "A . . . significant type of accountability of the federal government is to the international community through the upholding of human rights standards and compliance with treaties to which Australia is a signatory. These instruments reflect minimum standards of behaviour commonly accepted by the international community." HREOC also recommended compliance with international human rights standards as a key measure of the adequacy and effectiveness of the government's response to the recommendations of the Bringing them Home Report.¹⁸⁴

In addition, international law may provide the basis for legal reform as the recognition of native title in *Mabo [No 2]* demonstrates. International law may also provide a remedy when there are no domestic remedies or domestic procedures are exhausted without an adequate remedy through the Optional Protocol to the ICCPR and similar communications procedures for individual complaint under the Convention Against Torture and the Racial Discrimination Convention.

However, the success of international law in creating and protecting rights is subject to the political will of the elected representatives in individual countries such as Australia. This is because the domestic legal system determines the effect of international obligations, both treaties and customary international law. In Australia, international law becomes part of, or influences, municipal law through:

1. Legislation;
2. Rules of construction if a statute is ambiguous; and
3. Its role in guiding the development of the common law.

Australia's legal system places the main responsibility for implementing international obligations domestically with the Federal Parliament. Parliament deter-

183. *Mick Dodson at Corroboree 2000* (Australian Broadcasting Corporation radio broadcast, June 11, 2000), <http://www.abc.net.au/rn/relig/enc/stories/s140755.htm> (last visited Feb. 20, 2002).

184. HEALING REPORT, *supra* note 124, paras. 2.14, 2.16, http://www.apf.gov.au/senate/committee/submissions/lc_stolen.htm (last visited Mar. 22, 2001); Aboriginal and Torres Strait Islander Social Justice Commissioner, SOCIAL JUSTICE REPORT 1999, HREOC, Sydney, 10 (2000).

mines the content of legislation and can override the Court's interpretations of statutes or adoption of customary international law through further legislation. Parliament's supremacy means that the Court cannot strike down legislation that conflicts with international law. The only limitation is that imposed by the Australian Constitution, which without the main protections of individual's rights, such as equality, is of little limitation. In addition, the existence of the arcane race power specifically allows the enactment of racially detrimental laws. The result is native title legislation that can extinguish Indigenous Australians' land rights and override protections against racial discrimination.

The lack of remedies for human rights contraventions was of central concern to the UN Human Rights Committee, which in its Year 2000 report made the following observation and recommendation:

The Committee is concerned that in the absence of a constitutional Bill of Rights, or a constitutional provision giving effect to the [ICCPR], there remain lacunae in the protection of Covenant rights in the Australian legal system. There are still areas in which the domestic legal system does not provide an effective remedy to persons whose rights under the Covenant have been violated.

The State party should take measures to give effect to all Covenant rights and freedoms and to ensure that all persons whose Covenant rights and freedoms have been violated shall have an effective remedy (article 2).¹⁸⁵

A change in government¹⁸⁶ may see reparations for the Stolen Generation and the enactment of domestic legislation criminalizing genocide. It may even see the Native Title legislation revisited. Although a new government might establish greater statutory rights and remedies, these rights and remedies will remain subject to amendment and repeal under the current Australian Constitution.

Indigenous Australians' experience with international law provides three main lessons: first, the protection of human rights in Australia can be precarious; second, Australia's approach to human rights protection affects its international standing; and, third, whilst laws can improve human rights protection, reconciliation requires more than just laws.

Some rights are so basic and so precious that they should be invulnerable to repeal and easy amendment. Australia's current Chief Justice of the High Court, Murray Gleeson has stated that, "The whole point of having a constitutional right is to put it beyond the reach of Parliament."¹⁸⁷ Equality, with all its vagaries and problems of implementation¹⁸⁸ is one of those rights. The current Australian Constitution does not adequately protect the right of equality, and in

185. Human Rights Committee, *Consideration of Reports Submitted under Article 40 - Concluding Observations of the Human Rights Committee: Australia*, (69th session), July 28, 2000, U.N. Doc. CCPR/CO/69/AUS.

186. Australia held a Federal election on Nov. 10, 2001, that returned the ruling Liberal-National party Coalition, led by John Howard, to power so that the policies illustrated in this article are likely to continue for the next 3 years.

187. CHIEF JUSTICE MURRAY GLEESON, *THE RULE OF LAW AND THE CONSTITUTION* 69 (2000).

188. A right to equality needs to include the concept of 'special measures' or means by which formal equality may be diminished or avoided to achieve effective and genuine equality as set out in the Convention on the Elimination of All Forms of Racial Discrimination art. 1, para. 4 and Gerhardy, 159 C.L.R. 70.

relation to Indigenous Australians and other minority races, the Constitution positively allows inequality through the race power.

Entrenching a right to equality will not be easy. Australia has voted without success on the amendment of the Constitution to create rights at a number of referenda.¹⁸⁹ Australia's reluctance to entrench rights is the result of a combination of factors.¹⁹⁰ A majority of Australians have not suffered any human rights contravention and so do not see the need for rights protection. Australia has not been subject to the type of upheavals that typically generate the need for bills of rights, such as the American and French Revolutions or the end of Apartheid in South Africa. Other parts of Australia will oppose rights that are stated as necessary to protect a particular group, such as Indigenous Australians, because they equate the extension of rights to those groups as somehow pandering to interest groups and thus disadvantaging them. There is also argument over which rights should be included and which should not. Once a right that is perceived as undesirable for entrenchment becomes part of the bill of rights being debated then the entire bill loses support. This is illustrated by Australians' approach to the U.S. bill of rights, agreeing with free speech but fearing the prevalence of guns. Times may change so that what is seen as a desirable right today may be a social problem of the future.

The experience of Indigenous Australians is a warning against a lackadaisical approach to a right of equality. If the suffering of Indigenous Australians can prompt the creation of entrenched rights against discrimination, and for equality, then those rights will be for the protection of everyone. The amendment of the Constitution requires a referendum at which all Australians must compulsorily vote. The average Australian, not just politicians, judges, lawyers and human rights activists, must feel the urgent need for a right to equality. International law, particularly the Universal Declaration of Human Rights and twin International Covenants on Economic, Social and Cultural Rights, and Civil and Political Rights, provides a host of rights that could form the foundation of an Australian bill of rights. However, the bill must focus on the most central rights so as to attract sufficient votes at a referendum. Equality is a fundamental right, and therefore could attract bi-partisan support, as shown by Parliament's commitment "to the rights of all Australians to enjoy equal rights and be treated with equal respect regardless of race, colour, creed or origin."¹⁹¹

In addition, Australia's respect, or lack thereof, for international law and bodies like the United Nations is not only a matter of domestic concern. Australia's ability to appeal to international law and human rights in dealing with other nations is severely restricted if it fails to comply. Australia's position on Indigenous Australians compromises its previous credibility on human rights with the

189. TONY BLACKSHIELD & GEORGE WILLIAMS, *AUSTRALIAN CONSTITUTIONAL LAW & THEORY* 1183-88 (2d ed. 1998).

190. GEORGE WILLIAMS, *A BILL OF RIGHTS FOR AUSTRALIA* 33-41 (2000) (summarizing the arguments for and against adopting a bill of rights).

191. HOUSE OF REPRESENTATIVES, OFFICIAL HANSARD 6156-96 (Oct. 30, 1996) www.aph.gov.au/hansard.

rest of the world. A country like Australia that must rely heavily on persuasion for conducting foreign relations needs an unblemished human rights record if it is to be an effective player in world politics.

Finally, it must be remembered that law in general, and international law in this particular context, cannot provide all the answers. Reconciliation with Indigenous Australians is a moral or ethical issue for Australians in resolving their view of themselves as fair-minded and tolerant, or in Australian parlance 'giving everyone a fair go.' International law and human rights can provide the means for dialogue but reconciliation requires Australia to come to terms with its own history. Law may give moral imperatives greater clarity and concreteness, but when the law cannot vindicate a particular morality as with the failed lawsuits brought by members of the Stolen Generation, opponents of reparations may also use the law to deny the validity of those moral claims. The fact that Australian jurisprudence does not currently recognize or enforce this obligation in a legal sense does not remove the moral obligation. Australia's history of mistreatment of, and discrimination towards, Indigenous Australians requires more than just a constitutional right to equality.

Reconciliation is multi-faceted. The Australian Parliament needs to embrace reparations. In the Australian context, this means taking the symbolic step of offering a formal apology for past wrongs, following through on John Howard's 'practical reconciliation' of addressing Indigenous Australians' health and education, and providing some form of compensation. A right to equality is essential as a guarantee against repetition but not sufficient for reconciliation. International law may light the path towards equality and reconciliation, but the Australian people must choose to walk it.

APPENDIX 1

EXTRACTS FROM RACIAL DISCRIMINATION ACT 1975 (Cth)

Section 9 - Racial discrimination to be unlawful

(1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

(1A) Where:

(a) a person requires another person to comply with a term, condition or requirement which is not reasonable having regard to the circumstances of the case; and

(b) the other person does not or cannot comply with the term, condition or requirement; and

(c) the requirement to comply has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life;

the act of requiring such compliance is to be treated, for the purposes of this Part, as an act involving a distinction based on, or an act done by reason of, the other person's race, colour, descent or national or ethnic origin.

(2) A reference in this section to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes any right of a kind referred to in Article 5 of the Convention.¹⁹²

192. Article 5 provides:

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;

(c) Political rights, in particular the right to participate in elections—to vote and to stand for election—on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

(d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State;

(ii) The right to leave any country, including one's own, and to return to one's country;

(iii) The right to nationality;

(iv) The right to marriage and choice of spouse;

(v) The right to own property alone as well as in association with others;

Section 10 - Rights to equality before the law

(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

(2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.

(3) Where a law contains a provision that:

(a) authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or

(b) prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander;

not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which subsection (1) applies and a reference in that subsection to a right includes a reference to a right of a person to manage property owned by the person.

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- (vi) The right to inherit;
 - (vii) The right to freedom of thought, conscience and religion;
 - (viii) The right to freedom of opinion and expression;
 - (ix) The right to freedom of peaceful assembly and association;
 - (e) Economic, social and cultural rights, in particular:
 - (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
 - (ii) The right to form and join trade unions;
 - (iii) The right to housing;
 - (iv) The right to public health, medical care, social security and social services;
 - (v) The right to education and training;
 - (vi) The right to equal participation in cultural activities;
 - (f) The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks.

APPENDIX 2
THE VAN BOVEN PRINCIPLES

Commission on Human Rights
Sub-Commission on Prevention of Discrimination and
Protection of Minorities
E/CN.4/Sub.2/1996/17
BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO
REPARATION FOR VICTIMS OF GROSS VIOLATIONS OF
HUMAN RIGHTS AND HUMANITARIAN LAW

The duty to respect and to ensure respect for human rights and humanitarian law

1. Under international law every State has the duty to respect and to ensure respect for human rights and humanitarian law.

Scope of the obligation to respect and to ensure respect for human rights and humanitarian law

2. The obligation to respect and to ensure respect for human rights and humanitarian law includes the duty: to prevent violations, to investigate violations, to take appropriate action against the violators, and to afford remedies and reparation to victims. Particular attention must be paid to the prevention of gross violations of human rights and to the duty to prosecute and punish perpetrators of crimes under international law.

Applicable norms

3. The human rights and humanitarian norms which every State has the duty to respect and to ensure respect for, are defined by international law and must be incorporated and in any event made effective in national law. In the event international and national norms differ, the State shall ensure that the norm providing the higher degree of protection shall be applicable.

Right to a remedy

4. Every State shall ensure that adequate legal or other appropriate remedies are available to any person claiming that his or her rights have been violated. The right to a remedy against violations of human rights and humanitarian norms includes the right of access to national and international procedures for their protection.
5. The legal system of every State shall provide for prompt and effective disciplinary, administrative, civil and criminal procedures so as to ensure readily accessible and adequate redress, and protection from intimidation and retaliation.

Every State shall provide for universal jurisdiction over gross violations of human rights and humanitarian law which constitute crimes under international law.

Reparation

6. Reparation may be claimed individually and where appropriate collectively, by the direct victims, the immediate family, dependants or other persons or groups of persons connected with the direct victims.

7. In accordance with international law, States have the duty to adopt special measures, where necessary, to permit expeditious and fully effective reparations. Reparation shall render justice by removing or redressing the consequences of the wrongful acts and by preventing and deterring violations. Reparations shall be proportionate to the gravity of the violations and the resulting damage and shall include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

8. Every State shall make known, through public and private mechanisms, both at home and where necessary abroad, the available procedures for reparations.

9. Statutes of limitations shall not apply in respect of periods during which no effective remedies exist for violations of human rights and humanitarian law. Civil claims relating to reparations for gross violations of human rights and humanitarian law shall not be subject to statutes of limitations.

10. Every State shall make readily available to competent authorities all information in its possession relevant to the determination of claims for reparation.

11. Decisions relating to reparations for victims of violations of human rights and humanitarian law shall be implemented in a diligent and prompt manner.

Forms of reparation

Reparations may take any one or more of the forms mentioned below, which are not exhaustive, viz:

12. Restitution shall be provided to re-establish the situation that existed prior to the violations of human rights and humanitarian law. Restitution requires, inter alia, restoration of liberty, family life, citizenship, return to one's place of residence, employment of property.

13. Compensation shall be provided for any economically assessable damage resulting from violations of human rights and humanitarian law, such as:

- (a) Physical or mental harm, including pain, suffering and emotional distress;
- (b) Lost opportunities including education;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Harm to reputation or dignity;
- (e) Costs required for legal or expert assistance.

14. Rehabilitation shall be provided and will include medical and psychological care as well as legal and social services.

15. Satisfaction and guarantees of non-repetition shall be provided, including, as necessary:

- (a) Cessation of continuing violations;
- (b) Verification of the facts and full and public disclosure of the truth;

- (c) An official declaration or a judicial decision restoring the dignity, reputation and legal rights of the victim and/or of persons connected with the victim;
- (d) Apology, including public acknowledgement of the facts and acceptance of responsibility;
- (e) Judicial or administrative sanctions against persons responsible for the violations;
- (f) Commemorations and paying tribute to the victims;
- (g) Inclusion in human rights training and in history textbooks of an accurate account of the violations committed in the field of human rights and humanitarian law;
- (h) Preventing the recurrence of violations by such means as:
 - (i) Ensuring effective civilian control of military and security forces;
 - (ii) Restricting the jurisdiction of military tribunals only to specifically military offences committed by members of the armed forces;
 - (iii) Strengthening the independence of the judiciary;
 - (iv) Protecting the legal profession and human rights defenders;
 - (v) Improving, on a priority basis, human rights training to all sectors of society, in particular to military and security forces and to law enforcement officials.

APPENDIX 3 THE GENOCIDE CONVENTION

Article II

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 III

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

Article IV

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Article V

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

Article VI

Persons charged with genocide or any of the other acts enumerated in article III shall 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 its jurisdiction.