FEDERAL COURT OF AUSTRALIA

Nulyarimma v Thompson [1999] FCA 1192

CRIMINAL LAW – International crime of genocide – Meaning of genocide – Intentional element – Prohibition of genocide as a norm of international customary law – No legislation providing for prosecution of genocide claims in Australian courts – Whether genocide is cognisable in Australian courts in the absence of legislation.

ABORIGINES – Claims that sponsorship of *Native Title Act* amendments and failure to seek World Heritage Listing of Lake Eyre region were acts of genocide – Impropriety of courts inquiring into actions of Parliament – Obligations arising under *World Heritage Convention*.

A5 of 1999
WADJULARBINNA NULYARIMMA, ISOBEL COE, BILLY CRAIGIE and ROBBIE THORPE v PHILLIP R THOMPSON

S23 of 1999
KEVIN BUZZACOTT v ROBERT MURRAY HILL, MINISTER FOR THE ENVIRONMENT, ALEXANDER JOHN GOSSE DOWNER, MINISTER FOR FOREIGN AFFAIRS AND TRADE and COMMONWEALTH OF AUSTRALIA

WILCOX, WHITLAM and MERKEL JJ
SYDNEY (HEARD IN CANBERRA)
1 SEPTEMBER 1999

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

AUSTRALIAN CAPITAL TERRITORY **A5 of 1999**

DISTRICT REGISTRY

ON APPEAL FROM THE SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

BETWEEN: **WADJULARBINNA NULYARIMMA, ISOBEL COE, BILLY CRAIGIE and ROBBIE THORPE**
Appellants

AND: **PHILLIP R THOMPSON**
Respondent

JUDGES: **WILCOX, WHITLAM and MERKEL JJ**

DATE OF ORDER: **1 SEPTEMBER 1999**

WHERE MADE: **SYDNEY (HEARD IN CANBERRA)**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA

SOUTH AUSTRALIAN CAPITAL TERRITORY DISTRICT REGISTRY **S23 of 1999**

BETWEEN:	**KEVIN BUZZACOTT** **Applicant**
AND:	**ROBERT MURRAY HILL, MINISTER FOR THE ENVIRONMENT** **First Respondent**
	ALEXANDER JOHN GOSSE DOWNER, MINISTER FOR FOREIGN AFFAIRS AND TRADE **Second Respondent**
	COMMONWEALTH OF AUSTRALIA **Third Respondent**
JUDGES:	**WILCOX, WHITLAM and MERKEL JJ**
DATE OF ORDER:	**1 SEPTEMBER 1999**
WHERE MADE:	**SYDNEY (HEARD IN CANBERRA)**

THE COURT ORDERS THAT:

1. The proceeding be dismissed.

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GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

AUSTRALIAN CAPITAL TERRITORY DISTRICT REGISTRY **A5 OF 1999**

ON APPEAL FROM THE SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

BETWEEN: **WADJULARBINNA NULYARIMMA and ORS**
Appellants

AND: **PHILLIP THOMPSON**
Respondent

IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIAN DISTRICT REGISTRY
1999

AND BETWEEN: **KEVIN BUZZACOTT**
Applicant

AND; **ROBERT MURRAY HILL, MINISTER FOR THE ENVIRONMENT**
First Respondent

ALEXANDER JOHN GOSSE DOWNER, MINISTER FOR FOREIGN AFFAIRS
Second Respondent

COMMONWEALTH OF AUSTRALIA
Third Respondent

JUDGES: **WILCOX, WHITLAM and MERKEL JJ**

DATE: **1 SEPTEMBER 1999**

PLACE: **SYDNEY (HEARD IN CANBERRA)**

REASONS FOR JUDGMENT

1 **WILCOX J:** Two cases have been heard together by this Court. They are different in nature and derivation. Their common feature is that they involve claims by members of the Aboriginal community that certain Commonwealth Ministers and members of Parliament have engaged in genocide.

The two proceedings

2 The first case (A5 of 1999) is an appeal by four people, Wadjularbinna Nulyarimma, Isobel Coe, Billy Craigie and Robbie Thorpe ("the appellants"), against a decision of Crispin J, a judge of the Supreme Court of the Australian Capital Territory. This decision is reported as *Re Thompson; Ex parte Nulyarimma* (1998) 136 ACT 9. Crispin J upheld the refusal of the respondent in that case, the Registrar of the Magistrates Court of the Australian Capital Territory, Phillip R Thompson, to issue warrants for the arrest of four persons, John Winston Howard (the Prime Minister), Timothy Andrew Fischer (the Deputy Prime Minister), Brian Harradine (a Senator) and Pauline Lee Hanson (a member of the House of Representatives) in respect of informations that charged they had committed the criminal offence of genocide in connection with the formulation of the Commonwealth government's native title "Ten Point Plan" and presentation and support of the Bill that, as extensively amended, became the *Native Title Amendment Act* 1998.

3 The second case (S23 of 1999) is a motion by the respondents to strike out a proceeding instituted by Kevin Buzzacott in the South Australian Registry of the Federal Court of Australia, on behalf of the Arabunna People, against two Commonwealth Ministers, Robert Hill (Minister for the Environment) and Alexander Downer (Minister for Foreign Affairs and Trade) and the Commonwealth of Australia ("the respondents"). Mr Buzzacott alleges the respondents committed genocide in failing to apply to the UNESCO World Heritage Committee for inclusion of the lands of the Arabunna People (which include Lake Eyre) on the World Heritage List maintained under the *World Heritage Convention.* Mr Buzzacott did not seek criminal sanctions but he claimed the failure constituted genocide and sought civil remedies, including a mandatory injunction compelling the respondents to proceed with the World Heritage application. The strike out motion was referred by a Judge to a Full Court sitting in Adelaide, but adjourned by that Court to be dealt with by this Court in conjunction with the Australian Capital Territory appeal.

Australian history and genocide

4 I have had the advantage of reading in draft form the reasons for judgment to be delivered by each of my colleagues. I need not repeat what they say. Merkel J refers to the definition of genocide used in the 1948 *Convention on the Prevention and Punishment of the Crime of*

Genocide that was ratified by Australia on 8 July 1949 and came into force on 12 January 1951. It seems the term "genocide" was coined by the Polish jurist, Dr Raphael Lemkin, from the ancient Greek word *genos* (race or tribe) and Latin *cide* (killing). The essence of the international crime of genocide is the commission of acts that are intended to destroy, in whole or in part, a national, ethnical, racial or religious group.

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

6 Not surprisingly, this social devastation has led to widespread (although not universal) community demoralisation and loss of individual self-esteem, leading in turn to a high rate of alcohol and drug abuse, violence and petty criminality followed by imprisonment and, often, suicide. Many (not all) communities suffer substandard housing, hygiene and nutrition, leading to prevalent diseases that are rarely experienced by non-indigenous communities. The result of all this, as numerous studies have demonstrated, is that indigenous Australians face health problems of a different order of magnitude to those of other Australians, leading to an expectancy of life only about two-thirds that of non-indigenous people.

7 Leaving aside for the moment the matter of intent, it 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.

8 Many of us non-indigenous Australians have much to regret, in relation to the manner in

which our forebears treated indigenous people; possibly far more than we can ever know. Many of us have cause to regret our own actions. As the recent report of the Human Rights and Equal Opportunity Commission, "Bringing them home", reminded (or taught) us, the practice of removing children of mixed ancestry from Aboriginal communities was not something confined to the distant past; it continued well into the 1960s in some parts of Australia. There must be many people, still in their 30s and 40s, who were taken from their mothers as infants.

9 One of those people, although somewhat older, is Wadjularbinna Nulyarimma, the first appellant. She recounted her story to the Court in moving and eloquent terms. She told about the rape of her mother by white men, as a result of which she was conceived, the only mixed ancestry child in a black family. She told how her mother rubbed goanna fat and charcoal into her skin to make her black; nonetheless she was taken from her family and put into a mission home where she was forbidden to speak her own language. She told us how she came to marry:

> *"I was just called in one day by the superintendent, 'we're marrying you off into a white family'. And I was absolutely shocked. 'No, I don't want to go', I said, 'I don't want to go'. 'This is the best thing for you. You are not a black person; you have white blood in you'. I came from a black woman's womb. They are my family, my people and I have some white person, superintendent, telling me that he knows what is best for me and his best for me to marry into a white family was added stress, added pain, added trauma. I had no idea. A little black girl coming from humble beginnings now going to be put into the world of snobbery. Not just an urban black; I am going to be there where people measure their worth by their wealth, their position and power, poor sick people, but I was soon to learn that."*

10 Wadjularbinna Nulyarimma had several children, but eventually left them. She told us how this came about. Her mother came to the cattle station where she lived with her husband:

> *"… my husband then said she could not stay there. 'This is not a black's camp'. She had to go. And I had to face the facts, who am I? Am I this black girl playing a game of let us pretend I am white? Well, I had better start dealing with it and just be true to myself. And up to that date in 1970, I came to terms with who I was. And it was the first time I made a choice. And I said to my mother, 'I'm going home'. She said, 'You leave your husband, now?' And I said, 'Mamma, I've made up my mind'. And I made it up. I had to decide and my children – I destroyed my children.*
>
> *In Aboriginal law you stay with the man until you part through death. And*

> *my mother looked at me with tears streaming down her face and she said, 'You break Aboriginal law, now?' I was damned if I did and I was damned if I did not. And my children's lives, I had to decide. That is what white Australia did to me. And I looked into my little children's eyes and I had to tell them. They cried and said, 'We want to stay with our daddy'. But I said, 'I'm, somebody else, with a different law, different values, different system'. And I told them, in theory, all about it, that they were brought up as white children. Now my children are trying to find their identity and trying to fit in."*

11 The other appellants also told stories that indicated the trauma still suffered by indigenous Australians as a result of their treatment by whites. It is important to us as a nation that we do not treat indigenous devastation as only a thing of the past. The trauma lives on, and many of the causes as well.

12 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. Some of the Australian destruction clearly fell into this category. A notable example is the rounding up of the remaining Tasmanian Aboriginals in the 1830s, and their removal to Flinders Island. There are more localised examples as well. Before that date in Tasmania, and both before and after that date on the Australian mainland, there were shooting parties and poisoning campaigns to "clear" local holdings of their indigenous populations. 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.

13 Of course, there was an element of intent about all the killings. A squatter who shot at Aborigines in reprisal for them spearing his cattle must be taken to have intended to kill the **individuals** at whom he shot; it cannot necessarily be presumed he intended to destroy the **group** as such, even in part.

14 In his judgment under appeal, Crispin J set out an extensive history of the dispossession of Aboriginal people from their lands following British settlement of Australia: see paras [11] to [41]. His Honour's account is not unsympathetic to the appellants' viewpoint; indeed, quite the contrary. In para [11] his Honour observed:

> *"It is undeniable that the British colonisation had gravely adverse consequences for the Aboriginal peoples of Australia. They had shared unchallenged dominion over the Australian continent for thousands of years. Then within the space of a few generations the bulk of their land was wrested from them by invaders from over the seas."*

In para [32] Crispin J said: "the wholesale destruction of Aboriginal peoples was related to an equally wholesale usurpation of their lands". He went on to point out this usurpation was contrary even to English law. Yet it is apparent from his Honour's account that this course of conduct was not the product of any sustained or official intention to destroy the Aboriginal people, but rather of circumstances and the attitudes and actions of many individuals, often in defiance of official instructions. In the case of a dispossession of land and destruction of Peoples that occurred gradually over several generations and stemmed from many causes, it is impossible to fix any particular person or institution with an intention to destroy the Aboriginal people as a whole.

15 I mention the matter of intent to destroy an ethnical or racial group because it is something that may have been overlooked by those who instituted the proceedings now before the Court. Without offering any personal comment on the matter, I can understand the view that the proposals listed in the "Ten Point Plan", and substantially enacted in the 1998 amendments to the *Native Title Act*, further disadvantaged indigenous people in relation to their traditional lands. Given the intimate connection between their traditional lands and Aboriginal and Torres Strait Islander people, and the importance of their lands to their way of life and culture, it is understandable some would see the "Ten Point Plan" and 1998 amendments as only the latest step in a process that has been going on for more than 200 years. However, if one is to use a legal term like "genocide" to describe that process, it is important to remember this entails a requirement to prove an intent to destroy a people.

16 Similarly, I note the material put before the Court by Mr Buzzacott in connection with the importance to the Arabunna people of conserving the natural qualities of the Lake Eyre region. Mr Buzzacott points out the need to retain the waterholes that have so long

sustained life in this arid region. He says mining operations have already affected the waterholes, leading to a loss of reliable water and of flora and fauna. He claims this has adversely affected the utility of the waterholes for his People and their ability to maintain their traditional way of life. If these allegations are correct – I bear in mind they have yet to be tested – the proper conservation of this area is critically important to his People. It is understandable that, in the belief this would give the area a greater measure of protection, he favours its inclusion on the World Heritage List. It is also understandable he should see the apparent decision of Senator Hill and Mr Downer not to proceed with an application for inclusion as inimical to the survival of his People. However, even assuming their decision may have that **effect**, it is another matter to say the Ministers were actuated by an **intent** to destroy the Arabunna People, in whole or in part.

17 The existence of a particular intent is a matter of fact, and the facts of the present cases have yet to be investigated. However, even if it is possible for them, in their respective cases, to demonstrate genocidal intent, neither the appellants nor Mr Buzzacott would, in my opinion, be entitled to succeed. Although I agree with both my colleagues that genocide is a crime under international customary law, like Whitlam J but unlike Merkel J, I do not think that, in the absence of appropriate legislation, it is cognisable in an Australian court.

Genocide in international law

18 I accept that the prohibition of genocide is a peremptory norm of customary international law, giving rise to a non-derogatable obligation by each nation State to the entire international community. This is an obligation independent of the *Convention on the Prevention and Punishment of the Crime of Genocide.* It existed before the commencement of that Convention in January 1951, probably at least from the time of the United Nations General Assembly resolution in December 1946. I accept, also, that 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 set out in the Convention. It is generally accepted this definition reflects the concept of genocide, as understood in customary international law.

19 It follows from the obligation to prosecute or extradite, imposed by international customary

law on Australia as a nation State, that it would be constitutionally permissible for the Commonwealth Parliament to enact legislation providing for the trial within Australia of persons accused of genocide, wherever occurring. In *Polyukhovitch v the Commonwealth* (1991) 172 CLR 501, the High Court held 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. None of the Justices thought it necessary that Australia be under an **obligation** to enact the legislation; it was enough that it **pertained to conduct** external to Australia: see per Mason CJ at 530-531, per Deane J at 599-604, per Dawson J at 632-638, per Toohey J at 652-656, per Gaudron J at 695-696, per McHugh J at 712-714. Where there **is** a positive obligation to provide a trial, pursuant to international customary law, the argument in favour of legislative validity is even more compelling. Although Brennan J dissented on other grounds in *Polyukhovitch*, he was of this opinion. At 562-563 his Honour said:

> *"… I would hold that a law which vested in an Australian court a jurisdiction recognized by international law as a universal jurisdiction is a law with respect to Australia's external affairs. Australia's international personality would be incomplete if it were unable to exercise a jurisdiction to try and to punish offenders against the law of nations whose crimes are such that their subjection to universal jurisdiction is conducive to international peace and order."*

20 However, it is one thing to say Australia has an international legal obligation to prosecute or extradite a genocide suspect found within its territory, and that the Commonwealth Parliament may legislate to ensure that obligation is fulfilled; it is another thing to say that, without legislation to that effect, such a person may be put on trial for genocide before an Australian court. If this were the position, it would lead to the curious result that an international obligation incurred pursuant to customary law has greater domestic consequences than an obligation incurred, expressly and voluntarily, by Australia signing and ratifying an international convention. Ratification of a convention does not directly affect Australian domestic law unless and until implementing legislation is enacted. This seems to be the position even where the ratification has received Parliamentary approval, as in the case of the *Genocide Convention*. In *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 286-287, Mason CJ and Deane J said:

> *"It is well established that the provisions of an international treaty to which*

> *Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute. This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power whereas the making and the alteration of the law fall within the province of Parliament, not the Executive. So, a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law."*

21 Counsel for the appellants and Mr Buzzacott point out that genocide is one of a handful of "international crimes", along with piracy, torture, slavery and - more debatably - crimes against peace, war crimes and crimes against humanity. Hannikainen *Peremptory Norms (Jus Cogens) in International Law* (1988) at 285 defines an "international crime" as "a grave offence against international law which the international community of States recognises as a crime and for the committing of which the responsible individuals can be punished under international law **even if the domestic law of a particular State does not declare it to be punishable**" (Emphasis added). In support of the latter assertion, Hannikainen cites several sources, notably Art 6(c) of the *Statute of the Nuremberg Tribunal,* Art V(I) of the *Statute of the Tokyo Tribunal* and Art 15 of the *International Covenant on Civil and Political Rights*. It is not clear to me that these sources justify the statement. The Articles in the two War Crimes Tribunal statutes merely define the jurisdiction of the particular tribunals. Article 15 of the International Covenant is concerned to prohibit retrospective criminality. Its only present relevance is sub-article 2 which reads:

> *"2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."*

22 However, even if Hannikainen's statement is correct, it is not enough to say that, **under international law**, an international crime is punishable in a domestic tribunal even in the absence of a domestic law declaring that conduct to be punishable. If genocide is to be regarded as punishable in Australia, on the basis that it is an international crime, it must be shown that **Australian law** permits that result. There being no relevant statute, that means Australian common law.

23 It is at this point that the contest between the "incorporation" approach and the

"transformation" approach becomes material. Merkel J reviews that contest in some detail. It appears the incorporation approach is now dominant in England, Canada and, perhaps, New Zealand. The Australian position is far from clear. However, in his paper *International Law as a Source of Domestic Law*, published in Opeskin, *International Law and Australian Federalism* (1997), after reviewing the relevant High Court decisions, Sir Anthony Mason said at 218 "… the difficulties associated with the incorporation theory and proof of customary international law suggest that, in Australia, the transformation theory holds sway". Statements made in *Chow Hung Ching v The King* (1949) 77 CLR 449, which have been criticised by commentators but not disavowed by the High Court, seem to justify that conclusion.

24 However, at least in the present context, the debate is somewhat academic. In his contribution to Opeskin entitled *The Relationship Between International Law and Domestic Law*, at 40-47 Professor Ivan Shearer outlined what he called "the English Legacy". In the course of that outline, he referred to *R v Keyn* (1876) 2 ExD 63 and noted the distinction drawn by Cockburn CJ between recognition by a domestic court of the existence of an international rule and giving effect to it by creation of "a jurisdiction beyond and unknown to the law", which was something reserved for the legislature. Shearer thought the distinction was between "self-executing" and "non-self-executing" rules. At 51 he said:

> *"It may be argued that the issue of the status of customary international law in Australian law is not as great as might be thought in practical, if not in theoretical, terms. So far as 'clearly established' rules of international law are concerned, at least in respect of those that are directed towards individuals and are, in the sense explained above, self-executing, these are already regarded as embedded in the common law, such as the immunity of foreign armed forces, or have been incorporated by statute. The subject matter that brought the issue to a head in England, State immunity, while for a time governed by customary international law regarded as incorporated in domestic common law, is now governed by the* Foreign States Immunities Act *1985 (Cth)."* (Citations omitted)

25 I think this passage brings home the point that it is difficult to make a general statement covering all the diverse rules of international customary law. It is one thing, it seems to me, for courts of a particular country to be prepared to treat a civil law rule like the doctrine of foreign sovereign immunity as part of its domestic law, whether because it is accepted by those courts as being "incorporated" in that law or because it has been "transformed" by judicial act. It is another thing to say that a norm of international law criminalising conduct

that is not made punishable by the domestic law entitles a domestic court to try and punish an offender against that law.

26 Perhaps this is only another way of saying that domestic courts face a policy issue in deciding whether to recognise and enforce a rule of international law. If there is a policy issue, I have no doubt it should be resolved in a criminal case by declining, in the absence of legislation, to enforce the international norm. As Shearer pointed out at 42, in the realm of criminal law "the strong presumption *nullum crimen sine lege* (there is no crime unless expressly created by law) applies." In the case of serious criminal conduct, ground rules are needed. Which courts are to have jurisdiction to try the accused person? What procedures will govern the trial? What punishment may be imposed? These matters need to be resolved before a person is put on trial for an offence as horrendous as genocide.

27 I am unable to point to much authority for my conclusion. However, the comment of Brennan J in *Polyukhovic* at 565 is significant, even though it was made in a somewhat different context. The comment is quoted by Merkel J. Brennan J rejected the notion that municipal law might redefine an international crime and observed: "Rather, what is left to municipal law is the adoption of international law as the governing law of what is an international crime". On the following page, Brennan J said:

> *"… when municipal law adopts the international law definition of a crime as the municipal law definition of the crime, the jurisdiction exercised in applying the municipal law is recognized as an appropriate means of exercising universal jurisdiction under international law."*

28 Plainly, his Honour had in mind adoption by legislation. If there is any doubt about that matter, it is resolved by the fact that he followed with a quotation from Brownlie, *Principles of Public International Law* (4th ed, 1990) at 561:

> *"Since the latter half of the nineteenth century it has been generally recognized that there are acts or omissions for which international law imposes criminal responsibility on individuals and for which punishment may be imposed, either by properly empowered international tribunals or by national courts and military tribunals. These tribunals exercise an international jurisdiction by reason of the law applied and the constitution of the tribunal, or, in the case of national courts, by reason of the law applied and the nature of jurisdiction (the exercise of which is justified by international law)."*

29 Although it is but a straw in the wind, *Pinochet* (*Regina v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet* (No.3)[1999] 2 WLR 827) suggests the same conclusion. This is not because of anything said by their Lordships or even anything argued; but rather because of what was not argued. Usually, a non-argument would have no significance; but this was a most exceptional case. The appeal was twice argued in the House of Lords, and those supporting the extradition of Pinochet to Spain were represented by leading international lawyers. On the view that prevailed (that the issue of double criminality must be addressed as at the date of the conduct, not the date of the extradition application), extradition on all charges would have been secured if counsel had been able to demonstrate that Pinochet would have been punishable in the United Kingdom before the commencement of the 1988 United Kingdom statute adopting and implementing the Torture Convention. Yet, although torture is an international crime, nobody suggested Pinochet would have been triable in the United Kingdom before that date by reason of the incorporation into United Kingdom law of the international customary law about torture. The only explanation of this omission can be that those arguing for extradition accepted that torture was not a triable offence in the United Kingdom until implementing legislation was enacted.

30 I acknowledge that, despite the absence of argument on the point, Lord Millett took a different view. However, I share Whitlam J's difficulty in accepting his Lordship's conclusions. In particular I agree with Whitlam J that the decision of the Supreme Court of Israel in *Attorney-General of Israel v Eichmann* (1962) ILR 277 furnishes no support for the view that torture would have been punishable in the United Kingdom, pursuant to international customary law, before September 1988. Eichmann was charged under an Israeli statute. It was contended before the District Court that the terms of the Israeli statute were inconsistent with the principles of international customary law concerning genocide. In a passage in its reasons approved by the Supreme Court at 280, the District Court responded: "The Court has to give effect to the law of the Knesset, and we cannot entertain the contention that this law conflicts with the principles of international law". On my reading of the case, the District Court did only give effect to the law of the Knesset, the Israeli Parliament.

31 In his analysis of *Eichmann*, Merkel J emphasises a sentence in the judgment of the Supreme

Court "The jurisdiction was automatically vested in the State of Israel on its establishment in 1948 as a sovereign State". However, that sentence must be read with its successor: "Accordingly, in bringing the appellant to trial, it has functioned as an organ of international law and has acted to enforce the provision of that law through its own laws". I do not think the Supreme Court was saying that it was unnecessary for the State of Israel to enact legislation providing for the trial and punishment of offenders against international crimes; but rather that, immediately on its establishment as a nation State in 1948, Israel had the right (and perhaps the duty) of taking appropriate action to bring such offenders to trial. The action actually taken was the enactment of a special statute, and the Court did not suggest this was either inappropriate or unnecessary.

Disposition of the proceedings

32 It follows from what I have said that I am of the opinion that Mr Thompson was correct in refusing to issue the warrants sought by the appellants. In the absence of enabling legislation, the offence of genocide is not cognisable in the courts of the Australian Capital Territory. It is unnecessary for me to express views about the other obstacles in the appellants' path, as identified and discussed by both Crispin J and Merkel J. I agree with my colleagues that the appeal in proceeding A5 of 1999 ought to be dismissed.

33 The assumption underlying the other proceeding, S23 of 1999, appears to be that, if genocide is a criminal offence known to Australian law, civil remedies are available. This assumption is highly questionable but it is unnecessary to reach a final view about it; if I am correct in concluding that genocide is not presently cognisable in Australia, it must follow the genocide claim in that proceeding cannot succeed. That is so, even leaving aside the other problems mentioned by Merkel J.

34 In relation to the other causes of action in proceeding s23 of 1999, I agree with Merkel J. Merkel J tentatively suggests it **may** be possible to frame a claim of breach of fiduciary duty owed by the Crown to Aboriginal people, having regard to the claimed effects of mining on the Arabunna people. That would be a claim independent of the *World Heritage Convention* and the concept of genocide. I offer no view as to whether such a claim may effectively be made. I only say it would be a very different claim from that now before this

Court. Any such claim should be formulated in a new proceeding. I agree with Whitlam and Merkel JJ that this proceeding, also, ought to be dismissed.

I certify that the preceding thirty-four (34) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Wilcox.

Associate:

Dated: 1 September 1999

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
AUSTRALIAN CAPITAL TERRITORY DISTRICT REGISTRY **A 5 OF 1999**

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Third Respondent

JUDGES: **WILCOX,WHITLAM and MERKEL JJ**

DATE: **1 SEPTEMBER 1999**

PLACE: **SYDNEY**

REASONS FOR JUDGMENT

WHITLAM J:

35 The background to the two matters before the Court is set out in the reasons for judgment of Merkel J, which I have had the advantage of reading in draft. The question said to be common to both proceedings is whether genocide forms part of the law of Australia.

36 It is accepted by all parties that under customary international law there is an international crime of genocide, which has acquired the status of *jus cogens* or a peremptory norm. This means that States may exercise universal jurisdiction over such a crime. Counsel for the appellants submit, therefore, that courts in all countries have jurisdiction over genocide. They rely, in support of their contention, on the opinion of Lord Millett in *Reg v Bow Street Magistrate, Ex p. Pinochet (No. 3)* [1999] 2 WLR 827 at 912.

37 *Pinochet (No.3)* was concerned with Spain's attempt to extradite the former Chilean head of state from the United Kingdom to stand trial in Spain on several charges of torture committed (primarily in Chile) between 1972 and 1990. The House of Lords had to decide whether the crimes alleged were extradition crimes. Lord Browne-Wilkinson described the legal principles "in play" in that case as follows (at 832-833):

> *"In general, a state only exercises criminal jurisdiction over offences which occur within its geographical boundaries. If a person who is alleged to have committed a crime in Spain is found in the United Kingdom, Spain can apply to the United Kingdom to extradite him to Spain. The power to extradite from the United Kingdom for an "extradition crime" is now contained in the Extradition Act 1989. That Act defines what constitutes an "extradition crime". For the purposes of the present case, the most important requirement is that the conduct complained of must constitute a crime under the law both of Spain and of the United Kingdom. This is known as the double criminality rule.*
>
> *Since the Nazi atrocities and the Nuremberg trials, international law has recognised a number of offences as being international crimes. Individual states have taken jurisdiction to try some international crimes even in cases where such crimes were not committed within the geographical boundaries of such states. The most important of such international crimes for present purposes is torture which is regulated by the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 . . . The obligations placed on the United Kingdom by that Convention (and on the other 110 or more signatory states who have adopted the Convention) were incorporated into the law of the United Kingdom by section 134 of the Criminal Justice Act 1988. That Act came into force on 29 September 1988. Section 134 created a new crime under United Kingdom law, the crime of torture. As required by the Torture Convention "all" torture wherever committed worldwide was made criminal under United Kingdom law and triable in the United Kingdom. No one has suggested that before section 134 came into effect torture committed outside the United Kingdom was a crime under United Kingdom law. Nor is it suggested that section 134 was retrospective so as to make torture committed outside the United Kingdom before 29 September 1988 a United Kingdom crime. Since torture outside the United Kingdom was not a crime under U.K. law until 29 September 1988, the principle of double criminality which*

> *requires an Act to be a crime under both the law of Spain and of the United Kingdom cannot be satisfied in relation to conduct before that date if the principle of double criminality requires the conduct to be criminal under United Kingdom law* ***at the date it was committed****. If, on the other hand, the double criminality rule only requires the conduct to be criminal under U.K. law* ***at the date of extradition*** *the rule was satisfied in relation to all torture alleged against Senator Pinochet whether it took place before or after 1988. The Spanish courts have held that they have jurisdiction over all the crimes alleged.*
>
> *In these circumstances, the first question that has to be answered is whether or not the definition of an "extradition crime" in the Act of 1989 requires the conduct to be criminal under U.K. law at the date of commission or only at the date of extradition."*

The Appeal Committee of the House held that the definition of an "extradition crime" in the *Extradition Act 1989* (UK) required the conduct to be criminal under United Kingdom law at the date of commission.

38 Notwithstanding that no one had suggested to their Lordships that before s 134 of the *Criminal Justice Act 1988* (UK) came into effect, torture committed outside the United Kingdom was a crime under United Kingdom law, Lord Millett held that by 1973 English courts already possessed extraterritorial jurisdiction in respect of the crimes charged against Senator Pinochet and did not require the authority of statute to exercise it.

39 The second question in *Pinochet (No 3)* involved state immunity. Lord Millett observed (at 907-908):

> *"Whether conduct contrary to the peremptory norms of international law attracted state immunity from the jurisdiction of national courts, however, was largely academic in 1946, since the criminal jurisdiction of such courts was generally restricted to offences committed within the territory of the forum state or elsewhere by the nationals of that state."*

40 After then discussing subsequent developments in the principles of international law, his Lordship referred to what he described as "the landmark decision" of the Supreme Court of Israel in *Attorney-General of Israel v Eichmann* (1962) 36 ILR 5. He said (at 909-911):

> *"The court dealt separately with the questions of jurisdiction and act of state. Israel was not a belligerent in the Second World War, which ended three years before the state was founded. Nor were the offences committed within its territory. The District Court found support for its jurisdiction in the historic link between the state of Israel and the Jewish people. The*

Supreme Court preferred to concentrate on the international and universal character of the crimes of which the accused had been convicted, not least because some of them were directed against non-Jewish groups (Poles, Slovenes, Czechs and gipsies).

As a matter of domestic Israeli law, the jurisdiction of the court was derived from an Act of 1950. Following the English doctrine of parliamentary supremacy, the court held that it was bound to give effect to a law of the Knesset even if it conflicted with the principles of international law. But it went on to hold that the law did not conflict with any principle of international law. Following a detailed examination of the authorities, . . . it concluded that there was no rule of international law which prohibited a state from trying a foreign national for an act committed outside its borders. There seems no reason to doubt this conclusion. The limiting factor that prevents the exercise of extraterritorial criminal jurisdiction from amounting to an unwarranted interference with the internal affairs of another state is that, for the trial to be fully effective, the accused must be present in the forum state.

Significantly, however, the court also held that the scale and international character of the atrocities of which the accused had been convicted fully justified the application of the doctrine of universal jurisdiction. It approved the general consensus of jurists that war crimes attracted ***universal jurisdiction****. See, for example,* Greenspan's Modern Law of Land Warfare *(1959), p. 420 [scil. p 503], where he writes:*

> *"Since each sovereign power stands in the position of a guardian of international law, and is equally interested in upholding it, any state has the legal right to try war crimes, even though the crimes have been committed against the nationals of another power and in a conflict to which that state is not a party."*

This seems to have been an independent source of jurisdiction derived from customary international law, which formed part of the unwritten law of Israel, and which did not depend on the statute. . . .

. . .

The case is authority for three propositions. (1) There is no rule of international law which prohibits a state from exercising extraterritorial criminal jurisdiction in respect of crimes committed by foreign nationals abroad. (2) War crimes and atrocities of the scale and international character of the Holocaust are crimes of universal jurisdiction under customary international law. (3) The fact that the accused committed the crimes in question in the course of his official duties as a responsible officer of the state and in the exercise of his authority as an organ of the state is no bar to the exercise of the jurisdiction of a national court.

The case was followed in the United States in Demjanjuk v Petrovsky *(1985) 603 F.Supp. 1468; affirmed 776 F.2d 571. In the context of an extradition request by the State of Israel the court accepted Israel's right to*

try a person charged with murder in the concentration camps of Eastern Europe. It held that the crimes were crimes of universal jurisdiction, observing: "International law provides that certain offences may be punished by any state because the offenders are enemies of all mankind and all nations have an equal interest in their apprehension and punishment." . . . " (Emphasis supplied.)

41 Lord Millett next referred to provisions in instruments and to terms of resolutions relating to the human rights regime of the United Nations. He continued (at 911-912):

"The trend was clear. War crimes had been replaced by crimes against humanity. The way in which a state treated its own citizens within its own borders had become a matter of legitimate concern to the international community. The most serious crimes against humanity were genocide and torture. Large scale and systematic use of torture and murder by state authorities for political ends had come to be regarded as an attack upon the international order. Genocide was made an international crime by the Genocide Convention in 1948. By the time Senator Pinochet seized power, the international community had renounced the use of torture as an instrument of state policy. The Republic of Chile accepts that by 1973 the use of torture by state authorities was prohibited by international law, and that the prohibition had the character of jus cogens or obligation erga omnes. But it insists that this does not confer universal jurisdiction or affect the immunity of a former head of state ratione materiae from the jurisdiction of foreign national courts.

In my opinion, crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe a jus cogens. Secondly they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order.

. . .

. . .

Every state has jurisdiction under customary international law to exercise extraterritorial jurisdiction in respect of international crimes which satisfy the relevant criteria. Whether its courts have extraterritorial jurisdiction under its internal domestic law depends, of course, on its constitutional arrangements and the relationship between customary international law and the jurisdiction of its criminal courts. ***The jurisdiction of the English criminal courts is usually statutory, but it is supplemented by the common law. Customary international law is part of the common law, and accordingly I consider that the English courts have and always have had extraterritorial criminal jurisdiction in respect of crimes of universal jurisdiction under customary international law.***

. . .

> *In my opinion, the systematic use of torture on a large scale and as an instrument of state policy had joined piracy, war crimes and crimes against peace as an international crime of universal jurisdiction well before 1984. I consider that it had done so by 1973. For my own part, therefore, I would hold that* ***the courts of this country already possessed extraterritorial jurisdiction in respect of torture and conspiracy to torture on the scale of the charges in the present case and did not require the authority of statute to exercise it.*** *I understand, however, that your Lordships take a different view, and consider that statutory authority is required before our courts can exercise extraterritorial criminal jurisdiction even in respect of crimes of universal jurisdiction. Such authority was conferred for the first time by section 134 of the Criminal Justice Act 1988, but the section was not retrospective. I shall accordingly proceed to consider the case on the footing that Senator Pinochet cannot be extradited for any acts of torture committed prior to the coming into force of the section."* (Emphasis supplied.)

42 I am unable to read the judgment of the Supreme Court of Israel as suggesting that the doctrine of universal jurisdiction was to be regarded as an "independent source of jurisdiction" for the trial in *Eichmann.* The offences in that case were laid under an Israeli statute, the *Nazi and Nazi Collaborators (Punishment) Law* 1950. The Supreme Court said that, in enacting that Law, the parliament of Israel (the Knesset) only sought to set out the principles of international law and embody its aims. The court relied (at 287) on two propositions:

> *"(1) The crimes created by the Law and of which the appellant was convicted must be deemed today as having always borne the stamp of international crimes, banned by the law of nations and entailing individual criminal responsibility.*
>
> *(2) It is the peculiarly universal character of these crimes that vests in every state the authority to try and punish anyone who participated in their commission."*

43 The court dealt extensively (at 298-304) with the second proposition under the heading "Universal Jurisdiction". The excerpt from Professor Greenspan's work, which is set out in Lord Millett's speech, was cited by the court (at 301) as a view in support of another expert's opinion that even a neutral country has jurisdiction to try a person for a war crime. The court concluded (at 304):

> *"The State of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant."*

44 The Supreme Court of Israel plainly meant that the enactment of the Law in 1950 by the Knesset was a justified exercise of the principle of universal jurisdiction. It was, after all, the offences under that Law that the State of Israel prosecuted.

45 I turn now to the American cases cited by Lord Millett. In *Re Demanjuk* 603 F Supp 1468 (ND Ohio 1985) the court ruled that it had jurisdiction to conduct a hearing to determine whether the respondent was extraditable to Israel. The court expressly did not find that the respondent was charged with war crimes or genocide. Battisti CJ did not refer in his reasons for ruling to *Eichmann*.

46 *Demanjuk v Petrovsky* 776 F2d 571 (6th Cir 1985) was an appeal from the denial of a petition for a writ of habeas corpus. The appellant/petitioner was the respondent in the other case just mentioned. It appears from this report that Battisti CJ had subsequently certified for extradition. No appeal was available from that order. The only method of review was by collateral habeas corpus proceedings. The petition for habeas corpus was denied by Battisti CJ: 612 F Supp 571.

47 The Court of Appeals affirmed that order. The appellant was charged under Israel's *Nazi and Nazi Collaborators (Punishment) Law 1950* with having "murdered tens of thousands of Jews and non-Jews" in Poland. The United States extradition statute required that the crime for which extradition is sought be one provided for by treaty between the requesting state and the United States. The court held that the offence of "murder" in the extradition treaty with Israel included the crimes charged against the appellant and that the requirement of double criminality was met.

48 The United States statute also required that the extradition crime be committed "within the jurisdiction of [the] foreign government". The court said (at 580):

> *"The question is whether the murder of Jews in a Nazi extermination camp in Poland during the 1939-1945 war can be considered, for purposes of extradition, crimes within the jurisdiction of the State of Israel."*

The court noted (at 581) the decision in *Eichmann,* referred (at 582) to the definition of "universal jurisdiction" in the *Restatement of the Law* and, importantly, observed (at 582) that Israel was seeking to enforce "***its*** *criminal law*" (emphasis added). The court held (at 583)

that the State of Israel had jurisdiction to punish for war crimes and crimes against humanity committed outside of its geographic boundaries.

49 In my opinion, *Eichmann* and the two American cases provide no support for the suggestion that universal jurisdiction provides, by itself, a source of jurisdiction for municipal courts to try international crimes. The doctrine of universal jurisdiction was discussed by Brennan J and Toohey J in *Polyukhovich v Commonwealth* (1991) 172 CLR 501. Brennan J pointed out (at 563) that a municipal law may provide for the exercise of a universal jurisdiction recognized by international law, and said (at 576) that "a statutory vesting of the jurisdiction would be essential to its exercise by an Australian court". Toohey J commenced a more extensive discussion of universal jurisdiction by analysing "principles of jurisdiction which provide Australia with authority to prosecute" crimes existing in international law. His Honour explained universal jurisdiction, making use of the writing of academics (the references to which I shall omit), in the following passage (at 658-659):

> *"The term "jurisdiction" has different meanings in international and municipal law. In international law it is used in various ways but it may be taken to refer to "a state's general legal competence and is an aspect of state sovereignty": . . . Relevantly, it "refers to a state's legitimate assertion of authority to affect legal interests": . . . The term has legislative, adjudicatory and enforcement dimensions: . . . We are here concerned with Australia's authority to make criminal laws applicable to certain persons, events or things with the aim of dealing with an international law crime. We are concerned, therefore, not only with Australia's legislative power in constitutional law, but also with Australia's enforcement and adjudicatory authority in international law because the Commonwealth relies on that authority to support its legislative power."*

50 Toohey J identified the universality principle as one of the bases upon which a state may exert authority over an individual in international law. He continued (at 659):

> *"[It] permits jurisdiction to be exercised over a limited category of offences on the basis that the offender is in the custody of the prosecuting state. The jurisdiction is based on the notion that certain acts are so universally condemned that, regardless of the situs of the offence and the nationality of the offender or the victim, each state has jurisdiction to deal with perpetrators of those acts."*

51 *Polyukhovich* is often referred to as the War Crimes Act Case, and the High Court was there concerned with the question whether an amendment to that Act was beyond the

Commowealth's legislative power under the Constitution. Nonetheless, Brennan J's statement is quite explicit, and Toohey J proceeds on the assumption that any prosecution of an individual for an international crime in a municipal court will take place under a municipal law.

52 This brings me to the last passages that I have highlighted in Lord Millett's speech. Even if it be accepted that customary international law is part of the common law, no one has identified a rule of customary international law to this effect: that courts in common law countries have jurisdiction in respect of those international crimes over which States may exercise universal jurisdiction. That is hardly surprising. Universal jurisdiction conferred by the principles of international law is a component of sovereignty (*Polyukhovich* per Toohey J at 661), and the way in which sovereignty is exercised will depend on each common law country's peculiar constitutional arrangements.

53 In England and in Australia crimes are distinguished into common law and statutory crimes, according to whether the legal source of, and the authority for, the statement that particular conduct is criminal is found in common law or statute. In this context the phrase "common law" means law created by the decisions of judges, and I find it odd to speak, as his Lordship does, of the "usually statutory" jurisdiction of the English criminal courts being "supplemented by the common law". Courts are no longer able to create new criminal offences: *Knuller (Publishing, Printing and Promotions) Ltd v Director of Public Prosecutions* [1973] AC 435. Nonetheless, counsel for the appellants submit that the status of genocide as *jus cogens* compels recognition of genocide as part of the common law of Australia. This submission strikes formidable statutory obstacles.

54 Section 1.1. of the *Criminal Code (*Cth) provides:

> *"1.1 The only offences against laws of the Commonwealth are those offences created by, or under the authority of, this Code or any other Act."*

This provision came into operation on 1 January 1997 and abolished common law offences under Commonwealth law. Since that date genocide cannot be recognised as a common law offence under Commonwealth law.

55 This leaves for consideration the law of the Australian Capital Territory. Section 26 of the

Magistrates Court Act 1930 (ACT) ("the Act") provides for the laying of informations in respect of "an indictable offence or an offence which may be dealt with summarily as provided in section 19". The receipt of such an information is a necessary condition precedent to the grant by the registrar of the Magistrates Court of a summons or warrant under s 12(1) of the Act. The registrar's refusal to issue process under s 12(1) was the subject of the application for an order *nisi* dismissed by Crispin J.

56 Since the statute law of the ACT makes no express provision for an offence of genocide, s 19 of the Act has no application. The phrase "indictable offence" is unhelpfully defined by s 5(1) of the Act as "an offence which may be prosecuted before the Supreme Court by charge or indictment". However, s 477(1) of the *Crimes Act 1900* (ACT), which permits the summary disposal of certain cases, acknowledges that "a common law offence" under the law of the ACT is an indictable offence. Thus the threshold question on the application for the order *nisi* was: is genocide such a common law offence?

57 It may be doubted that there are any common law offences under the law of the ACT that did not exist as part of the law of New South Wales continued in force after 1 January 1911 by virtue of s 6 of the *Seat of Government Acceptance Act 1909* (Cth). The emergence after the Second World War of the international crime of genocide no doubt imposes non-derogable obligations on Australia under the law of nations. The exercise of universal jurisdiction to prosecute such an offence is a matter for the Commonwealth, yet Parliament has expressly abolished common law offences under Commonwealth law. The courts of the States and the Territories can have no authority for themselves to proscribe conduct as criminal under the common law simply because it has now become recognised as an international crime with the status of *jus cogens* under customary international law. In any event, common law offences are anathema in the so-called Griffith Code jurisdictions: Queensland, Western Australia, Tasmania and the Northern Territory. It would be absurd if the common law countenanced the selective exercise by municipal courts of a universal jurisdiction under international law.

58 It follows that, in my opinion, genocide is not an offence in respect of which an information may be laid under the Act, and the registrar had no authority to issue the process requested. I would accordingly dismiss the appeal from Crispin J.

59 If, however, I am wrong and genocide is an offence in the ACT, then the appeal must nonetheless be dismissed for the reasons given by Merkel J. So far as the other matter before the Court is concerned, I agree with his Honour and with the order he proposes.

I certify that the preceding twenty-five (25) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Whitlam.

Associate:

Dated: 1 September 1999

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

AUSTRALIAN CAPITAL TERRITORY DISTRICT REGISTRY — **A 5 OF 1999 AND S 23 OF 1999**

BETWEEN: **WADJULARBINNA NULYARIMMA AND OTHERS**
Appellant

AND: **PHILLIP THOMPSON**
Respondent

AND BETWEEN: **KEVIN BUZZACOTT**
Applicant

AND: **ROBERT HILL,**
MINISTER FOR THE ENVIRONMENT
First Respondent

HON ALEXANDER DOWNER,
MINISTER FOR FOREIGN AFFAIRS
Second Respondent

COMMONWEALTH OF AUSTRALIA
Third Respondent

JUDGES: **WILCOX, WHITLAM AND MERKEL JJ**

DATE: **1 SEPTEMBER 1999**

PLACE: **MELBOURNE**

REASONS FOR JUDGMENT

MERKEL J:

Introduction

60 There are two matters before the Full Court. Each matter involves a claim by Aboriginal persons that conduct engaged in by certain Ministers of the Commonwealth or Commonwealth parliamentarians is contributing to the destruction of the Aboriginal people as an ethnic or racial group.

61 The first matter (*Re Thompson*) involves claims that the extinguishment of native title constitutes the crime of genocide. The second matter (*Buzzacott v Hill*) involves claims that the failure of the Commonwealth, and certain of its Ministers, to proceed with World Heritage listing of the lands of the Arabunna people is an act of genocide, a breach of fiduciary duty and is otherwise unlawful.

62 In each matter the applicants are seeking to remedy wrongs of the past committed against the Aboriginal people. In some instances litigants, even where assisted or represented by legal advisers, have unrealisable expectations of the capacity of the law to remedy past wrongs. However, the Court's role is to hear and determine, in accordance with law, controversies arising between parties. It is not within the Court's power, nor is its function or role, to set right all of the wrongs of the past or to chart a just political and social course for the future.

63 I have no hesitation in recognising the dispossession and alienation of the Aboriginal people from their land in Australia. The decision of the High Court in *Mabo v Queensland [No 2]* (1992) 175 CLR 1 was a belated recognition by the common law of Australia of the rights and interests held by Aboriginal people in respect of the land they had occupied and used in accordance with their culture, traditions and laws prior to the acquisition of British sovereignty over Australia. As a consequence of that decision, and the *Native Title Act 1993* (Cth) ("the NT Act"), which was passed to give effect to it, some Aboriginal people in Australia are entitled to have their traditional native title recognised and given effect to under Australian law.

64 However, neither of the two matters before the Full Court rely upon a claim to native title under the NT Act or under the common law. Rather, in each matter the applicants seek to rely upon entirely separate and discrete entitlements allegedly arising under the general law. Thus, whether the entitlements claimed exist, or can be recognised depends upon principles of Australian law applicable to all persons within Australia, whether they are Aboriginal persons or not. The applicants seek to resort to those principles, and those principles alone, in pursuing their claims. The role of the Court is to adjudicate upon those claims in accordance with law. In doing so the Court is to determine, in accordance with its judicial function, what the law is rather than what the law should be. The latter function is that of the legislature.

65 I agree with the observation of Kirby J in *Thorpe v Commonwealth [No 3]* (1997) 71 ALJR 767 at 775 that

> *"The law which has often been an instrument of injustice to Aboriginal Australians can also, in proper cases, be an instrument of justice in the vindication of their legal rights."*

66 However, a court can only give effect to or vindicate "legal rights" in accordance with law in a matter properly before it. As was said by Brennan J in *Re Citizen Limbo* (1989) 92 ALR 81 at 82-83:

> *"…when one comes to a court of law it is necessary always to ensure that lofty aspirations are not mistaken for the rules of law which courts are capable and fitted to enforce. It is essential that there be no mistake between the functions that are performed by the respective branches of government. It is essential to understand that courts perform one function and the political branches of government perform another. …it would be a mistake for one branch of government to assume the functions of another in the hope that thereby what is perceived to be an injustice can be corrected. Unless one observes the separation of powers and unless the courts are restricted to the application of the domestic law of this country, there would be a state of confusion and chaos which would be antipathetic not only to the aspirations of peace but to the aspirations of the enforcement of any human rights."*

The proceedings

Re Thompson

67 The appellants, or their representatives, attended at the Magistrates Court of the Australian Capital Territory on 6 July 1998 and requested that the Registrar issue warrants for the arrest of John Winston Howard (the Prime Minister), Timothy Andrew Fischer (the Deputy Prime Minister), Brian Harradine (a Senator) and Pauline Lee Hanson (a member of the House of Representatives). The appellants' warrants of arrest were sought in respect of informations which contained charges that those persons, acting in their respective capacities, in formulating or supporting the Commonwealth government's "Ten Point plan" and the *Native Title Amendment Bill 1997* (Cth), had committed the criminal offence of genocide.

68 The Registrar declined to issue the warrants on the ground that the offence of genocide was not known to the law of the Australian Capital Territory. The appellants applied to the Supreme Court of the Australian Capital Territory for an order nisi requiring the Registrar

to show cause why an order should not be made requiring him to issue the warrants and the informations.

69 The application was heard by Crispin J in the Supreme Court of the Australian Capital Territory: see *Re Thompson; Ex parte Nulyarimma* (1998) 136 ACTR 9. His Honour (at 30) concluded that "no offence of genocide is known to the domestic law of Australia" and, as a consequence, the Registrar's decision was not capable of being impugned. Accordingly, Crispin J stated that he would dismiss the application on that ground. However, in deference to the other arguments put to him Crispin J also considered whether, assuming genocide was an offence under Australian law, the application would fail in any event on the basis that the contemplated prosecutions would be doomed to failure. His Honour stated that it would not be an appropriate exercise of his discretion to make an order nisi absolute if the facts relied upon were not capable of supporting the charge the appellants wished to bring. Crispin J concluded that there was nothing in the extensive material placed before him "to suggest that there is an arguable case" in relation to the appellants' allegations of genocide.

70 Accordingly, the application to review the Registrar's decision was dismissed. The appellants have appealed from the judgment of Crispin J to a Full Court of the Federal Court.

71 The material before the Full Court included the extensive material relied upon by the appellants before Crispin J. In addition, without objection from any of the parties, a number of the individual appellants addressed the Court on their personal experiences in order to explain, and enable the Court to better appreciate the basis for their contentions that the conduct, about which they were complaining, constituted genocide.

Buzzacott v Hill

72 The appeal from Crispin J in *Re Thompson* was heard together with a motion to strike out another proceeding in the Court which sought, inter alia, to found a civil cause of action on the basis of genocide, breach of fiduciary duty and other allegedly unlawful conduct. That proceeding was commenced by Kevin Buzzacott ("the applicant") against Senator Robert Hill (in his capacity as the Commonwealth Minister for the Environment), Alexander Downer (in his capacity as Commonwealth Minister for Foreign Affairs), and the Commonwealth of Australia ("the respondents").

73 The applicant commenced the proceeding "in a representative capacity for all the Arabunna people". He claimed that the failure of the respondents to apply for World Heritage listing for the lands of the Arabunna people (which included Lake Eyre in South Australia) constituted, under international and Australian law, unlawful conduct including genocide which gave rise to an entitlement in the applicant, representing the Arabunna people, to mandatory injunctions compelling the respondents to "forthwith proceed with the World Heritage Listing of the Arabunna lands". Damages were also claimed.

74 The respondents moved the Court to dismiss or permanently stay the proceeding on the grounds that it did not disclose a reasonable cause of action, was frivolous and vexatious and constituted an abuse of the process of the Court. The motion, which was referred to and came on for hearing before another Full Court, was adjourned by that Court to be dealt with by this Full Court when hearing the appeal in *Re Thompson*.

Genocide

75 Senior and junior counsel, appearing *pro bono* for the appellants in *Re Thompson*, and also for the applicant, put the same argument on genocide in each proceeding. In *Re Thompson*, before Crispin J, a number of different grounds were relied upon by the appellants to contend that genocide was a criminal offence under Australian law. However, before the Full Court the appellants relied only upon one ground. That ground can be summarised as follows:

- the prohibition against genocide is a customary norm of international law;
- Australian municipal law incorporates customary norms of international law without the need for legislation;
- the universal crime of genocide, as a customary norm of international law, has been incorporated into the common law of Australia.

76 Thus, so it was contended on behalf of the appellants, the universal crime of genocide being incorporated as part of the common law of Australia can give rise to criminal liability for acts of genocide (wherever committed) which can be tried in any superior court of record in Australia. Counsel for the appellants made it quite clear that their submissions were founded on customary international law and not conventional international law which is the law of treaties cf *Dietrich v The Queen* (1992) 177 CLR 292.

77 Counsel appearing for the respondents contended that customary international law and, in particular, the universal crime of genocide under customary international law can only form part of the law of Australia if legislation by an Australian Parliament enacts the law. To date, no such enactment has occurred. Accordingly, so it is contended, the offence of genocide is not known in Australian law and cannot give rise to any criminal or civil liability in an Australian court. Counsel also submitted that the material in both cases does not raise an arguable claim of genocide in any event. Counsel appearing for the Registrar in *Re Thompson* contended that whether or not genocide was part of Australian law (about which the Registrar put no submission) the appeal must fail as the material before the Registrar was such that he was bound in law to refuse to issue the warrants.

78 Although the parties were in dispute over the status of the prohibition against genocide under Australian law they were in agreement, correctly in my view, on its status as a universal crime under international law. In that regard, it was common ground that genocide, as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ("the Genocide Convention") has been recognised, since at least 1948, as a crime under customary international law over which nation States may exercise universal jurisdiction.

79 Articles II, III and IV of the Genocide Convention, which define conduct constituting the offence of genocide and associated offences, provide as follows:

> *"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."*

80 It is to be noted that the definition includes not only the destruction of a national, ethnical, racial or religious group through mass killings but also through a co-ordinated plan of different actions aiming at the destruction of essential foundations of the life of the group with the aim of its annihilation: see Lemkin: Genocide 'Crime under International Law' (1947) 41 *American Journal of International Law* 145 at 147.

81 It was also common ground between the parties, correctly in my view, that:

- the prohibition of genocide is a peremptory norm of customary international law (*jus cogens*) giving rise to non derogable obligations *erga omnes* that is, enforcement obligations owed by each nation State to the international community as a whole: see M Cherif Bassiouni "International Crimes: Jus Cogens and Obligatio Erga Omnes", *Law and Contemporary Problems* Vol 59: No 4 (1996) 63 at 68, Lee A Steven "Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of Its International Obligations", *Viriginia Journal of International Law* Vol 39 (1999) 425 at 437-439 and Brownlie *Principles of Public International Law*, 4th ed 1990 at 512-515;
- although Australia ratified the Genocide Convention, and that ratification was approved by the Commonwealth Parliament by the enactment of the *Genocide Convention Act 1949* (Cth), neither the ratification or its legislative approval as such, had the effect of incorporating the Genocide Convention as part of Australia's municipal law: see *Dietrich* at 305, 359-360, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287-288, 298 and 315-316 and *Kruger v Commonwealth* (1997) 190 CLR 1 at 70-71, 87 and 159.

82 The area of dispute between counsel for the respective parties related to whether the crime of genocide, which attracts universal jurisdiction under international law, can become part of Australian law without a legislative act creating genocide as an offence. That issue involves consideration of the circumstances in which customary international civil and criminal law can become part of the municipal law of Australia.

Incorporation or transformation?

(a) England

83 The two schools of thought as to the manner in which rules of international customary law can become part of English law were explained by Lord Denning M.R. in *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 Q.B. 529 at 553-554 as follows:

> *"One school of thought holds to the doctrine to incorporation. It says that the rules of international law are incorporated into English law automatically and considered to be part of English law unless they are in conflict with an Act of Parliament. The other school of thought holds to the doctrine of transformation . It says that the rules of international law are not to be considered as part of English law except in so far as they have been already adopted and made part of our law by the decisions of the judges, or by Act of Parliament, or long established custom. The difference is vital when you are faced with a change in the rules of international law. Under the doctrine of incorporation, when the rules of international law change, our English law changes with them. But, under the doctrine of transformation the English law does not change. It is bound by precedent. It is bound down to those rules of international law which have been accepted and adopted in the past. It cannot develop as international aw develops.*
>
> *(i) The doctrine of incorporation. The doctrine of incorporation goes back to 1737 in Buvot v. Barbuit (1736) 3 Burr. 1481; 4 Burr. 2016; sub nom. Barbuit's case in Chancery (1737) Forr. 280, in which Lord Talbot L.C. (who was highly esteemed) made a declaration which was taken down by young William Murray (who was of counsel in the case) and adopted by him in 1764 when he was Lord Mansfield C.J. in Triquet v. Bath (1764) 3 Burr. 1478:*
>
> *'Lord Talbot declared a clear opinion – 'That the law of nations in its full extent was part of the law of England,…that the law of nations was to be collected from the practice of different nations and the authority of writers.' Accordingly, he argued and determined from such instances, and the authorities of Grotius, Barbeyrac, Binkershoek, Wiquefort etc., there being no English writer of eminence on the subject.'*
>
> *That doctrine was accepted, not only by Lord Mansfield himself, but also by Sir William Blackstone, and other great names, too numerous to mention. In 1853 Lord Lyndhurst in the House of Lords, with the concurrence of all his colleagues there, declared that…'the law of nations, according to the decision of our greatest judges, is part of the law of England': see Sir George Cornewall Lewis's book, Lewis on Foreign Jurisdiction (1859), pp. 66-67.*
>
> *(ii) The doctrine of transformation. The doctrine of transformation only goes back to 1876 in the judgment of Cockburn C.J. in Reg. v. Keyn (1876) 2 Ex.D. 63, 202-203:*
>
> *'For writers on international law, however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have received the assent of the nations who are to be bound by it… Nor, in my opinion, would the clearest proof of*

> *unanimous assent on the part of other nations be sufficient to authorise the tribunals of this country to apply, without an Act of Parliament, what would practically amount to a new law. In so doing, we should be unjustifiably usurping the province of the legislature.'*
>
> *To this I may add the saying of Lord Atkin in Chung Chi Cheung v. The King [1939] A.C. 160, 167-168:*
>
> *'So far, at any rate, as the courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law.'"*

84 The *incorporation* approach treats customary international law, upon its proof as such and without more, as part of the common law of England. The transformation theory requires a further step; a rule of international law only becomes a part of English law when it is accepted and adopted by judicial decision as such ("common law adoption") or by legislation ("legislative adoption"). The point of practical distinction between the *incorporation* and *common law adoption* approaches is that under the latter approach the rule of international law is adopted upon a court determining that the rule is not inconsistent with existing legislation, the common law, or public policy and that it is therefore appropriate that it should form part of the common law of England. An additional question arises to whether international criminal law can only become part of municipal law by legislative adoption.

85 Counsel for the appellants and Mr Buzzacott contend that, either by incorporation or common law adoption the prohibition of genocide has become, or ought now to be received as, part of the common law of Australia. Counsel for the respondents contend that it is only by legislative adoption, which has not yet occurred, that the crime of genocide can be considered part of the law of Australia. In order to resolve the competing contentions it is necessary to consider the origin and application of each of the approaches relied upon by the parties.

86 The *incorporation* approach was explained in Blackstone's *Commentaries* ((1809) 4 *Bl.Comm.*66-67):

> *"The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world….This general law is founded on this principle, that different nations ought in time of peace to do one another all the good they can; and, in time of war, as little harm as possible, without prejudice to their own real interests. And, as none of these states will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest; but such rules must necessarily result from those principles of natural justice, in which all*

> *the learned of every nation agree; or they depend upon mutual compacts or treaties between the respective communities; in the construction of which there is also no judge to resort to, but the law of nature and reason, being the only one in which all the contracting parties are equally conversant, and to which they are equally subject. In arbitrary states this law, wherever it contradicts or is not provided for by the municipal law of the country, is enforced by the royal power; but since in England no royal power can introduce a new law, or suspect the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land."*

87 Similarly, in 1805 Lord Eldon, in *Dolder v Huntingfield* (1805) 11 Ves 283, stated that where a question is not concluded by a rule of English law, and is one to which international law applies, the Courts must apply the principles of international law. In *Novello v Toogood* (1823) 1 B & C 554 Abbott CJ observed that the law of nations must be deemed a part of the common law. In *De Wutz v Hendricks* (1824) 2 Bing 314 Best CJ referred to international law being "adopted into" the municipal law of every civilised country.

88 The *incorporation* approach held sway during the 18th and for a large part of the 19th century. It was summarised by Sir William Holdsworth in "The Relation of English Law to International Law" Goodhart et al *Essays on Law and History by William Holdsworth*, 1946 260 at 261 as follows:

> *"….if a statute or a rule of the common law conflicted with a rule of international law, an English judge must decide in accordance with the statute or the rule of the common law. But, if English law was silent, it was the opinion of both Lord Mansfield and Blackstone that a settled rule of international law must be considered to be part of English law, and enforced as such."*

89 The question of the relation of English law to international law was the subject of detailed consideration in the Court of Crown Cases Reserved in *R v Keyn* (1876) 2 Ex. Div. 63. The accused, a German national, was the Captain of the ship *Franconia*. He negligently ran down another vessel, the *Strathclyde* and, as a result of the collision a passenger on the latter vessel was killed. His act, according to English law, amounted to manslaughter. The question before the Court was whether an English Court had jurisdiction to try him. Since the collision occurred within the three mile limit of England, that question depended upon whether the English Courts would recognise the rule of international law that the sea within that limit was part of the territory to which it was adjacent.

90 The minority (Lord Coleridge, Brett and Amphlett JJA, Grove, Benman and Lindley JJ) held that, since international law recognised the three mile limit and that law was a part of the law of England, the court had jurisdiction. Lord Coleridge (at 153-154), adopting the Blackstone approach, accepted the well established proposition of international law that a state has dominion over its territorial waters:

> *"Law implies a law-giver, and a tribunal capable of enforcing it and coercing its transgressors. But there is no common law-giver to sovereign states; and no tribunal has power to bind them by decrees or coerce them if they transgress. The law of nations is that collection of usages which civilized states have agreed to observe in their dealings with one another. What these usages are, whether a particular one has or has not been agreed to, must be matter of evidence. Treaties and acts of States are but evidence of the agreement of nations, and do not in this country at least per se bind the tribunals. Neither, certainly, does a consensus of jurists; but it is evidence of the agreement of nations on international points; and on such points, when they arise, the English courts give effect, as part of English law, to such agreement."*

91 However, the majority (Cockburn CJ, Kelly CB, Bramwell JA, Lush and Field JJ and Sir R Phillimore and Pollock B) held that the only international law which could be considered part of English law were those parts which could be proved to have been received into English law: see for example at 161 per Cockburn CJ. That reception, it was held, could be effected by statute incorporating a rule of international law or proved by "the assent" of the nations who are bound by international law to the particular rule. Cockburn CJ (at 202-203), delivering the leading judgment of the majority, said:

> *"To be binding, the law must have received the assent of the nations who are to be bound by it. This assent may be express as by treaty, or the acknowledged concurrence of governments, or may be implied from established usage, – an instance of which is to be found in the fact that merchant vessels on the high seas are held to be subject only to the law of the nation under whose flag they sail, while in the ports of a foreign state they are subject to the local law as well as to that of their own country. In the absence of proof of assent, as derived from one or other of these sources, no unanimity on the part of theoretical writers would warrant the judicial application of the law on the sole authority of their views and statements. Nor, in my opinion, would the clearest proof of unanimous assent on the part of other nations be sufficient to authorize the tribunals of this country to apply, without an Act of Parliament, what would practically amount of a new law. In so doing we should be unjustifiably usurping the province of the legislature."*

92 Lush J (at 238-239), who agreed in the main with Cockburn CJ, observed that only an Act of

Parliament, rather than international law applying beyond the low-water mark, could "enlarge the area of our municipal law."

93 Whilst some of the observations of Cockburn CJ and Lush J suggest an Act of Parliament is required before rules of international law can be incorporated into municipal law, later authority is to the effect that the basic difference between the majority and the minority judgments in *Keyn* concerned whether the law relating to the territorial sea had evolved to a stage where it could be received as part of the common law of England. If it had not then it could only be incorporated into English law by statute. Mason J (at 465-466) in the *Seas and Submerged Lands Act* case, after referring to the judgment of Viscount Haldane LC delivered on behalf of the Board in *Attorney-General (Canada) [1914] AC at 174-175* said:

> *"… Viscount Haldane made it equally plain that the rule of international law was dynamic and that the solution which it might ultimately provide to the issue debated in Keyn's Case would turn on the future evolution of international law."*

94 Viscount Haldane had referred to the "obscurity" in the judgement of Cockburn CJ in *Keyn* on the topic of the relation between international law and municipal law.

95 Holdsworth (at 265-266) said of the majority view in *Keyn.*

> *"In other words, it is not true to say that all the rules of international law, as and when they are evolved by the jurists, become part of English law; but only those parts which, by legislation, judicial decision, or established practice, have been received into English law."*

96 The majority view indicated that international law was not so much a part, as a source, of English law, rather than the older view that it is *per se* part of the law of England: see JL Brierley "International Law in England" (1935) 51 *Law Quarterly Review* 31 and Holdsworth at 267.

97 The majority view in *Keyn* prevailed in the United Kingdom. In *West Rand Central Gold Mining Co Ltd v Rex* [1905] 2 KB 391 Lord Alverstone CJ (at 407), delivering the judgment of the court, said that not only must the international law sought to be applied be proved by satisfactory evidence, but it must also be shown:

> *"…that the particular proposition put forward has been recognised and acted upon by our own country or that it is of such an age and has been so widely*

> *and generally accepted, that it can hardly be supposed that any civilised state would repudiate it. The mere opinion of jurists, however eminent or learned that it ought to be so recognised, are not in themselves sufficient."*

98 Holdsworth (at 270-271) observed that *Keyn* established a further condition that:

> *"…the rule of international law must not conflict with a rule of English law. If it conflicts with a rule of English law no effect can be given to it. In Regina v. Keyn Cockburn C.J. held, in effect, that, by the rules of English law, the English courts had no jurisdiction over the offences of foreigners (not being part of the crew of a British ship) committed by them on the high seas; that English law had never recognized that the English State had a general dominion over territorial waters; that, except for special purposes defined by statute, it held such territorial waters to be part of the high seas; and that therefore to assert a criminal jurisdiction over a foreigner in the case before the court would amount to changing the law of England. Even if all other nations could be proved to have assented to this jurisdiction, such assent would not 'be sufficient to authorize the tribunals of this country to apply, without an Act of Parliament, what would practically amount to a new law….The assent of nations is doubtless sufficient to give the power of parliamentary legislation in a matter otherwise within the sphere of international law; but it would be powerless to confer without such legislation a jurisdiction beyond and unknown to the law, such as that now insisted on, a jurisdiction over foreigners in foreign ships on a portion of the high seas.'"*

99 The majority view in *Keyn* that the territory of the realm in England did not extend beyond the low water mark into territorial waters was accepted in *New South Wales v Commonwealth* (1975) 135 CLR 337 ("the *Seas and Submerged Lands case*") at 368, 378, 465-466; 468-469; 486-487, 490-491. In that case the High Court held by a majority, in reliance on *Keyn* that the territorial boundaries of the Australian colonies prior to Federation in 1901 did not extend beyond the low water mark.

100 In *Chung Chi Cheung v The King* [1939] AC 160 an issue arose as to the immunities the domestic courts would afford an accused in relation to a crime committed on a public ship in foreign waters. Lord Atkin (at 167-168), delivering the judgment of the Judicial Committee of the Privy Council, observed that the immunities did not depend upon "an objective extraterritoriality, but on implication of the domestic law". In concluding that under international law the immunities in question were able to be waived by the nation to which the public ship belonged his Lordship said:

> *"It must be always remembered that, so far, at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no*

> *external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rules is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals."*

101 The fact that *Chung Chi Cheung* and *Keyn* were concerned with the application of customary international law to a criminal prosecution did not give rise to a different approach or principle.

102 In *Trendtex Trading* the question was whether sovereign immunity extended to commercial transactions. Previously the principle under international law, which had been accepted as the law of England, was that it did. However, international law had developed over time to deny sovereign immunity for commercial transactions. The court had to determine whether it would recognise the change in international law or was bound by *stare decisis* to apply the previous rule of law until it was changed by the House of Lords. Lord Denning (at 554), in adopting the *incorporation* approach, said:

> *"Seeing that the rules of international law have changed – and do change – and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law. It follows, too, that a decision of this court – as to what was the ruling of international law 50 or 60 years ago – is not binding on this court today. International law knows no rule of stare decisis. If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change – and apply the change in our English law – without waiting for the House of Lords to do it."*

103 Shaw LJ (at 577) agreed, saying:

> *"…what is to be adopted into English law and applied in the English courts is the current principle in regard of which 'nations have agreed that it should be so by the law of nations'."*

104 Shaw LJ said that the role of English courts is to ascertain what the prevailing international rule is and apply that rule. His Lordship (at 579) expressed his conclusion as follows:

> *"What is immutable is the principle of English law that the law of nations (not what was the law of nations) must be applied in the courts of England. The rule of stare decisis operates to preclude a court from overriding a decision which binds it in regard to a particular rule of (international) law, it does not prevent a court from applying a rule which did not exist when the earlier*

> *decision was made if the new rule has had the effect in international law of extinguishing the old rule. The judgment in The Parlement Belge, 5 P.D. 197 cannot be a binding authority as to what form the doctrine of sovereign immunity would take a century after the judgment was delivered. As Brett L.J. said, at p 205: 'it depends upon whether all nations have agreed'. When they have agreed to a different effect the old rule loses its validity. It is supplanted in international law (and therefore also in English law of which it forms a part) by the new rule which derives its force from, and only from, that agreement of which Brett L.J. spoke.'*
>
> *This view would appear to be in accord with the dictum of Lord Mansfield C.J. in Heathfield v. Chilton, 4 Burr. 2016, that 'the law of nations will be carried as far in England as anywhere.' So also Lord Lyndhurst in 1853, 'The law of nations according to the decisions of our greatest judges is part of the law of England.' This is hardly consonant with the idea that what was the law of nations persists as part of English law when it has ceased to be part of international law."*

105 Stephenson LJ (at 568-572) disagreed, observing that the differences between the *incorporation* and *transformation* doctrines may be thought to be "more apparent then real". His Lordship's dissent arose more from his view that the change in international law which the majority accepted, was far from clear. Stephenson LJ observed that rules of international law:

> *"[w]hether they be part of our law or a source of our law, must be in some sense 'proved'"*

106 As his Lordship was not satisfied that the established principles of absolute immunity had been displaced by a new rule, he concluded that the Court was bound by previous decisions to hold that absolute sovereign immunity was a rule of international law until the House of Lords or the legislature declared otherwise.

107 *Trendtex Trading* has since been accepted as authority for the proposition that, under international law and therefore English law, no immunity from suit can be claimed for a government in respect of ordinary commercial transactions as distinct from acts of a governmental nature: see *I Congreso del Partido* [1983] AC 244 at 261-262 per Lord Wilberforce and *Alcom Ltd v Republic of Colombia* [1984] AC 580 at 598-599 per Lord Diplock.

108 However, whether *Trendtex Trading* has been accepted as re-instating the Blackstone *incorporation* approach is less clear. Since *Trendtex Trading* there has been some reference in decisions of the courts to that approach but there has been little consideration of how it is

to be applied: see for example *Westland Ltd v Arab Organisation for Industrialisation* [1995] QB 282 at 310 and *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] 3 WLR 969 at 1113-1114 per Lord Oliver.

109 In my view, the conflict between the two so-called schools of thought may, as was said by Stephenson LJ, be more apparent than real. See also FA Mann *Foreign Affairs in English Courts* 1986 at 124. As was observed by Sir Anthony Mason in "International Law as a Source of Domestic Law" Opeskin et al *International Law and Australian Federalism* 1997 210 at 215, it seems surprising that the doctrine of precedent was seen as so significant in *Trendtex Trading*. Once a rule of international law is accepted as part of the law of England there would be no great difficulty in recognising, and therefore accepting, a change in that rule provided that the change was established by evidence and was not inconsistent with legislation, the common law or public policy. On that view, the same result in *Trendtex Trading* could have been reached by applying the principles established in *Keyn* and accepted in *Chung Chi Cheung*.

110 The role of international law was considered in the recent *Pinochet* extradition case: see *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet (No 3)* [1999] 3 WLR 827. That case involved a determination of the validity of an extradition request by a Spanish Court of Senator Pinochet for alleged crimes committed during his period in office in Chile from 1973 to 1990. Pursuant to the *Extradition Act 1989* (UK) the acts for which Pinochet was accused, were required to be a crime in both Spain (the requesting state) and the United Kingdom. One of the primary issues that arose was whether the definition of an "extradition crime" required the alleged conduct to be criminal under United Kingdom law at the *date of its commission*, or at the *date of the extradition request*. The issue was significant as extra-territorial torture only became a statutory offence in England upon the enactment of the *Criminal Justice Act 1988* (UK). Thus, the outcome of the issue had the potential to severely limit the number of crimes for which Pinochet could be extradited.

111 In the result, the House of Lords held that in order for a crime (in this case, torture committed extraterritorially) to be extraditable under the Act, it had to have been a crime in both the requesting State and the United Kingdom at the time the offence was committed. As extraterritorial torture had only been made an offence in 1988 by the enactment of the *Criminal Justice Act 1988*, the extraditable offences were limited to those committed after 29

September 1988. Accordingly, the alleged offences of torture and conspiracy to torture prior to that date were held not to be extraditable offences as they were not crimes in the United Kingdom at the time they were committed.

112 Although it was accepted that torture was a universal crime under international law prior to the enactment of the *Criminal Justice Act 1988* (UK) (see *Pinochet* at 841-842 per Lord Browne-Wilkinson, at 881 per Lord Hope, at 897-898 per Lord Hutton and at 910 –912 per Lord Millett) the decision in *Pinochet* that extraterritorial torture was not a crime in England prior to its enactment as a crime in 1988 appears to afford strong support for the legislative adoption approach contended for by the respondents.

113 One would have expected that whether the universal crime of torture (wherever committed) under international law was part of the law of England prior to the creation of the statutory offence, as from 29 September 1988 under the *Criminal Justice Act 1988* (UK), was critical to determining whether extraterritorial torture committed prior to 29 September 1988 was an extraditable offence. However, surprisingly, in *Pinochet* it was not suggested by any party that before s 134 of the *Criminal Justice Act 1988* came into effect torture committed outside England was an offence under English law: see *Pinochet* at 833 per Lord Browne-Wilkinson.

114 It was in that context that only Lord Millett considered whether extraterritorial torture was incorporated as part of the law of the United Kingdom prior to that date. Lord Millett (at 911-912) expressed his conclusion on that issue as follows:

> *"In my opinion, crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe a jus cogens. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order. Isolated offences, even if committed by public officials, would not satisfy these criteria. The first criterion is well attested in the authorities and textbooks: for a recent example, see the judgment of the international tribunal for the territory of the former Yugoslavia in Prosecutor v Furundzija (unreported), 10 December 1998, where the court stated, at para 156:*
> *'at the individual level, that is, of criminal liability, it would seem that one of the consequences of the jus cogens character bestowed by the international community upon the prohibition of torture is that every state is entitled investigate, prosecute, and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction.'*
> *The second requirement is implicit in the original restriction to war crimes and crimes against peace, the reasoning of the court in the Eichmann case*

> *and the definitions used in the more recent conventions establishing ad hoc international tribunals for the former Yugoslavia and Rwanda.*
>
> *Every state has jurisdiction under customary international law to exercise extraterritorial jurisdiction in respect of international crimes which satisfy the relevant criteria. Whether its courts have extraterritorial jurisdiction under its internal domestic law depends, of course, on its constitutional arrangements and the relationship between customary international law and jurisdiction of its criminal courts. The jurisdiction of the English criminal courts is usually statutory, but it is supplemented by the common law. Customary international law is part of the common law, and accordingly I consider that the English courts have and always have had extraterritorial criminal jurisdiction in respect of crimes of universal jurisdiction under customary international law."*

115 *Trendtex Trading* was considered by Lord Phillips but only in the context of state immunity from civil suit. On the question of universal jurisdiction, contrary to the view of Lord Millett, Lord Phillips (at 923-924) said:

> *"I believe that it is still an open question whether international law recognises universal jurisdiction in respect of international crimes – that is the right, under international law, of the courts of any state to prosecute for such crimes wherever they occur. In relation to war crimes such a jurisdiction has been asserted by the State of Israel, notably in the prosecution of Adolf Eichmann, but this assertion of jurisdiction does not reflect any general state practice in relation to international crimes. Rather, states have tended to agree or to attempt to agree, on the creation of international tribunals to try international crimes. They have however, on occasion, agreed by conventions, that their national courts should enjoy jurisdiction to prosecute for a particular category of international crime wherever occurring."*

116 As *Pinochet's* case itself demonstrates, the issue of the adoption of universal crimes as part of the domestic law of Nation states is not a moot point. In Australia, as a result of the double criminality rule in extradition (see s 19(2)(c) of the *Extradition Act 1988* (Cth)) the issue in *Pinochet* could well arise in respect of universal crimes, including genocide if the crime does not directly involve conduct that is an extraditable offence of *Demjanjuk v Petrovsky* 776 F.2d 571 (1985) at [14, 15].

117 Under the current state of the English authorities, as a result of *Trendtex Trading*, the *incorporation* approach seems to be the preferred view but it is an open question as to whether that will be the view which prevails if and when the issue arises for decision in the House of Lords: see *I Congreso del Partido* at 261-262 per Lord Wilberforce.

(b) Canada and New Zealand

118 The precise relationship between customary international law and municipal law in Canada has been described as "ambivalent" (see Cohen, Bayefsky "The Canadian Charter of Rights and Freedoms and Public International Law" (1983) 61 *Canadian Bar Review* 265 at 277). However it appears that the prevailing view, in reliance upon Lord Atkin in *Chung Chi Cheung*, is that customary international law is invoked as part of the domestic law of Canada by "adoption" that is, without the requirement of transformation by legislation except where it conflicts with statutory law or the common law: see *Reference Re Power of Municipalities to Levy Rates on Foreign Legations and High Commissioners' Residences* [1943] SCR 208 ("the Foreign Legations Case") at 214, 230-231 per Duff CJ and at 232-233 per Rinfret J; *Reference Re Exemptions of US Forces from Canadian Criminal Law* [1943] 4 DLR 11 at 41 per Taschereau J.

119 The clearest exposition of the adoption of Lord Atkin's view was by Taschereau J in the *US Forces Exemptions* case. His Honour (at 41), after referring to *Chung Chi Cheung* and its adoption in the Supreme Court by Duff CJ in the *Foreign Legations* case, said:

> *"I have come to the conclusion that there exists such a body of rules adopted by the nations of the world. These rules have been accepted by the highest Courts of the United States, and some of them, applicable to the present case, have also been accepted by the Judicial Committee. I have to acknowledge their existence, and treat them as incorporated in our domestic law, following the directions given in the Cheung case. And I see nothing in the laws of the land inconsistent with their application within our territory."*

120 See also Boyefsky, "International Human Rights Law in Canadian Courts" Cotler et al *International Human Rights Law Theory and Practice* 1992 115 at 117-119.

121 A similar approach seems to have been taken in New Zealand although without consideration of the basis on which customary international law forms part of the domestic law of New Zealand: see *Marine Steel Ltd v Government of the Marshall Islands* [1981] 2 NZLR 1; *Governor of Pitcairn and Associated Islands v Sutton* [1995] 1 NZLR 426 per Richardson J at 436 and Butler & Butler, "The Judicial Use of International Human Rights Law in New Zealand" (1999) 29 *Victoria University of Wellington Law Review* 173 at 177.

122 The difficulty with attempting to gain assistance from the manner in which customary international law forms part of the municipal law of other nations is that the position is usually governed by a number of factors including the nation's particular constitutional

framework which may differ from that applicable in Australia. For example see Shearer, "The Relationship between International Law and Domestic Law" in Opeskin et al 34 at 38-40.

(c) Australia

123 Although the High Court has on occasions accepted that customary international law forms part of the Australian law (see for example *Potter v Broken Hill Pty Co Ltd* (1906) 3 CLR 479 at 495 per Griffith CJ, 506-507 per Barton J and 510 per O'Connor J) the issue of the relation between customary international law and Australian law appears to have first arisen in the High Court in *Polites v Commonwealth* (1945) 70 CLR 60. In that case, the Court held that regulations having the effect of conscripting aliens were valid, notwithstanding customary international law forbidding such conscription save in limited circumstances, as the Australian Parliament had evinced a legislative intention to give the executive an unqualified discretion to call up aliens. That conclusion meant it was unnecessary for the court to consider the relation between international customary law and Australian law. However, Williams J (at 80-81), referring to *Chung Chi Cheung*, observed that when customary international law

> *"…has been established to the satisfaction of the courts [it] is recognised and acted upon as part of English municipal law so far as it is not inconsistent with the rules enacted by statutes or finally declared by the courts…"*

124 The role of international customary law was again before the High Court in *Chow Hung Ching v The King* (1949) 77 CLR 449. The issue before the Court was whether civilians accompanying a Chinese Army team who were convicted of assault and other offences in the then Australian Trust Territory of Papua New Guinea, had immunity from the jurisdiction of the court under customary international law on the ground that they were members of a visiting armed force and thus not subject to the local criminal jurisdiction. The court held that as the accused were not members of the military force of the Republic of China they did not have immunity from the jurisdiction of the Supreme Court of the Territories that might have been possessed by a member of that force.

125 Latham CJ (at 462) summarised the common law's recognition of customary international law as follows:

> *"International law is not as such part of the law of Australia (Chung Chi Cheung v The King, and see Polites v The Commonwealth), but a universally*

> *recognized principle of international law would be applied by our courts: West Rand Central Gold Mining Co. v. The King."*

126 Starke J (at 470-471) cited with approval, and applied, the observations of Lord Atkin in *Chung Chi Cheung* as did McTiernan J (at 487). Dixon J (at 477) considered the issue at some length observing:

> *"It is a mistake to treat the question of the extent of the immunity as one depending upon the recognition by Great Britain of a rule of international law. In the first place the theory of Blackstone (Commentaries (1809), vol. 4, p. 67) that 'the law of nations (whenever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land' is now regarded as without foundation. The true view, it is held, is 'that international law is not a part, but is one of the sources, of English law' (Article by Prof. J.L. Brierly on International Law in England, (1935), 51 Law Quarterly Review, p. 31). 'In each case in which the question arises in the court must consider whether the particular rule of international law has been received into, and so become a source of, English law' (Sir William Holdsworth, Relation of English Law to International Law: Essays in Law and History, p. 267)."*

127 Dixon J then examined whether the rule of immunity had been "received into" the Australian common law and found that notwithstanding there being "little authority" on the question, the immunity of foreign armed forces had been "held to be part of our municipal law". Since *Chow Hung Ching* there have been observations by members of the High Court on the relation of customary international law and municipal law but there has been no decision directly in point. For example in *Bonser v La Macchia* (1969) 122 CLR 177 at 214 Windeyer J said:

> *"…the present case must be decided by the law of Australia, not by recourse to doctrines of international law, except so far as they have been taken into and become part of the law of the land."*

128 Similar observations were made in the *Seas and Submerged Lands case* by Jacobs J at 496 and by Gibbs J at 407. On the other hand Murphy J at 500-502 and in *Raptis & Son v South Australia* (1977) 138 CLR 346 at 394-395 appeared to support Blackstone's *incorporation* approach.

129 The domestic role of international law was considered by Sir Anthony Mason in "International Law as a Source of Domestic Law" in Opeskin et al at 210. Mason made a number of observations about the conceptual difficulties involved in the *incorporation* and *transformation* theories, observing that Australia has not clearly adopted either approach. He considered the different interpretations of Lord Atkin's statement in *Chung Chi Cheung*

and observed that the primary concern of Lord Atkin (in *Chung Chi Cheung*), Cockburn CJ (in *Keyn*) and Lord Alverstone CJ (in *West Rand Central Gold Mining Co*) seemed to be with the question of evidence; that is, proof of the existence of the rule of international law. See also Brownlie *Principles of International Public International Law* 4th ed at 45-46. Mason, after considering the initial trend in Australia to adopt the *incorporation* theory (see *Wright v Cantrell* (1944) 44 SR (NSW) 45 at 47 per Jordan CJ, Maxwell and Roper JJ concurring) discussed the "sway" more recently to the *transformation* approach, based upon Dixon J in *Chow Hung Ching*. Mason (at 215) said:

> *"Dixon J's 'source' view, however, is not without ambiguity. As Sawer points out, difficulties arise in determining the meaning of the word 'source' in this approach:*
> *In one sense, a statute or authoritative decision is but a 'source' of law; clearly, however, Holdsworth, Brierley and Dixon J must have used the word in another sense, or there would be no point in their contradicting Blackstone. If, however, international law is only a possible historical or persuasive source for a rule…then there must exist a judicial discretion in the Australian (and English) Courts to ignore international law rules not so far 'received' on some ground of their inconsistency with general policies of our law, or lack of logical congruence with its principles."*

Conclusion

130 Cardozo J, in the Supreme Court of the United States in *New Jersey v Delaware* 291 U.S. 361, 383 (1934), said:

> *"International law, or the law that governs between states, has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the imprimatur of a court attests its jural quality."*

131 It is plain from a survey of the case law in England, Canada, New Zealand and Australia that the courts have had considerable difficulty in formulating the principles to be applied in determining when a court is to give its imprimatur to the "jural quality" of a rule of international law or put another way, whether a rule of customary international law has become part of domestic law. However, it appears that in Australia at least, Dixon J's "source" view, which equates generally with what I have loosely described as the common law adoption approach, holds sway over the *incorporation* or legislative adoption approaches.

132 The more difficult task is to define with some precision what is meant by the "source" view or the common law adoption approach. In my view, the approach can be formulated as

follows:

1. A recognised prerequisite of the adoption in municipal law of customary international law is that the doctrine of public international law has attained the position of general acceptance by or assent of the community of nations "as a rule of international conduct, evidenced by international treaties and conventions, authoritative textbooks, practice and judicial decisions.": see *Compania Naviera Vascongado v SS Cristina* [1938] AC 485 at 497 per Lord Macmillan. Once a rule has been established as having the general acceptance of nation States in the manner stated by Lord Macmillan it will have satisfied the "assent" or "acceptance" of nations criteria of Cockburn CJ in *Keyn* and Lord Atkin in *Chung Chi Cheung* and will be given "the force of law within the realm": see Lord Macmillan at 497.

2. The rule must not only be established to be one which has general acceptance but the court must also consider whether the rule is to be treated as having been adopted or "received into, and so become a source of English law": see Holdsworth at 268 and *Chow Hung Ching* at 477 per Dixon J.

3. A rule will be adopted or received into, and so a source of, domestic law if it is "not inconsistent with rules enacted by statutes or finally declared by [the courts]": *Chung Chi Cheung* (at 168) per Lord Atkin. Plainly, international law cannot be received if it is inconsistent with a rule enacted by statute. However, the position is less clear with a rule that might be inconsistent with the common law. To the extent that international law is to be received into domestic law, it will have necessarily altered or modified the common law and, to that extent, might be said to be inconsistent with it. Thus, in my view a strict test of inconsistency could not have been intended. I would accept Sawer's observation that inconsistency with the common law (that is, the rules declared by the courts) means "inconsistency with the general policies of our law, or lack of logical congruence with its principles": see Sawer "Australian Constitutional Law in Relation to International Relations and International Law and Australian Law" in O'Connell *International Law in Australia* 1965 at 50 and Mason at 215.

4. A rule of customary international law is to be adopted and received unless it is determined to be inconsistent with, and therefore "conflicts" with, domestic law in the

sense explained above. In such circumstances no effect can be given to it without legislation to change the law by the enactment of the rule of customary international law as law: see *Keyn* at 202-203 per Cockburn CJ and Holdsworth at 270-271. This approach subordinates rules of customary international law to domestic law thereby avoiding a fundamental difficulty of the *incorporation* approach which, by requiring the common law to invariably change to accord with rules of international law, subordinates the common law to customary international law. In my view, to do so amounts to re-instating Blackstone's view which I regard Lord Atkin and Dixon J as having rejected.

I do not regard *Trendtex Trading* as offering a sufficient foundation for the re-instatement of Blackstone's *incorporation* view. I agree with Mason's observation (at 214-215) that in *Trendtex Trading* there would have been no great difficulty in adjusting the doctrine of precedent to meet the special case of a change in a rule of international law being received into domestic law. Thus, whilst the result in *Trendtex Trading* is not in dispute, it could equally have been arrived at by the "source" view that is, the adoption of the *current* rules of customary international law to the extent their operation is not inconsistent with municipal law. Indeed that was, in part, the approach taken by Shaw LJ in *Trendtex Trading*.

5. The rules of customary international law, once adopted or received into domestic law have the "force of law" in the sense of being treated as having modified or altered the common law. The decision of the court to adopt and receive a rule of customary international law is declaratory as to what the common law is. Upon a court so declaring the common law to be different from what it was earlier perceived to be effect will be given to the declaration "as truly representing the common law": see *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 485. A rule, once so declared, is applicable to both civil and criminal proceedings in a domestic court: see *Keyn*, *Chung Chi Cheung* and *Chow Hung Ching*.

6. As *Trendtex Trading* demonstrates international law evolves and changes from time to time. However, unlike the common law, the evolution of, and change, in international law is established by evidence and other appropriate material. Thus, it may be that in certain instances the adoption will only be as from the date the particular rule of customary law has been established.

Is legislation necessary if universal crimes are to be adopted as crimes under municipal Law?

133 The authorities to which I have referred do not suggest that the principles governing the adoption of customary international law relate only to international civil law and not to international criminal law. The issue appears to be an open question that has not yet been the subject of authoritative decision although dicta to which I later refer supports the adoption into municipal law of international criminal law in respect of universal crimes. In the first instance it is appropriate to approach that issue by considering the applicability of the above principles to genocide.

134 Even using Lord Alverstone CJ's criteria in *West Rand Central Gold Mining* (at 406-407) genocide, as a universal crime, has been "recognised and acted upon" by Australia by its ratification of the Genocide Convention and the approval of that ratification by the Commonwealth Parliament through the enactment of the *Genocide Convention Act 1949* (Cth). Further, the definition of a "political offence" in s 5 of the *Extradition Act 1988* (Cth) also gives effect to Article VII of the Genocide Convention by excluding genocide from being a political crime for the purposes of protecting a person from extradition for political crimes.

135 The universal crime of genocide also meets the additional criterion of Lord Alverstone CJ of being "so widely and generally accepted, that it can hardly be supposed that any civilised State would repudiate it". Although Lord Alverstone's observations related to proof of a rule of customary international law, when a norm such as prohibition of genocide meets his criteria, it is difficult to discern any policy reason for rejecting the adoption of that norm as part of a nation's municipal law. In that regard, Australia's executive and legislative ratification of the Genocide Convention is confirmation of Australia's acceptance that genocide is a universal crime under international law. Thus, although the ratification of the treaty does not incorporate it into Australian domestic law as such, it is nevertheless confirmation of Australia's recognition of the status of genocide as a universal crime under international law.

136 Further, as was pointed out by Lord Millett in *Pinochet* at 911-912 crimes attract universal jurisdiction where they are "so serious and on such a scale that they can justly be regarded as

an attack on the international legal order". As recent international experience in Rwanda, Bosnia, Kosovo and elsewhere has shown, universal crimes directly impact upon and attack "the international legal order" and cannot be considered purely internal matters of sovereign States.

137 The position concerning the adoption of universal crimes into municipal law was considered by Brennan J (at 565) in *Polyukhovich*:

> *"Such transgressions are universally condemned and are internationally recognized as crimes which can be tried according to international law by the courts of any nation into whose hands the offender falls. The same national competence was recognized in relation to the offence of piracy, as the Privy Council observed in In re Piracy Jure Gentium:*
> *'With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes and the trial and punishment of the criminals, are left to the municipal law of each country. But whereas according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its terra firma or territorial waters or its own ships, and to crimes by its own nationals wherever committed, it is also recognized as extending to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national, but 'hostis humani generis' and as such he is justicible by any State anywhere.'*
> *Their Lordships' statement that recognition of crimes as defined by international law is 'left to the municipal law of each country' should not be understood to mean that international law accepts whatever definition of an international crime the municipal law may contain. Rather, what is left to municipal law is the adoption of international law as the governing law of what is an international crime."*

and (at 567):

> *"However, when municipal law adopts the international law definition of a crime as the municipal law definition of the crime, the jurisdiction exercised in applying the municipal law is recognised as an appropriate means of exercising universal jurisdiction under international law. Brownlie, op.cit., p.561, states the position thus:*
> *'Since the latter half of the nineteenth century it has been generally recognized that there are acts or omissions for which international law imposes criminal responsibility on individuals and for which punishment may be imposed, either by properly empowered international tribunals or by national courts and military tribunals. These tribunals exercise an international jurisdiction by reason of the law applied and the constitution of the tribunal or, in the case of national courts, by reason of the law applied and the nature of jurisdiction (the exercise of which is justified by international law).'"*

138 Whilst Brennan J was not considering the manner in which a universal crime might be adopted into municipal law, it is plain that his Honour had no doubt as to the authority of nation States to enforce international law against any offender within its jurisdiction irrespective of where the offence was committed. In *re Piracy Jure Gentium* [1934] AC 586 at 589 *Viscount Sankey* delivering the judgment of the Privy Council, referred to the jurisdiction over pirates in England prior to the enactment of Act of Henry VIII., cap 15, in the year 1536 providing for the punishment "of pirates and robbers of the sea", and said:

> *"Before that Act, the jurisdiction over pirates was exercised by the High Court of Admiralty in England…"*

139 Thus, piracy is a long recognised example of jurisdiction vesting in a municipal court in respect of international crimes without legislation conferring the jurisdiction.

140 The issue in the present case is whether the adoption of a universal crime having the status of *jus cogens* is an *a fortiori* example of a rule of customary international law that is to be adopted as part of municipal law (provided the adoption satisfies the principles to which I have referred) *or* is the one exception to the application of those principles.

141 As explained earlier it is not in dispute that the acceptance under international law of a universal crime which has attained the status of *jus cogens* obliges a nation state to punish an offender or to extradite that offender, who is within its territory, to a state that will punish the offender. However, little consideration has been given to the processes by which the common law states fulfil or enforce that obligation. In the two main instances where the issue has arisen (*Polyukhovich* and *Eichmann*), the states in question, Australia and Israel respectively, enacted statutes providing for the punishment of universal crimes; the major issue in each case related to the validity of the statutes.

142 Thus, in *Polyukhovich* the majority accepted that the legislation to give effect to the obligations under international law in respect of a universal crime was a means of fulfilling Australia's obligations and a valid exercise of legislative power under s 51(xxix) of the Constitution. As the prosecution was for an offence under the *War Crimes Act 1945* (Cth) (as amended by the *War Crimes Amendment Act 1988*) it was unnecessary for the Court to consider whether international law in respect of universal crimes could be prosecuted in municipal courts without legislation. However, Brennan J in considering the adoption of international law into municipal law, in the context of the issue of retrospectivity, said (at

572):

> *"It is one thing to vest in a municipal court jurisdiction to administer the law of nations, albeit that that law is adopted by the municipal law. It is another thing to vest jurisdiction to administer municipal law that does not correspond with international law. The real objection to the validity of the Act is that the Act rejects international law as the governing law for the trial of persons allegedly guilty of war crimes and adopts a municipal law definition which operates retrospectively."*

143 In dealing with whether retrospectivity denied to the Act the capacity to satisfy an international obligation or to meet an international concern or to confer a universal jurisdiction recognised by international law, his Honour accepted that international law refused to countenance retrospectivity in international criminal law and in municipal law unless the crime was an offence under international law, when it was committed. Brennan J (at 576) concluded:

> *"Therefore, the question is whether the statutory offence created by s. 9 of the Act corresponds with the international law definition of international crimes existing at the relevant time. If it does, the Act vests jurisdiction to try alleged war criminals for crimes which were crimes under the applicable (international) law when they were committed; its apparent retrospectivity recognized by international law and that is sufficient to enliven the external affairs power to support the Act which vests that jurisdiction. Even if there be no international obligation or concern calling for the exercise of the universal jurisdiction, a statutory vesting of the jurisdiction would be essential to its exercise by an Australian court and that would suffice to give the support of s 51(xxix) to the law. But if the statutory offence created by s. 9 does not correspond with the international law definition of international crimes existing before 8 May 1945, the retrospective creation by Australian municipal law of the crime defined by the Act is offensive to international law. In that event, to meet an international concern or (subject to a further submission yet to be considered) to be appropriate and adapted to the vesting of a universal jurisdiction.*
>
> *This view is consistent with the view of Professor Baxter who, after the Supreme Court of Israel had affirmed Israel's jurisdiction to try and to condemn Eichmann for war crimes and other violations of international law committed before Israel came into existence, added a postscript to his Article on "The Municipal and International Law Basis of Jurisdiction over War Crimes" op, cit. The postscript appears in Bassiouni and Nanda (eds), A Treatise on International Criminal Law (1973), vol. 2, p. 65. The author wrote (at p. 83):*
>
> *"There could be no objection under international law to Israeli law's reaching out to 'a person' of whatsoever nationality to the extent that the*

> *municipal law of that country merely incorporated in its law crimes under international law subject to universal jurisdiction. It is thus necessary to examine the consistency of the crimes defined by the law of Israel with those crimes recognised by international law."*
>
> *Baxter's conclusion was that Israeli municipal law defined war crimes restrictively and not more broadly that the international law definition, but he stopped short of affirming that Israel's definition of crimes other than war crimes conformed to international law."*

144 In the above passage his Honour was concerned with the prerequisite for a valid exercise of statutory power under s 51(xxix), being that the offence created under the legislation not offend the retrospectivity principle under international law. Whether the enactment was of a universal crime or not, consistency with international law was a critical element for validity if the law was to be supported under s 51(xxix). In the course of his discussion of that issue Brennan J referred to the necessity for a "statutory vesting" of jurisdiction in an Australian court where there is no "international obligation or concern calling for the exercise of the universal jurisdiction". There can be little dispute about his Honour's observation as, although a statute validly enacted under s 51(xxix) can vest jurisdiction *under* municipal law in a municipal court in respect of a crime under international law it is only where the crime is a universal crime having the status of *jus cogens* that jurisdiction *under* international law can vest in the tribunals of nation states irrespective of where the crime is committed.

145 In common law jurisdictions, in the former instance a statutory vesting of jurisdiction in municipal courts is essential as there is no vesting of jurisdiction in those courts under international law which, as such, does not authorise extra-territorial jurisdiction in all states other than in the case of universal crimes. The reverse is the situation in respect of universal crimes where there is a vesting of extra-territorial jurisdiction *under* international law which, as such, authorises the adoption of that law by all states under their municipal law. Thus his Honour's observation, which was primarily concerned with retrospectivity in international criminal law and s 51(xxix), affords no support for the contention of the Commonwealth that a statutory vesting of jurisdiction is essential in respect of universal crimes having the status of *jus cogens*. Essentially it is the universality and *jus cogens* status of that result in the vesting of jurisdiction in all nation states. Thus, in respect of non-universal international crimes a "statutory vesting" of jurisdiction in an Australian court is the only basis upon which jurisdiction can vest.

146 Legal issues similar to those that arose in *Polyukhovich* also arose in *Attorney-General (Israel) v Eichmann* (1962) ILR 277. Eichmann was charged with crimes against humanity and war crimes "against the Jewish people" pursuant to an Israeli statute, the *Nazi* and *Nazi Collaborators (Punishment) Law 1950*. The main issue related to the validity of the municipal statute conferring jurisdiction on a court in Israel to try Eichmann. In the judgment of the District Court ((1968) 36 (International Law Reports 5)) the court considered the source of its jurisdiction to try Eichmann for war crimes and genocide of the Jewish people and concluded, inter alia, that:

- the crimes were universal crimes under the law of nations (29-30);

- the international character of the crimes in question offered "the broadest possible, though not the only, basis for Israel's jurisdiction according to the law of nations" (at 49);

- accordingly, a source of the state of Israel's right to prosecute and punish universal crimes is the vesting of that right "in every State within the family of nations" (at 50).

147 On appeal, counsel for Eichmann relied on two main grounds for contending that the Israeli statute was invalid and, as a consequence, the Court had no jurisdiction under international law. First, the statute breached customary international principles prohibiting criminal legislation with retroactive effect and secondly, the statute breached customary international principles relating to territorial sovereignty by conferring jurisdiction on Israel to punish persons for acts committed outside its territory. In that context, the Court considered whether international law prohibited the exercise of jurisdiction in a national court on either ground In the result, the Supreme Court upheld Israel's jurisdiction to prosecute crimes committed outside its territory, prior to Israel coming into existence, due to the universal nature of the crimes. The Court supported its view of the validity of the legislation on the basis of its consistency with international law and in that context considered the jurisdiction of Israel to prosecute Eichmann under international law.

148 The Court rejected Eichmann's contention that the Israeli statute conferred jurisdiction in a manner contrary to international law by examining the principles that govern the relationship between Israel municipal law and international law. In its detailed reasons the Supreme Court (at 270) stated that it fully concurred with the conclusions and reasons of the District Court. The Supreme Court (at 280) also said that the principles were identical to the

position in England concluding:

> *"The principle in question is received into municipal and becomes a part of that law only after it has acquired general international recognition. 'The municipal Court of a particular State' said Mr Justice Dunkelblum in Motion…(Shimshon Palestine Portland Cement Factors Ltd v Attorney-General… 'will recognise the principles of international law and will decide in accordance therewith only if all other civilised peoples have agreed to them, so that it is a necessary assumption that such principles have been recognised by that State. A principle of international law must therefore be established by sufficient proof to justify the conclusion…that it is recognised by majority of States and widely prevails.'*
> *(See also the judgment of Lord Alverstone in West Rand Central Gold Mining Co v Rex [1905] 2 KB 391, 406-07, and the judgment of Lord Macmillan in The Christina [1938] 1 All ER 719, 725."*

149 Eichmann contended that even if the crimes alleged against him were crimes under customary international law the same law entitled him to claim that retrospectivity and the prosecution of extra-territorial offences were not accepted under the rules of international law. The Court (at 283 and 286) concluded that as there was insufficient international consensus as to the existence of the rules of international law contended for by Eichmann, the rules could not be "deemed to be embodied in municipal law by virtue of international law" and consequently, the district court was not "enjoined to pay heed to it".

150 The Supreme Court (297-303) concluded that the nature and scale and international character of the atrocities alleged against Eichmann warranted the application of the principle of universal jurisdiction at customary international law. The Court (at 291-292) discussed the nature of universal crimes under customary international law:

> *"…it becomes essential to dwell first on the features which identify crimes that have long been recognized by customary international law…these crimes constitute acts which damage vital international interests; they impair the foundations and security of the international community; they violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilized nations. The underlying principle in international law regarding such crimes is that the individual who has committed any of them and who, when doing so, may be presumed to have fully comprehended the heinous nature of his act, must account for his conduct. It is true that international law does not prescribe explicit and scaled criminal sanctions; that there does not exist either an International Criminal Court or even international penal machinery. For the time being, however, international law surmounts these difficulties – which merely reflect its present retarded stage of development - by authorising the countries of the world to mete out punishment for the violation of its provisions, which is effected* ***by putting these provisions into operation either directly or by virtue***

> ***of municipal legislation which has adopted and integrated them.*** *" [Emphasis added]*

151 It is quite clear from the above passage, as well as the court's full concurrence with the detailed reasoning of the District Court, that it was accepting that Israeli courts had jurisdiction in respect of universal crimes under customary international law adopted as municipal common law in accordance with *West Rand Central Gold Mining* and *The Christina or* by virtue of municipal legislation. Upon the enactment of the *Nazi and Nazi Collaborators (Punishment) Law 1950* the statute, rather than the common law, applied in Israel. The court (at 279) in concluding that the 1950 law was the source of jurisdiction of the District Court in the case, said:

> *"The appellant is a 'fugitive from justice' from the point of view of the law of nations, since the crimes attributed to him are of an international character and have been condemned publicly by the civilized world (see Resolution No. 96(1) of the United Nations General Assembly of December 11, 1946, on "the Crime of Genocide") and therefore, by virtue of the principle of universal jurisdiction, every country has the right to try him.* ***The jurisdiction was automatically vested in the State of Israel on its establishment in 1948 as a sovereign State.*** *Accordingly, in bringing the appellant to trial, it has functioned as an organ of international law and has acted to enforce the provision of that law through its own laws.," [Emphasis added]*

152 Whilst the Court's decision was that the 1950 law conformed with customary international law in relation to universal crimes, it is clear that an important step in its reasoning was that the power to prosecute Eichmann vested under customary international law in the State of Israel upon its establishment and that the power, in accordance with principles that were "identical" to those applied in England, was able to be exercised "directly or by virtue of municipal legislation".

153 The Supreme Court's reasoning led Lord Millett in the *Pinochet* case to conclude that the valid exercise of jurisdiction by Israel in the Eichmann case was not solely dependent on the municipal legislation. His Lordship (at 910) observed:

> *"As a matter of domestic Israeli law, the jurisdiction of the court was derived from an Act of 1950. Following the English doctrine of parliamentary supremacy, the court held that it was bound to give effect to a law of the Knesset even if it conflicted with the principles of international law. But it went on to hold that the law did not conflict with any principle of international law. Following a detailed examination of the authorities,…it concluded that there was no rule of international law which prohibited a state from trying a foreign national for an act committed outside its borders. There seems no reason to doubt this conclusion . The limiting factor that*

> *prevents the exercise of extraterritorial criminal jurisdiction from amounting to an unwarranted interference with the internal affairs of another state is that, for the trial to be fully effective, the accused must be present in the forum state.*
>
> *Significantly, however, the court also held that the scale and international character of the atrocities of which the accused had been convicted fully justified the application of the doctrine of universal jurisdiction. It approved the general consensus of jurists that war crimes attracted* ***universal jurisdiction****. See, for example Greenspan's Modern Law of Land Warfare (1959), p. 420, where he writes:*
>
> *'Since each sovereign power stands in the position of a guardian of international law, and is equally interested in upholding it, any state has the legal right to try war crimes even though the crimes had been committed against the nationals of another power and in a conflict to which that state is not a party.'*
>
> *This seems to have been an independent source of jurisdiction derived from customary international law, which formed part of the unwritten law of Israel, and which did not depend on the statute…"*

154 It is clear that under customary international law the jurisdiction to prosecute in respect of universal crimes vests in nation states, it being a matter for the legal system of the particular state how the jurisdiction is to be exercised. The significance of *Eichmann* for present purposes is that the Court, in a carefully reasoned decision, concluded that under customary international law jurisdiction vested in Israel as a common law state directly *or* by municipal statute. The same conclusion was also arrived at by Lord Millett in *Pinochet*.

155 *Eichmann* was considered by the United States Court of Appeals, Sixth Circuit in *Demjanjuk v Petrovsky* 776 2d 571 (1985) in the context of an extradition request by the State of Israel of Demjanjuk for prosecution under the same 1950 Law. The court (at 581-582) rejected the challenge to the jurisdiction of Israel to prosecute Demjanjuk on the basis , inter alia, of the principle of universal jurisdiction saying (at 583):

> *"The underlying assumption is that the crimes are offenses against the law of nations or against humanity and that the prosecuting nation is acting for all nations. This being so, Israel or any other nation, regardless of its status in 1942 or 1943, may undertake to vindicate the interest of all nations by seeking to punish the perpetrators of such crimes."*

156 In the cases, to which I have referred, relating to universal crimes the issue of adoption of international law as part of municipal common law was not a matter directly in issue and thus only arose incidentally. It is therefore appropriate to approach the judgment in Eichmann

and the comments of Lord Millett in *Pinochet* in favour of adoption with some caution. Nevertheless, it is significant that under international law the duties in respect of universal crimes arise as non-derogable obligations of all states. Thus, save as to the question of prosecution or extradition there is no discretion as to whether to fulfil the obligation. Therefore a vesting under the common law, rather than by a discretionary exercise of legislative power, is consistent with the principles of international law.

157 The above analysis, commencing with jurisdiction in respect of piracy vesting in the Admiralty Court without legislation prior to 1536 and concluding with Lord Millett's observations in *Pinochet,* does not support the view that customary international law, whether civil or in respect of universal crimes, can only be incorporated into municipal law in common law states, like Australia, by legislation. A different situation arises in respect of international criminal law in respect of non-universal international crimes where extra-territoriality and the status of *jus cogens*, is absent.

158 Such crimes may arise under treaties or conventions which establish the offence and a legal framework for those states party to the agreements to prosecute the crimes. Examples are international conventions concerned with drug trafficking, environmental protection and the taking of civilian hostages: see Akehurst, 'Jurisdiction in International Law' *British Yearbook of International Law* Vol 46 (1972-1973) at 160 to 161; Murphy, 'Civil Liability for International Crimes' *Harvard Human Rights Journal* Vol 12 (1999) 1 at 3; *Restatement (Third), Foreign Relations Law of the United States*, (1987) para 404. As the crimes are not universal crimes under international law the offences vest jurisdiction only in those states party to the particular convention: see generally Crawford, 'The ILC adopts a Statute for an International Criminal Court' *American Journal of International Law* Vol 89 (1995) 404 at 408.

159 The reason for the requirement of legislation in such cases is, unlike the situation in respect of universal crimes, international law does not vest extra-territorial jurisdiction generally in nation states in such matters.

160 In my view there is no binding authority or persuasive jurisprudential support for the Commonwealth's submission that adoption of customary international civil law or criminal law in relation to universal crimes, as such, into Australian municipal law requires legislation

to that effect. As explained earlier, as the issue was not argued in *Pinochet* or *Polyukhovich* I do not accept that either decision is determinative in favour of accepting the respondents' contentions.

161 Accordingly, for the foregoing reasons, subject to one matter, I do not accept that different policy reasons or principles ought to apply to the adoption of customary international criminal law in relation to universal crimes into municipal law. The matter to which I refer is the policy of the common law that it is no longer the function of the courts to create a new offence. Thus, the conclusion that customary international civil and criminal law in relation to universal crimes, *can* be adopted and received into Australian domestic law without legislation does not, of itself, answer the question whether to adopt a universal crime (such as genocide) as a crime justiciable under municipal law is inconsistent with the policy of the common law or public policy.

162 The remaining issue is whether genocide is not to be received into, and so become a source of, domestic law as to do so would be inconsistent with municipal law, the policy of the common law or public policy.

163 It was not contended that the adoption was inconsistent with rules enacted by statute. However, s 1.1 of the *Criminal Code 1995* (Cth), which came into operation on 1 January 1997, might be thought to abolish common law crimes. The section provides that the only offences against "laws of the Commonwealth" are those offences created by, or under the authority of, the Code or any other Commonwealth law. However, it is plain that the reference in the Code to "laws of the Commonwealth" refers to Commonwealth statutory and common law offences and not to crimes arising under customary international law or the common law generally. As was pointed out in respect of s 1.1 in the Explanatory Memorandum to the *Criminal Code Bill* "[T] here are very few Commonwealth common law offences." The main examples given of such offences were breach of statutory command, misprison of felony, forcible entry in relation to Commonwealth property, fraud in office and refusal to serve in public office and other Commonwealth offences referred to in the Gibbs Committee Review of Australian Criminal Law July 1990. Such offences have a federal source or element arising from the offence being in relation to an officer, property, revenue or statute of the Commonwealth: see Chs 20 and 21 of the Gibbs Committee Review. A universal crime arising under customary international law, if adopted and received as part of

the common law in Australia, is received as part of the common law generally and is not received as Commonwealth common law as it does not have the requisite federal element or source. Further, if it was contended that s 1.1 operates to prevent customary international law in relation to universal crimes becoming part of the common law in Australia then the contention runs into the formidable obstacle of the rule of statutory construction that general words in a statute are to be read or construed to accord with the rules of international law: see *Polites* at 68-69, 77, 79, 81.

164 As was made quite clear by the Minister of Justice in the course of the Second Reading speech for the Code (see Hansard, House of Representatives, 1 March 1995 at MC 1331 to MC 1336) it was hoped that the Code was the beginning of the process of codifying Commonwealth criminal law and eventually the criminal law of Australia generally. The sentiments expressed in the Second Reading speech reflect a public policy of codifying the criminal law which has now occurred to a substantial extent throughout Australia. Whilst that policy can be relevant to whether a universal crime should be adopted and received as part of municipal law without legislation to that effect, it does not constitute a statutory prohibition or impediment to its adoption and receipt. Thus, the adoption and receipt of genocide into municipal law is not inconsistent with the rules enacted by statute.

165 Adoption is also not inconsistent with any of the requirements of the common law in respect of a crime. Genocide, as a crime, is clearly defined under international law, may be prosecuted in a superior court of record in any State (and probably any Territory) in Australia and would be punishable by that court in accordance with the policies and principles of the common law in relation to common law offences. I do not accept the contention on behalf of the Commonwealth that the uncertainty in that regard is such that adoption should be refused. The common law has long accepted a court's general powers of punishment in respect of common law crimes. Recent cases of criminal contempt of court are an example: see *La Trobe University v Robinson* [1972] VR 883; *Keeley v Justice Brooking* (1979) 143 CLR 162; *Gallagher v Durak* (1983) 152 CLR 238; *Hinch v Attorney-General* [1987] VR 721 and *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15. I see no reason why similarly general powers cannot be recognised by the common law in the punishment of genocide.

166 The primary contention of the Commonwealth was that the courts are no longer able to create criminal offences (see *R v Rogerson* (1991) 174 CLR 268 at 304 per McHugh J and *Reg v*

Knuller (Publishing) Ltd [1973] AC 435, 457-458, 464-465, 479, 490 and 496) and that the creation of new crimes is a matter of policy for the legislature, rather than the courts, to determine. Thus, so it is contended, the extent to which international criminal law is to be incorporated into domestic law and also whether Australia's international obligations are to be implemented domestically, is for the legislature alone to determine: see for example *Byers v Paulsen* 997 F. Supp 1380 (ED Wash 1998) and *Hawkins v Comparet-Cassani* 33 F.Supp 2d 1244 (US Dist CD Cal 1999). Certainly, the endeavour to codification the criminal law of Australia, to which I have referred, offers strong support for the Commonwealth's contention as does the now well established authority that the creation of new crimes is a matter of policy for the legislature.

167 However, it is not accurate to say that the reception into the common law of a universal crime under international law involves the courts in "creating" a new crime. Rather, the court is determining whether to "adopt" and therefore receive as part of the common law an existing offence under international law which has gained the status of a universal crime. However, there is force in the contention that the court's adoption of genocide as a crime will result in a new offence being established under domestic law and that that is the function of the legislature and not the courts. Thus, the adoption might be said to be inconsistent with "the general policies of our law "or lack" logical congruence with its principles" (see *Sawer* at 377). Put another way it can be contended that it is fundamentally inconsistent with the public policy of codification of the criminal law in Australia.

168 However put, the primary policy consideration against adoption is that it involves courts in creating a new criminal offence which the courts no longer have the power to do. Support for that view is to be found in *R v Rogerson* at 304 where McHugh J, citing *Knuller* stated that courts are no longer able to create criminal offences. In *Knuller*, the House of Lords was asked to rule on the question of whether conspiracy to corrupt public morals and conspiracy to corrupt public decency were criminal offences. In separate judgments, each of the Law Lords held that courts no longer retain any general or residual power to create new criminal offences: see 457-8 per Lord Reid, 464-5 per Lord Morris, 479 per Lord Diplock, 490 per Lord Simon and 496 per Lord Kilbrandon. Lord Simon (at 490) said:

> *"it is my view that the courts have no more power to create new offences than they have to abolish those already established in the law; both tasks are for Parliament."*

169 Lord Diplock (at 479) was also unequivocal about the state of the law in England stating:

> *"The constitutional setting in which judges in earlier centuries claimed the power to create new criminal offences has long since passed away. To have reasserted it in 1962 was, in my view, an unacceptable judicial usurpation of what has now become an exclusively legislative power."*

170 The principle that courts no longer have power to create new offences was subsequently affirmed by the House of Lords in *R v Withers* [1975] AC 842; at 857-8 per Lord Dilhorne at 863, per Lord Simon and at 877 per Lord Kilbrandon.

171 Historically, the creation of criminal offences was recognised as the domain of the courts. As Viscount Dilhorne outlined in *Withers* [1975] at 858, the Court of the King's Bench assumed the power to declare new offences where they had never previously existed with the demise of the Star Chamber. The role of the court in declaring new offences was supported at that time by the fact that Parliament did not meet regularly and that legislation relating to criminal law was enacted only infrequently.

172 By the nineteenth century, the role of Parliament had clearly changed. It now sat at regular intervals and did concern itself with legislating with respect to criminal offences. As a result of these developments, Stephen declared in 1884 in his influential *A History of the Criminal Law of England Volume 3* at 360 that while the law in its earlier stages had been naturally developed by judicial decisions, a new state of affairs had arisen:

> *"On the one hand, the courts have done their work; they have developed the law. On the other hand, parliament is regular in its sittings and active in its labours; and if the protection of society requires the enactment of additional penal laws, parliament will soon provide them. If parliament is not disposed to provide punishments for acts which are upon any ground objectionable or dangerous, the presumption is that they belong to that class of misconduct which it is not desirable to punish. Besides, there is every reason to believe that the criminal law is, and for a considerable time has been, sufficiently developed to provide all the protection for the public peace and for the property and persons of individuals which they are likely to require under almost any circumstances which can be imagined; and this is an additional reason why its further development ought to be left to the hands of parliament."*

173 As a result, Stephen (at 359) said that while the power to create new criminal offences "has been asserted by several high authorities for a great length of time, it is hardly probable that any attempt would be made to exercise it at the present day".

174 Stephen's observations are generally considered to be early authority for the proposition that courts ceased to have the power to create new criminal offences. Stephen's comments suggest that the court's inherent common law power to create criminal offences had, in practice, lapsed as the function was accepted as one more appropriately to be performed by Parliament. This interpretation is supported by his decision in *R v Price* (1884) 12 QB 247. Stephen J declined to declare the act of burning a dead body to be a misdemeanour, stating that whether the act was serious enough to be an offence should be left to Parliament to decide. Interestingly, rather than say that he did not have the power to declare the act an offence, Stephen said (at 255) that he should "pause long" before so declaring.

175 Support for the proposition that courts' power to create new offences did not cease to exist but rather was, as a matter of practice, accepted by the courts as having been assumed by Parliament, is found in a number of English decisions earlier that century in which some residual power was asserted. In *Price*, for example, Stephen J (at 255) said that there were some instances in which courts had declared acts to be new misdemeanours where the act involved "great public mischief or moral scandal". One of the first such cases was *R v Higgins* (1801) 2 East 5, in which Lawrence J at [21] stated that "all offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable". Further, there were decisions at that time in which the power to create offences was still being purportedly asserted in relation to particular acts which were considered serious enough to warrant the intervention of the court. For example in *R v Wellard* (1884) 14 QB 63 Huddleston B said (at 67) that an act may be declared a misdemeanour at common law where it "openly outrages decency and is injurious to public morals". Even after *Knuller* and *Withers* in *R v Tan* [1983] 1 QB 1053 at 1062 Parker J, without referring to those decisions, said that "we accept … that the courts should not, *or at least should be slow to,* create new offences…" (emphasis added).

176 For present purposes I accept that *Knuller* and *Withers* establish that in municipal law the function of creating new offences now rests with Parliament and that such residual power as the courts may have retained to create new criminal offences has now lapsed. Plainly, strong policy considerations support that conclusion. The declaration of acts as criminal where they have not been seen to be so before usurps the proper role of Parliament. The exercise of courts' power to create a new offence will also introduce an unwarranted uncertainty into the criminal law. Certainty as to the law, which enables individuals to

know which actions are criminal and which actions are not criminal is an essential element of the criminal law. Further, any change in the criminal law requires a value judgment that is better left to Parliament. As Brennan J stated in *Dietrich* at 320:

> *"Changes in the common law are not made whenever a judge thinks a change is desirable. There must be constraints on the exercise of the power, else the courts would cross 'the Rubicon that divides the judicial and the legislative powers'." (to adopt Lord Devlin's phrase in his memorable paper "The Judge as Lawmaker", in The Judge (1979))*

177 However, the authorities are concerned with the "creation" of new offences under municipal law and not the adoption into municipal law of offences under international law. In my view the latter situation was not considered in, and is not governed by, the decisions in *Knuller* or *Withers*. That is not to say that the same, or similar policy considerations that underlie those decisions should not lead to the same conclusion.

178 Neither the creation of uncertainty nor the imposition of a value judgment are involved in determining whether genocide, as a crime of universal jurisdiction under international law is to be adopted as part of municipal law. As pointed out earlier, the requirement of certainty creates no difficulty in the present case as the definition of the crime and procedures for its prosecution and punishment in the domestic courts are sufficiently certain. The evolution of the prohibition against genocide to the status of *jus cogens* and its adoption in the common law does not involve the creation of a new standard leaving potential offenders uncertain as to whether they have, or have not, engaged in criminal conduct. In that regard international criminal law refuses to countenance retrospectivity (*Polyukhovich* at 575 per Brennan J). Also, as explained above, there is no value judgment, as such, involved in the common law adoption process; adoption of a universal crime, such as genocide, into the common law will occur because established criteria for adoption of customary international law into municipal law have been satisfied rather than because it is "desirable" to do so.

179 That leaves only the primary policy consideration being that, by adoption, the courts are usurping the role of the legislature. The reasons discussed earlier for not requiring that there be legislative adoption in respect of customary international law generally, and in particular in respect of universal crimes, in my view afford an answer to this consideration. The courts are not creating a new offence by reference to the courts' view of public policy; rather the courts are determining, by reference to criteria established by the common law, whether by adoption, municipal law is to recognise and therefore receive that which has evolved into a

crime of universal jurisdiction in international law.

180 Further, international law is an expanding branch of the law of the community of nations. I agree with the observation of Lord Millett in *Pinochet* at 914:

> *"…as the Privy Council pointed out in In re Piracy Jure Gentium [1934] A.C. 586, 597, international law has not become a crystallised code at any time, but is a living and expanding branch of the law. Glueck observed, 59 Harv.L.Rev. 396, 398: 'unless we are prepared to abandon every principle of growth for international law, we cannot deny that our own day has its right to institute customs.' In a footnote to this passage he added:*
> *'Much of the law of nations has its roots in custom. Custom must have a beginning; and customary usages of states in the matter of national and personal liability for resort to prohibited methods of warfare and to wholesale criminalism have not been petrified for all time.'*
> *The law has developed still further since 1984, and continues to develop in the same direction. Further international crimes have been created."*

181 It would be anomalous for the Municipal Courts not to continue their longstanding role of recognising, by adoption, the changes and developments in international law. Accordingly, in my view there is no inconsistency involved in the common law *continuing* to recognise the historical, and increasingly important, role of customary international law, always of course, subject to the legislature's power to abrogate, vary or confirm the operation of the common law of Australia in that regard. As was said in the joint judgment in *Western Australia v Commonwealth* (1995) 183 CLR 373 at 487:

> *"A law of the Commonwealth may exclude, wholly or partially, the operation of the common law on a subject within its legislative power or it may confirm the operation of the common law on such a subject or it may simply assume that the common law applies to the subject, as in truth it does unless excluded."*

182 Policy considerations in favour of adoption in the present case are re-enforced by the executive and legislative recognition accorded in Australia to genocide as an international crime.

183 Returning to the question I raised earlier, in my view genocide is an *a fortiori* example of where a rule of international law is to be adopted as part of municipal law. Some may see a decision to that effect as a new legal development. However, as Sir Ninian Stephen observed in his 1981 Southey Memorial lecture:

> *"Development has always been the life-blood of the common law and the more swiftly our society changes, the greater the need for developments in the*

> *Development has always been the life-blood of the common law and the more swiftly our society changes, the greater the need for developments in the law to keep pace with those changing mores."*

Stephen, "Southey Memorial Lecture 1981: Judicial Independence – A Fragile Bastion", (1981) 13 Melbourne University Law Review).

184 More importantly, however, it is difficult to see why a court should turn its back on over 300 years of acceptance of the law of nations forming part of the common law. As Lord Denning's discussion in *Trendtex Trading* demonstrates, the issue over that period has been between the *incorporation* or *transformation* approaches, rather than whether adoption can only occur with legislation. As was said by Justice McHugh in a recent paper (The Judicial Method, Australian Bar Association Conference London, 5 July 1998) at 5:

> *"The law is a social instrument – a means, not an end. It changes as society changes. As Justice Cardozo recognised, law may well be influenced by logic, historical development, or tradition, but '[t]he end which the law serves will dominate them all.' In Justice Cardozo's view, '[n]ot the origin, but the goal is the main thing.'"*

and at 8:

> *"But few lawyers today doubt the truth of the statement of Oliver Wendell Holmes jnr that the; 'life of the law has not been logic: it has been experience.' Lord Reid said that, when a judge has 'some freedom to go in one or another direction', he or she should have regard to 'common sense, legal principle and public policy in that order.'"*

185 In the present case I have no difficulty in determining that the "end" or "goal" which the law serves will be better served by treating universal crimes against humanity as part of the common law in Australia. Further, 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.

186 For the foregoing reasons I am of the view that the offence of genocide is an offence under the common law of Australia. As it is plain that genocide was a universal crime under customary international law at the time of the events relied upon in the two matters before the Court it is unnecessary to consider the date upon which genocide first became a universal crime under international law.

Re Thompson

(a) Are the appellants entitled to relief?

187 The appellants have succeeded in establishing that the ground upon which the Registrar refused to issue the arrest warrants and the informations, being that the offence of genocide was not known to the law of the Australian Capital Territory, was wrong in law. However, that is not the end of the matter as the appellants, who are seeking a discretionary remedy, must nevertheless establish that they are entitled to the relief they seek.

188 Before Crispin J the appellants sought to obtain an order to compel the Registrar to issue summonses against various persons and in effect facilitate the prosecution of those persons on charges of genocide. Section 26 of the *Magistrates Court Act 1930* (ACT) provides that an information may be laid before a Magistrate where a person is suspected of having committed an indictable offence in the Territory. For present purposes I will assume, without deciding, that an information can be laid before a Magistrate in respect of a common law offence. The Registrar's power to issue the summonses is derived from s 12 of the *Magistrates Court Act 1930* (ACT) which provides, inter alia, that any Magistrate or the Registrar of that court "may receive an information and grant a summons or warrant thereon…". As was pointed out by Crispin J (at 27) similar statutory provisions have been construed as entitling a person called upon to exercise the power to refuse to do so if the facts alleged would not constitute an offence or if there is no prima facie case that the facts alleged would constitute an offence: see *R v Scott; Ex parte Church* [1924] SASR 220 at 229 and *Ex parte Qantas Airways Ltd; Re Horsington* (1969) 71 SR (NSW) 291.

189 The power to grant an order in the nature of mandamus in relation to any such decision is conferred in s 16(1) of the *Magistrates Court Act 1930* (ACT) which provides that where a Magistrate or Registrar refuses to do any act relating to the duties of his or her office the party requiring the act may apply to the Supreme Court, upon affidavit as to the facts, for an order calling upon the Magistrate or Registrar to show cause why the act should not be done and the Supreme Court may make the order absolute.

190 The grant of relief sought by the appellants is discretionary. It is well established that the Court will exercise its discretion to refuse such an application, even if an error of law is established, in the event that it concludes that it is "futile" to grant the relief sought: see

Rahim v Minister for Immigration and Ethnic Affairs (1997) 78 FCR 223 at 238, *Wasfi v Commonwealth* (1998) 155 ALR 310 at 323-324; *Minister for Immigration and Multicultural Affairs v Hughes* [1999] FCA 325 at [11] per Merkel J (Carr and RD Nicholson JJ concurring) and the Full Court of the Federal Court in *Minister of Immigration and Multicultural Affairs v Oganes* [1999] FCA 649 at [9].

191 Thus, if the Registrar would be "bound in law" to arrive at the same decision or the facts alleged do not constitute an offence, the orders sought by the appellants will be refused notwithstanding that the Registrar erred in law in making his decision on the particular ground upon which he relied.

(b) Should the grant of relief be refused?

192 Crispin J (at 11) summarised the allegations upon which the appellants' charges were based as follows:

> "(a) that on 1 July 1998 the persons named in the summonses had by introducing into the parliament and/or securing the passage of the Native Title Amendment Bill committed an act of genocide;
>
> (b) that on 1 July 1998 the persons so named had committed an unspecified act of genocide;
>
> (c) that between February 1998 and July 1998 by what has been described as 'the ten point plan' and the Native Title Amendment Bill attempted, aided and abetted and/or conspired to do certain acts of genocide;
>
> (d) certain other acts and omissions said to constitute genocide on the part of each member of parliament including a failure to legislate to give effect to the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide (1948) and, in particular, a failure to enact legislation creating statutory offences of genocide."

193 As explained by Crispin J there are obviously fundamental difficulties confronting the appellants. In substance, in reliance upon *D'Emden v Pedder* (1904) 1 CLR 91; *Hughes and Vale Pty Ltd v Gair* (1954) 90 CLR 203; *Sankey v Whitlam* (1978) 142 CLR 1; *R v Murphy* (1986) 5 NSWLR 18 and *R v Jakson* (1987) 8 NSWLR 116, his Honour held that:

- Section 16 of the *Parliamentary Privileges Act 1987* (Cth) (reproducing in part Art 9, s 1 of the Bill of Rights 1688 (UK)) prohibited the court from inquiring into the propriety of the exercise of legislative power conferred on parliament by the Constitution or related parliamentary proceedings and members of parliament, in speaking to and voting on a bill, cannot commit a crime;

- it was of crucial importance that elected members of Parliament be free to act in the manner they consider to be in the national interest without fear of punishment;

- these principles protected members of parliament from prosecution both from introducing the bill and for failure to give effect to the provisions of the Convention.

194 The allegations of the appellants related primarily to the Commonwealth government's "Ten Point plan" which ultimately found its expression after consultation, political compromise and legislative amendment in the *Native Title Amendment Bill 1997* [No 2]. The "Ten Point plan" was the Commonwealth government's response to the problems raised by the decision of the High Court in *Wik Peoples v Queensland* (1996) 187 CLR 1 in which the court held that the grant of a pastoral lease had not necessarily extinguished native title. It is unnecessary for present purposes to outline the details of the "Ten Point plan" save to say that it constituted a political endeavour by the Commonwealth government to strike a balance between various competing interests in respect of land which was actually or potentially the subject of native title claims. The *Native Title Amendment Act 1998* (Cth) received the Royal Assent on 27 July 1998. The *Native Title Act 1993* (Cth), as amended by that Act, is complex but, in substance, it:

- continues to recognise native title rights and sets down basic principles in relation to native title in Australia;

- provides for the validation of 'past acts' and 'intermediate period acts' which may be invalid because of the existence of native title, and confirms the extinguishment of native title in some circumstances;

- provides for a future act regime in which native title rights are protected and conditions are imposed on acts affecting native title land and waters;

- provides for the extinguishment of native title in certain circumstances but grants compensation rights in respect of native title that is extinguished; and

- provides a process by which claims for native title and compensation can be determined

195 An objection of the appellants, and many other Aboriginal persons, to the "Ten Point plan" and the *Native Title Amendment Act 1998* (Cth) is that it resulted in the unjustifiable extinguishment of native title in certain circumstances. In the present case, in substance, it was contended that that extinguishment gave rise to the crime of genocide. Crispin J (at 34) dealt with the complaint, inter alia, on the basis that the formulation of the legislative policy in relation to the "Ten Point plan", was as much part of the conduct of parliamentary business as the presentation of a bill to enact the policy into law and it would defeat relevant public policy considerations if the protection given to members of parliament by the law could be circumvented by prosecuting them for antecedent formulation of the policies reflected in legislation.

196 Further, in respect of genocide Crispin J, after carefully considering the evidence and material before him, stated (at 32):

> *"Even if the specific allegations are considered within the relevant historical context there must still be evidence capable of supporting precise charges to justify criminal prosecution. Despite the extensive arguments which have been advanced I am unable to see any basis upon which the allegations relied upon by the applicants and interveners could be said to raise an arguable case that any of the potential defendants have been guilty of acts which fall within the definition in Art 2 of the Convention. That definition requires not only that the alleged acts be of the kind stipulated in paragraphs (a) to (e) inclusive but that they be committed 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group'. In the present case it has not been shown that the alleged acts are of a kind so stipulated and there is no evidence that they were committed with such intent."*

197 His Honour's reasoning in respect of the matters set out above was not the subject of detailed submission on the part of the appellants. In those circumstances it is undesirable that I comment in detail upon it other than to say that the conclusions at which his Honour arrived were plainly open on the evidence and it has not been shown that his Honour erred in law in arriving at those conclusions. Indeed, in my opinion the conclusions are clearly correct.

198 Crispin J could also have drawn upon the implied constitutional freedom of political

communication which embraces advocacy for, as well as opposition to, the "Ten Point plan" and the legislation which gives effect to it. The conduct complained of as constituting "genocide" in the present case clearly falls within "opinions and arguments concerning government and political matters that effect the people of Australia" which has been unanimously held to fall within the implied freedom of political communication under the Commonwealth Constitution: see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 571. Additionally, there being no challenge to the constitutional validity of the *Native Title Amendment Act 1998* (Cth), the role of members of an Australian parliament in supporting and voting for a valid law could not possibly constitute criminal conduct in Australia in any event.

199 However, before departing from this aspect of the case it 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. Toohey J in *Kruger* (at 88) noted that each of the "acts" in Article II of the Genocide Convention is qualified by the opening words "with intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such". 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, 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, ethnical, racial or religious group, as such'.": see Prosecutor v Akayesu [September 2 1998] 37 ILM 1399 (1998) 1401 at 1406.*

200 It is common ground that under international law the "act charged" must be one of the acts set out in Article II of the Genocide Convention. As Dawson J (at 72) in *Kruger* noted, the Genocide Convention did not deal with cultural genocide; references to cultural genocide having been expressly deleted from it in the course of the drafting of the Convention: see Kunz, "The United Nations Convention of Genocide" *American Journal of International Law* Vol 43 (1949) 738 at 742: Cassese *Human Rights in a Changing World* (1990), at 76. Thus, a claim of conduct committed with intent to destroy in whole, or in part, the *culture* of a

national, ethnical, racial or religious group would not, without more, fall within Article II of the Genocide Convention. Rather, such matters were left to be dealt with under other Instruments or Conventions dealing with human rights: see Lippman "The Drafting of the 1948 Convention on the Prevention and Punishment of Genocide" (1985) 3 *Boston University International Law Journal* 1 at 30-31 and 44-45.

201 Specific international instruments have dealt with particular aspects of cultural protection. For example, as was pointed out by the Commonwealth, the laws of armed conflict as reflected in the 1949 Geneva Conventions, the 1977 Additional Protocols, as well as the 1954 Hague Convention for the protection of cultural property in the event of armed conflict and its recently concluded protocol of 26 March 1999, all contained provisions aimed to protect cultural property in times of armed conflict although none of the relevant instruments employed the term "cultural genocide". They seek to protect cultural rights in specific ways. Further, the International Covenant on Civil and Political Rights 1966 (16 December 1966, ATS 1980 No 23, Articles 18 and 27) and the International Covenant on Economic, Social and Cultural Rights (16 December 1966, ATS 1976 No 5, Article 15) also deal with protection of cultural freedoms and practices.

202 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. In the present matter none of the allegations relied upon by the appellants are capable of raising an arguable case that any of the persons the subject of the proposed warrants and informations have engaged in any conduct that is capable of constituting the crime of genocide under international and domestic law.

203 Accordingly, for the above reasons I am satisfied that:

- the appellants have not established that they are entitled to the issue of the warrants and informations they seek;

- the Registrar was bound in law to refuse to issue the warrants albeit that he did so on a basis which was wrong in law;

- Crispin J was correct in dismissing the application for an order in the nature of mandamus albeit that one of the bases relied upon by him in doing so was wrong in law.

Buzzacott v Hill & Ors

204 The Application, inter alia, alleges that the respondents have acted unlawfully in declining to proceed with an application by Australia to place the lands of the Arabunna people and, in particular, lands in the Lake Eyre region on the World Heritage List. It is alleged that the failure to proceed with an application for World Heritage listing was "for political reasons involving the vested interests of certain big mining, pastoral and other businesses" and because the first respondent "well knew in 1998 that he would announce the go ahead for another uranium mine (and waste dump) at Beverly and a radioactive waste dump at another northern location in South Australia". It was alleged that, as a result of that conduct, the respondents had committed acts of genocide, breached fiduciary obligations and the duty of care owed to the Arabunna people and acted with bad faith towards the Arabunna people.

205 The relief sought was:

- a mandatory injunction compelling the respondents "forthwith to proceed with the World Heritage listing of the Arabunna lands";

- an injunction restraining the respondents from permitting any activities on Arabunna lands by non-Arabunna persons "which may in any way effect the World Heritage values of the Arabunna lands";

- damages.

206 The respondents contended that the Application should be struck out and the proceeding be dismissed or permanently stayed primarily on the ground that the claims could not give rise to any reasonable cause of action known to the law. It was contended that:

- the World Heritage listing sought by the applicant was pursuant to Art 11 of the Convention for the Protection of the World Cultural and Natural Heritage (23 November 1972, ATS 1975 No 47) ("the World Heritage Convention");

- the only obligations arising under the World Heritage Convention are obligations owed as between the States who are parties to it under the international law of treaties with the consequence that the Convention cannot be a source of any rights or obligations which are enforceable by a person in an Australian court;

- a failure by any of the respondents to take steps to have property included in the World Heritage List established under the Convention is not justiciable;

- accordingly, in so far as the applicant's causes of action and claims for relief, including damages, rely upon the World Heritage Convention they must fail.

207 With respect to the applicant's claim for "damages" based on other alleged causes of action the respondents' submission is that the claim is bound to fail as:

- no civil cause of action is known in Australia for acts of genocide and, in any event, the facts raised are not capable of sustaining a claim of genocide;
- no fiduciary relationship, fiduciary duties or duties of care known to the law can arise out of the matters pleaded in the Application.

208 In *Thorpe* (at 774-775) Kirby J stated the relevant principles to be applied on a strike out application analogous to that that has been made in the present case. His Honour said:

> *"Setting aside, striking out, summarily dismissing or permanently staying proceedings of a litigant who has come to a court of law, are self-evidently serious steps. They are to be reserved to a clear case. If there is any doubt, a court should err on the side of allowing the claim to proceed. Evidence at trial may sometimes lend colour and strength to a claim. Reformulation of a pleading should normally be permitted where justice requires that course, particularly where a party does not have the assistance of legal representation. A court will ordinarily provide some assistance in such a situation although not to the point of unfairly disadvantaging the other party or losing either the reality or appearance of neutrality and impartiality which is the hallmark of the judiciary under the Australian Constitution and under international human rights law.*

> *Even if a party makes good its attack on another's pleading, a court will ordinarily permit the opponent to reframe the pleading so long as it is clear that there is point in doing so and that the further time and opportunity will have utility. The guiding principle is doing what is just. Courts, particularly today, strive to uphold efficiency and economy in the disposal of proceedings before them. But they also remember that pleadings are a means to the end of justice according to law. Pleadings are the servants, not the masters of the judicial process."*

See also Lindon v Commonwealth (1996) 136 ALR 251, Dey v Victorian Railways Commissioners (1949) 78 CLR 62 at 91 and General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125 at 128-129.

The World Heritage Convention

209 The World Heritage Convention, and the *World Heritage Properties Conservation Act 1983* (Cth) ("the World Heritage Act") which gave effect to the Convention, were considered by the High Court in *Commonwealth v Tasmania* (1983) 158 CLR 1 ("the *Tasmanian Dams case*"), *Richardson v Forestry Commission* (1988) 164 CLR 261 and *Queensland v Commonwealth* (1989) 167 CLR 232.

210 In the joint judgment (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) in *Queensland v Commonwealth* (at 235-236) the World Heritage Convention and the World Heritage Act were explained as follows:

> *"The Act provides the legislative framework for giving effect to Australia's obligations under the Convention for the Protection of the World Cultural and Natural Heritage ('the Convention'): see The Commonwealth v. Tasmania ('the Tasmanian Dam Case'). A copy of the English text of the Convention is set out in a schedule to the Act. The Convention imposes on each State Party a duty to ensure the identification of cultural heritage and natural heritage situated on its territory (Arts 3 and 4; see also Art. 5(d)), 'cultural heritage' and 'natural heritage' being so defined as to require that any property coming within either definition be of 'outstanding universal value': Arts 1 and 2. Each State Party is obliged to submit to the World Heritage Committee an inventory of the properties forming part of the cultural heritage and natural heritage situated in its territory which it considers suitable for inclusion in the 'World Heritage List': Art. 11 par. 1. The List is to be established and kept up-to-date by the Committee on the basis of the inventories submitted by the State Parties and is to contain properties which form part of the cultural heritage or natural heritage and which the Committee 'considers as having outstanding universal value in terms of such criteria as [the Committee] shall have established': Art.11, par. 2. In addition to the duties of identifying properties forming part of the cultural*

> *heritage and natural heritage and of submitting inventories of such properties for inclusion in the World Heritage List, each State Party is under a duty to take measures for the protection, conservation, presentation and transmission to future generations of the cultural, heritage and natural heritage: Arts 4 and 5. The framers of the Act have sought to restrict the application of the provisions of the Act authorizing the creation of regimes of control over properties to those properties in respect of which the Convention imposes on Australia an obligation of protection and conservation."*

211 The World Heritage Act, which was enacted to give effect in Australia to its obligations under the World Heritage Convention, is primarily concerned with ensuring protection and conservation of property defined in s 3A as "identified property".

212 "Identified property" is defined as property which is subject to an inquiry to determine whether it forms part of the cultural or natural heritage, is subject to World Heritage list nomination, is included in the World Heritage list or is declared by regulations to form part of the cultural or natural heritage. Restrictions might be imposed on "identified property" by a Proclamation made by the Governor General where such property is being or is likely to be damaged or destroyed: see ss 6-11 and *Queensland v Commonwealth* at 235-238. Additional protection is given to Aboriginal sites but only where such sites are situated within identified property: see ss 8 and 11.

213 As the Arabunna lands do not fall within any of the categories of "identified property", any rights which the applicant can seek to claim or enforce in the present proceeding must be limited to such rights (if any) as he has in relation to conduct of the Executive government under the World Heritage Convention, rather than under the World Heritage Act.

214 The World Heritage Convention imposes a duty on each State party to identify and delineate cultural heritage properties situated within its territory which are suitable and appropriate for protection and conservation in accordance with the Convention. In *Richardson*, Mason CJ and Brennan J (at 290), after observing that the Convention does not sustain the view that the duty to ensure protection does not arise or attach to land until the State identifies and delineates that land as part of the heritage, added:

> *"This is not to say that a failure on the part of a State to protect land, which is ultimately identified as part of the heritage, pending that identification is a breach of duty capable of enforcement. It is for each State to determine what it will do by way of protecting a particular property pending resolution of its status as part of the heritage. But the taking of action by a State to protect*

> *or conserve a particular property in its territory pending resolution of the status of that property as part of the heritage is to carry out and give effect to the Convention because the taking of the action is incidental to the State's duty to ensure protection of the heritage and to the attainment of the object of the Convention."*

215 The joint judgment in *Queensland v Commonwealth* (at 238-239) also observed that, although the World Heritage Convention (as with other treaties of independent States) gives rise to international obligations, those obligations are not administered in or determined or enforced by the Municipal Courts.

216 Article 11 of the World Heritage Convention provides for each State, in so far as possible, to submit to the World Heritage Committee property situated within its territory and suitable for inclusion in the World Heritage List. In *Richardson* (at 296) Mason CJ and Brennan J said that the ultimate decision as to whether any property should be proposed for inclusion in the World Heritage List is to be made by the Executive government based upon a

> *"calculus of factors, including factors which are cultural, economic and political."*

217 Similar observations were made in the Full Federal Court in *Minister for Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 15 FCR 274 at 278-279 per Bowen CJ and at 306-308 per Wilcox J. In *Peko Wallsend Ltd* the Full Court held that, although certain decisions of the Executive government in the exercise of prerogative power may be justiciable in the courts, the complex policy considerations involved in a decision to nominate a property for inclusion in the World Heritage List resulted in such a decision being non-justiciable. The policy matters referred to were issues relating to "environment, the rights of Aborigines, mining and the impact on Australia's economic position of allowing or not allowing mining as well as matters affecting private interests" (Bowen CJ at 279) and that the decision "primarily involved Australia's international relations" and, rather than relating essentially to the personal circumstances of any individual, "concerned a substantial area of land which the Government regarded as being of national, indeed international, significance and in relation to which many people had concerns of various types" (Wilcox J at 307). Shephard J (at 280) agreed generally with Bowen CJ and Wilcox J.

218 Plainly, a decision not to proceed with World Heritage listing of a particular property involves the same, or substantially similar, categories of policy considerations as a decision to proceed with such a listing. Accordingly, for the reasons given in *Peko-Wallsend*, the

decision sought to be impugned in the present case is not justiciable, as such, in a Municipal Court.

219 However, there are additional difficulties with seeking to review a decision not to apply for the listing of a particular property. The nomination by Australia to list a property on the World Heritage List qualifies the property as an "identifiable property" under s 3A of the World Heritage Act and therefore capable of being subject to the restrictions imposed on its use and development if a Proclamation is made by the Governor-General under the Act. Accordingly, a decision to nominate a property for World Heritage listing can potentially affect the interests of persons in relation to the property nominated. I say "potentially" as the interests can only be affected if a Proclamation is made under the Act. However, a decision not to apply for a listing has no consequences for the property under the World Heritage Act save that it is remains unaffected by the Act. Thus, being one step further removed from a Proclamation, it is even more difficult to contend that any person's rights or interests are affected by a decision not to nominate a property for World Heritage listing.

220 Further, as was pointed out earlier in these reasons in respect of the Genocide Convention, a Convention does not form part of the municipal law of Australia. Accordingly, it cannot be relied upon as conferring any justiciable right upon an individual: see *Simsek v Macphee* (1982) 148 CLR 636 at 641 per Stephen J, *Koowarta* at 224 per Mason J. The obligations relied upon in the present case arise out of duties owed under the World Heritage Convention under international law by States, and not to or by individuals. In *Tasmanian Wilderness Society Inc v Fraser* (1982) 153 CLR 270 Mason J (at 274) pointed out that a breach of a duty owed under the World Heritage Convention "is not a matter justiciable at the suit of a private citizen". Further, as was said by Mason CJ and Deane J in *Teoh* (at 287):

> *"…a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law."*

221 See also *Teoh* at 298 per Toohey J, at 304 per Gaudron J and at 316 per McHugh J.

222 Their Honours use of the term "direct" implicitly acknowledges the indirect role of treaties in municipal law. For example, international standards have been drawn upon to influence the development of the common law: see *Mabo v Queensland* at 42-43; *Dietrich v The Queen* (1992) 177 CLR 292 at 306, 321, 360 and *Jago v District Court of New South Wales* (1988)

12 NSWLR 558 at 569. In *Mabo [No 2]* Brennan J (at 42), after observing that the common law does not necessarily conform with international law, said that 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". Legislation is construed on the basis that Parliament is to be taken not to intend to remove the fundamental rights and freedoms represented by those international standards unless the legislation does so expressly or by necessary implication: see *Coco v The Queen* (1994) 179 CLR 427 at 435-437 and *Bropho v Western Australia* (1990) 171 CLR 1 at 17-18. Also, failure to have regard to a material treaty obligation can lead to the vitiation of certain decisions made by government authorities or bodies under Commonwealth legislation: Teoh.

223 In the present case the indirect role of conventional international law is of no avail to the applicant as his claims rely on the World Heritage Convention as a direct source of individual rights and obligations.

224 It follows from the foregoing discussion that, in so far as the Application seeks relief to compel any of the respondents to proceed with the World Heritage listing of the Arabunna lands or claims damages as a result of the failure of the respondents to proceed with the World Heritage listing of those lands, it must fail as it relies upon non-justiciable claims.

Fiduciary duty

225 In *Mabo [No 2]* (at 199-205) Toohey J considered the circumstances in which a fiduciary duty may be owed by the Crown with respect to the lands of indigenous people. In *Thorpe* (at 775) Kirby J noted that the concept considered by Toohey J of a fiduciary duty arising "out of the *power* of the Crown to extinguish traditional title by alienating the land or otherwise" (*Mabo [No 2]* at 205) has not gathered the support of a majority in the High Court. Whilst that consideration could not, of itself, result in such a claim being struck out on a pleading motion, Toohey J's view cannot assist the applicant in the present case as his claim, as set out in the Application, is not based upon the extinguishment, directly or indirectly, of a native title right or interest: see s 223 of the *Native Title Act 1993* (Cth).

226 Rather, it is alleged by the applicant that the respondents' failure to proceed with the World Heritage listing of the lands of the Arabunna people is likely to lead to uranium mining and a

radioactive waste dump at sites proximate to those lands, which will cause harm to the lands and culture of the people. The difficulty confronting the applicant on that claim is that, as stated above, it is founded upon an alleged right, interest or duty based on the World Heritage Convention which cannot operate as a direct source of any individual rights or obligations under municipal law.

227 An alternative view of the fiduciary duty owed by the Crown to indigenous people was considered by Professor Finn (now Justice Finn) in PD Finn, *Essays on Law and Government Vol 1* 1995 at 18-19 and PD Finn in ""The Forgotten 'Trust": The People and the State" in Cope, *Equity Issues and Trends* 1995 at 138. It was suggested that in some circumstances the Crown and its agencies, when exercising public power effecting "Aboriginal rights" may be obliged to act *fairly* as between the indigenous and the non-indigenous communities; see for example *Te Runanganui o Te Ika Wheuna Inc Society v Attorney-General* [1994] 2 NZLR 20 at 24. The analogy was drawn between the exercise of public power affecting classes of the community possessing different *rights inter se* and a fiduciary who is obliged to act *fairly* as between different classes of beneficiary in taking decisions which affect the rights of the classes *inter se*. However, even on that view in the present case the pre-condition, being the exercise of "public power" in a manner that affects "Aboriginal rights", is absent as the source of the *right* affected is said to be the World Heritage Convention.

228 Further, although the World Heritage Convention and the World Heritage Act, provide for protection of Aboriginal cultural sites as part of world cultural heritage, their ambit is protection of that heritage for the benefit of the national and international community. Thus, even putting aside the difficulty of reliance upon the Convention as a source of any fiduciary obligation, neither the Convention, or the legislation to give effect to it, treat the indigenous people of Australia, *as such*, as being persons whose special interests are being protected by properties being nominated for World Heritage Listing.

229 Accordingly, for the foregoing reasons the claims for relief based on fiduciary duty do not give rise to arguable causes of action and are to be struck out.

Duty of care

230 The essential elements for a cause of action in negligence based on an omission to act by a

public authority as enunciated in the recent High Court decisions in *Pyrenees Shire Council v Day* (1998) 192 CLR 330 and *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431 are plainly absent in this matter. As the World Heritage Convention cannot give rise to justiciable rights and obligations in municipal law, a failure to proceed with World Heritage listing of a particular property under the Convention, of itself, cannot found a cause of action based upon a duty of care.

Genocide

231 Although I have concluded that genocide is a universal crime under international law and municipal law, the conduct complained of in the Application is plainly not capable of constituting genocide under international or municipal law. Accordingly, it is unnecessary to consider whether, and if so the circumstances in which, genocide might give rise to civil liability or civil remedies.

Other claims

232 Certain other claims relating to allegations of bad faith, a failure to enact the Genocide Convention and certain statements made in relation to East Timor were set out in the Application. It is sufficient to say that I accept the respondents' submissions that those claims are not capable of giving rise to any claim for damages or for any of the other relief claimed by the applicant.

233 Accordingly, for the above reasons the claims brought by the applicant are misconceived and the proceeding is one which ought to be dismissed. I have carefully considered whether leave to replead, even to a limited extent, should be granted but have arrived at the conclusion that it is not appropriate to do so for much the same reasons as leave was not given in analogous circumstances in *Thorpe* (at 779-780) by Kirby J.

234 In arriving at my conclusion I have approached the Application as primarily raising non-justiciable claims based upon the World Heritage Convention. It may well be that underlying the grievances raised by the applicant, which appear to be genuinely held, there may have been some specific conduct which has been engaged in by agencies or officers of the Commonwealth government that might have caused, or might be causing, harm to the

rights of the Arabunna people. The decision at which I have arrived in the present case is not intended to deny those persons recourse to the law in respect of that harm. They may, or may not, have a cause of action in that regard. As was observed by Gummow J in *Lindon v Commonwealth* (1995) 70 ALJR 145 at 146 I am not to be taken as suggesting that it would not be possible to frame an action in such a way that did present a specific issue that might involve ventilation of at least some of the basic grievances sought to be raised by the applicant in proper legal form to achieve a specific result. However, the present Application does not do so, is misconceived and would require not only radical change in relation to any causes of action to be relied upon but also would require different parties. In these circumstances it is appropriate to dismiss the application.

Conclusion

235 For the above reasons I have concluded that the appeal in *Re Thompson* is to be dismissed and the proceeding in *Buzzacott v Hill and Ors* is also to be dismissed.

I certify that the preceding one hundred and seventy six (176) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Merkel.

Associate:

Dated: 1 September 1999

No. A5 of 1999

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No. S39 of 1999

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Solicitor for the Respondents:	Australian Government Solicitor
Date of Hearing:	31 May and 1 June 1999